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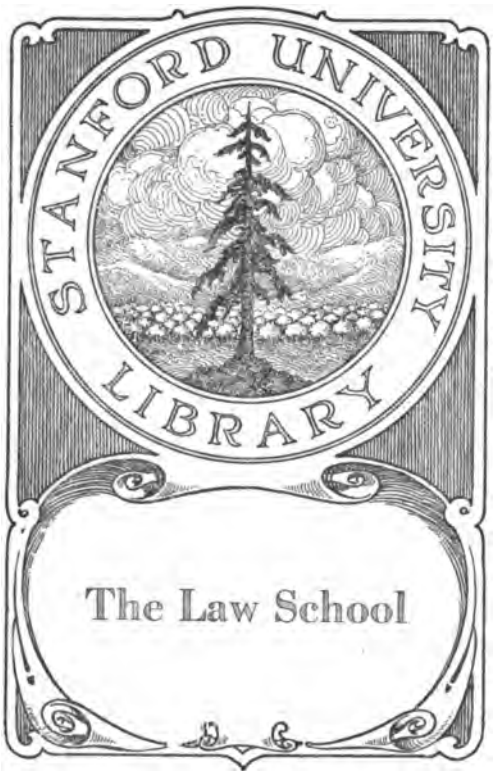
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HANDBOOK

OF THE LAW OF

PRIVATE CORPORATIONS

By WM. L. CLARK, Jr.

THIRD EDITION

By I. MAURICE WORMSER
OF THE NEW YORK BAR
PROFESSOR OF LAW, FORDHAM UNIVERSITY LAW SCHOOL
AUTHOR OF CASEBOOK ON CORPORATIONS

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To

FRANK P. CLARK, Esq.,

of Baltimore,

As a slight mark of the author's regard and of his remembrance and sincere appreciation of many kindnesses, this volume is affectionately dedicated.

PREFACE TO THIRD EDITION

IN THIS edition, the text has been completely revised throughout to meet the rapid developments of the last decade in the law of corporations. The notes have been amplified and the citations brought down to date.

I wish to thank Professor Robert D. Petty for valuable suggestions, and my former student, Cornelius J. Smyth, for assistance with several chapters.

I. MAURICE WORMSER.

Fordham University Law School,
New York, N. Y.

PREFACE TO FIRST EDITION

THERE are few subjects in the law in which so many difficulties, and so great a conflict in the decisions, are to be met with as in the law of private corporations. The law is unsettled on many points. These points have received special attention in this treatise, and to some of them more space has been devoted than is given them in the larger works. For examples, reference may be made to the chapters in which are discussed the doctrines in regard to corporations de facto (page 86),[1] estoppel to deny corporate existence (page 99),[2] subscriptions to stock prior to incorporation (page 263),[3] and watered stock (page 368).[4] The doctrine, often laid down in the cases, and stated in all the text books, but which has been virtually exploded by recent decisions, that the capital stock and assets of a corporation constitute a trust fund for the benefit of creditors, has been given considerable space (page 539).[5]

The entire work has been written from the cases themselves, and throughout his work the author has aimed at making the book a true reflection of the cases. The authorities have been selected with care, and none have been cited without personal examination.

The work is not intended to deal with corporation law in its application to particular corporations, but only with the rules and principles of law applicable to corporations generally. It would be impossible to go further than this, and keep within the limits of a handbook in one volume.

WM. L. C., JR.

Washington, D. C., February 6, 1897.

[1] Page 97, 3d Ed.
[2] Page 113, 3d Ed.
[3] Page 332, 3d Ed.
[4] Page 455, 3d Ed.
[5] Page 677, 3d Ed.

TABLE OF CONTENTS

CHAPTER I

OF THE NATURE OF A CORPORATION

Section		Page
1–3.	Corporation Defined	1–13
4.	Creation of Corporations	13–14
5.	Limited Powers of Corporations	14
6–8.	Attributes and Incidents of a Corporation	14–25
9.	Corporation as a "Person," "Citizen," etc.	26–27
10–11.	Kinds of Corporations	27–33

CHAPTER II

CREATION AND CITIZENSHIP OF CORPORATIONS

12.	Creation—In General	34
13–18.	Power to Create	34–43
14.	State Legislatures	37–40
15.	Congress	40–41
16.	Territorial Legislatures	41
17.	Prescription	36–37
18.	Delegation of Power	41–43
19–20.	General and Special Laws	43–49
21.	Intention to Create	49–50
22.	Ratification of Claim to Corporate Existence	50–51
23–24.	Agreement between Corporation and State—Acceptance of Charter	52–56
25.	Place of Organization	56
26.	Compliance with Conditions Precedent	57–66
27.	Agreement between Corporators and Corporation	66
28–29.	Who may Become Corporators	67–70
30.	Purpose of Incorporation	70–75
32–35.	Corporate Name	76–82
36–38.	Residence and Citizenship of Corporations	82–90
39.	Extension of Charter—Creation of New Corporation	90–92
40.	Proof of Corporate Existence	93–96

CHAPTER III

EFFECT OF IRREGULAR INCORPORATION

41–42.	Corporations De Facto	97–112
43–44.	Estoppel to Deny Corporate Existence	112–122
45.	Liability of Associates as Partners	122–125

CHAPTER IV

RELATION BETWEEN CORPORATION AND ITS PROMOTERS

Section		Page
46a.	Who are Promoters—Their Functions	126–128
46b.	Liability of Corporation for Expenses and Services of Promoters	128–129
47.	Liability on Contracts by Promoters	130–135
48.	Liability of Promoters to Corporation and Stockholders	136–141
48a.	Underwriters and Underwriting	141

CHAPTER V

POWERS AND LIABILITIES OF CORPORATIONS

49.	In General	142–144
50.	Express Powers	144–145
51.	Powers Incidental to Corporate Existence	145–146
52.	Powers Implied from Powers Expressly Granted	146
53.	Construction of Charters—In General	146–150
54.	Power to Take and Hold Real and Personal Property	151–154
55.	Power to Act as Trustee	155–156
56–57.	Powers as to Contracts and Conveyances	156–194
58–61.	Form and Mode of Corporate Contracts	194–201

CHAPTER VI

POWERS AND LIABILITIES OF CORPORATIONS (Continued)

62.	What Acts are Ultra Vires—A Corporation Can Exceed Its Powers	202–204
63.	Effect of Ultra Vires Act—In General	204–206
65, 66.	Ultra Vires Conveyances of Land or Transfers of Personalty	206–210
67.	Ultra Vires Contracts	210–236
68.	Illegal Contracts	236–241

CHAPTER VII

POWERS AND LIABILITIES OF CORPORATIONS (Continued)

69.	Liability for Torts	242–249
70–72.	Responsibility for Crime—Contempt of Court	249–255

CHAPTER VIII

THE CORPORATION AND THE STATE

73–74.	Power of the State over Corporations—Charter as a Contract	256–263
75.	Police Power of the State	263–268
76.	Power of Eminent Domain	268–269
77.	Reservation of Power to Repeal or Amend Charter	269–278
78.	Offer of Amendment—Power of Majority	278
79–81.	Taxation of Corporations	278–290

CHAPTER IX

DISSOLUTION OF CORPORATIONS

82.	How Dissolution is Effected	291–310
83–84.	Equity Jurisdiction	310–313
85.	Effect of Dissolution	313–319

CHAPTER X

MEMBERSHIP IN CORPORATIONS

Section		Page
86.	How Membership is Acquired	320–322
87–88.	"Capital Stock" and "Capital"	322–324
89–90.	Nature of Shares of Stock	324–329
91.	Certificates of Stock	329–330
92.	Subscriptions to Stock—Subscriptions after Incorporation	330–332
93–97.	Subscriptions Prior to Incorporation	332–345
98.	Who may Become Subscribers	345–348
99.	Form of Subscription—Statutory Formalities	348–352
100.	Mutual Consent	352–354
101.	Subscriptions Induced by Fraud	354–364
102.	Subscriptions under Mistake	364–365
103.	Subscription by Agent	365–366
104–106.	Agents to Receive Subscriptions	366–367
107–109.	Conditional Subscriptions	368–374
110–112.	Subscriptions upon Special Terms	375–380
113.	Conditional Delivery of Subscription	380–381
114–115.	Subscription of Entire Capital—Distribution	381–386
116.	Payment of Deposit	387–390
117.	Delivery of Certificate	390–391
118–121.	Remedy of Corporation on Subscriptions	392–397
122–125.	Calls	397–402
126.	Assignment of Unpaid Subscription	402
127–132.	Release and Discharge of Subscriber	403–409
133.	Estoppel of Subscriber	409–410

CHAPTER XI

MEMBERSHIP IN CORPORATIONS (Continued)

134.	Right of Members to Inspect Books and Papers of Corporation	411–418
135.	Right to Vote at Meetings	418
136–137.	Profits and Dividends	418–442
138–140.	Increase of Capital Stock	442–444
141.	Shareholders' Right to Preference	444–445
142–145.	Preferred Stock	446–454
146–148a.	Watered and Bonus Stock	455–482
149–151a.	Actions by Stockholders for Injuries to Corporation—Interference in Management	482–505
152.	Expulsion of Members	505–511

CHAPTER XII

MEMBERSHIP IN CORPORATIONS (Continued)

153–154.	Transfer of Shares	512–517
155.	Effect of Transfer	517–521
156–156a.	Lien of Corporation on Shares	521–524
157–158.	Validity of Transfers	524–525
159–160a.	Mode of Transfer	526–528
161–162a.	Registration of Transfer	528–539
163–166.	Forged and Unauthorized Transfers	539–550
167.	Liability of Indorser of Forged Certificate	550–551
168–169.	Liability of Corporation Arising from Unauthorized or Invalid Transfer	551–553

Section Page
170–171. Liability of Corporation on Certificates Issued Fraudulently, Without Authority, etc. 553–557
172. Remedy against Corporation for Refusal to Recognize Transfer 557–558
173. Compelling Corporation to Issue New Certificates 558–559

CHAPTER XIII

MANAGEMENT OF CORPORATIONS—OFFICERS AND AGENTS

174–177. Powers of the Majority of Stockholders 560–572
178–181. By-Laws 572–582
182–184. Stockholders' Meetings 582–592
185–188. Voting 592–606
189–190. Election and Appointment of Officers and Agents 606–607
191. Qualifications of Directors or Other Officers 607–609
192. Powers of Directors 609–612
193–194. Directors' Meetings and Resolutions 613–618
195–197. Authority of Other Officers and Agents 619–629
198. Notice to Officer as Notice to Corporation 629–631
199. Contracts between Stockholder and the Corporation 631–632
200. Relation between Officers and Corporation 632–636
201–202. Contracts or Other Transactions between Directors or Officers and the Corporation 636–646
203. Liability of Directors and Officers to the Corporation 646–651
204–205. Remedies against Officers 652–654
206. Liability of Officers and Agents on Contracts 654–655
207–209. Liability of Corporation for Torts of Officers and Agents 656–664
210. Liability of Officers and Agents to Third Persons for Torts 664–665
211. Compensation of Directors and Officers 666–668
212. Removal of Directors, Officers and Agents 669–671
213. Relation between Officers and Stockholders 672–674

CHAPTER XIV

RIGHTS AND REMEDIES OF CREDITORS

214. Relation between Creditors and the Corporation—Remedies in General 675–676
215. Property Subject to Execution 676–677
216. Assets of a Corporation as a "Trust Fund" for Creditors 677–684
217. Interference in Management of Corporation 684–686
218. Fraudulent Conveyances and Transfers 687–690
219. Suits for Injunction and Receiver 690–691
220. Assignment for Benefit of Creditors—Preferences 691–693
221. Dissolution of Corporation 693–694
222. Consolidation of Corporations 694
223. Extension of Charter—New Corporation 695–696
224. Set-Off by Debtor of Corporation 696
225–226. Relation between Creditors and Stockholders 697–702
227–230. Statutory Liability of Stockholders 703–713
231. Who are Liable as Stockholders under the Statutes 714–726
232–233. Who may Enforce Statutory Liability 726–727
234–236½. Remedies of Creditors against Stockholders 728–739
237. Necessity for Judgment against Corporation 740–741
238. Effect of Judgment against Corporation 742–743
239. Statute of Limitations 743–746
240. Set-Off by Stockholders 747–748
241. Contribution among Stockholders 749

Section		Page
242–243.	Relation between Creditors and Officers	750–752
244.	Preferences to Officers Who are Creditors	752–754
245.	Statutory Liability of Officers	754–757

CHAPTER XV

FOREIGN CORPORATIONS.

246.	Foreign Corporations Defined	758
247–249.	Status of a Foreign Corporation	758–787
250–253.	Actions by and Against	787–800
254.	Visitorial Power over Foreign Corporations	800–803

TABLE OF CASES CITED

(Page 805)

INDEX

(Page 873)

HANDBOOK

OF THE LAW OF

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THIRD EDITION

CHAPTER I

OF THE NATURE OF A CORPORATION

1–3. Corporation Defined.
4. Creation of Corporations.
5. Limited Powers of Corporations.
6–8. Attributes and Incidents of a Corporation.
9. Corporation as a "Person," "Citizen," etc.
10–11. Kinds of Corporations.

CORPORATION DEFINED

1. A corporation aggregate is a collection of individuals united by authority of law, into one body, under a special denomination, with the capacity of continuous succession, and of acting in many respects as an individual.[1] Every corporation aggregate consists of:

(a) A collection of individuals.

(b) A legal entity, which is, for many purposes, in contemplation of law, separate and distinct from the members who compose it.

[1] "Bodies politic and corporate have been known to exist as far back, at least, as the time of Cicero; and Gaius traces them even to the laws of Solon, of Athens, who lived some 500 years before. Poth. Panel of Just. (Paris Ed., 1823) bk. 3, p. 109. These associated bodies, or communities of individuals, with certain rights and privileges belonging to them by law in their aggregative capacity, were styled by the Romans 'Collegium,' and sometimes 'Universitas'; as, 'Collegia Zibicimum,' 'Collegia Aurificum,' 'Collegia Architectorum'—the society, corporation, or community of flute players, goldsmiths, architects, etc. Id. bk. 20, p. 110. The terms used by one of the

2. For the purpose of acquiring, holding, and conveying property, contracting obligations, incurring liabilities, suing and being sued, a corporation is regarded in law as a legal entity, separate and distinct from the members who compose it. For instance:

(a) The property of a corporation is owned by the corporation, and not by the individual members.

(b) Conveyances of such property must be made by the corporation, and cannot be made by the members as individuals.

(c) Suits on causes of action accruing in favor of or against a corporation must be brought by or against the corporation, and not by or against the members individually.

(d) A corporation may take from and convey to its members, and may contract with them, and may sue them and be sued by them.

3. That a corporation is a legal entity, separate and distinct from the members who compose it, has been often regarded as a legal fiction, introduced for the convenience of the corporation in transacting business, and of those who do business with it; when urged to an intent and purpose not within its reason and policy, the fact that the corporation is also a collection of individuals will be recognized in equity, and even at law.

Roman jurisconsults to describe the nature of such a corporation or associated body of individuals, under the laws of the republic, are, perhaps, as appropriate as any general language which can be used to describe a corporation aggregate at the present day, without referring to the specific object for which any particular corporation is organized. I have thus translated it from the Latin of the Digest: 'But those who are permitted to form themselves into a body, under the name of a corporation, society, or other community, have within their peculiar jurisdiction, as in the similar case of the republic, property in common, and a common chest or treasury, and an agent or head of the corporation or society, by whom, as in the republic, whatever is necessary to be done for the benefit of the community may be transacted.' Dig. lib. 3, tit. 4a. And from time immemorial, as at the present day, this privilege of being a corporation, or artificial body of individuals, with the power of holding their property, rights, and immunities in common, as a legally organized body, and of transmitting the same in such body by an artificial succession different from the natural successions of the property of individuals, has been considered a franchise, which could not be lawfully assumed by any associated body without a special authority for that purpose from the government or sovereign power. Dig. lib. 47, tit. 22, De Coll, et Corp., 4 Guyol, Rep. de Jur. art. 'Communante Laique'; Domat, Pub. Law, bk. 1, tit. 15, § 2." Warner v. Beers, 23 Wend. (N. Y.) 103, 122. For the history of corporations, see 2 Kent, Comm. 268; 1 Wat. Corp. § 11; 1 Pol. & M. Hist. Com. Law, 469; "History of Business Corporations Prior to 1800," article in 2 Harv. Law Rev. 105, by S. Williston.

Definitions

"Persons capable of purchasing," said Lord Coke, "are of two sorts, persons natural, created of God, and persons created by the policy of man, as persons incorporated into a body politic." [2] The latter sort of person is what we call a corporation, or body corporate. "It is called a body corporate because the persons composing it are made into one body." "It is only in abstracto, and rests only in contemplation of law." [3]

Many definitions of a corporation may be found in the books, differing more or less from each other; but there are two, which are often quoted, and which bring out better than any others the two sides of a corporation. One is the definition of Chief Justice Marshall in the Dartmouth College Case; and the other is that of Mr. Kyd, who wrote on the law of corporations in England over a century ago.

Chief Justice Marshall said: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being." [4]

Mr. Kyd defines a corporation as: "A collection of many individuals united into one body, under a special denomination, having

[2] 1 Co. Inst. 202, 250.

[3] 10 Rep. 50. "A body politic is a body to take in succession, framed (as to that capacity) by policy, and therefore it is called by Littleton a 'body politic'; and it is called a 'corporation' or 'body corporate' because the persons are made into a body, and of a capacity to take and grant," etc. Co. Litt. 250a.

[4] Per Chief Justice Marshall, in DARTMOUTH COLLEGE v. WOODWARD, 4 Wheat. (U. S.) 518, 636, 4 L. Ed. 629, Wormser Cas. Corporations, 189. See Ang. & A. Corp. § 1; 10 Cyc. 143.

perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights more or less extensive according to the design of its institution or the powers conferred upon it, either at the time of its creation or any subsequent period of its existence." [5]

Chancellor Kent's description of a corporation is as follows: "A corporation is a franchise possessed by one or more individuals, who subsist, as a body politic, under a special denomination, and are vested, by the policy of the law, with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual. The object of the institution is to enable the members to act by one united will, and to continue their joint powers and property in the same body, undisturbed by the change of members, without the necessity of perpetual conveyances, as the rights of members pass from one individual to another. All the individuals composing a corporation and their successors are considered in law as but one person, capable under an artificial form of taking and conveying property, contracting debts and duties, and of enjoying a variety of civil and political rights. One of the peculiar properties of a corporation is the power of perpetual succession; for, in judgment of law, it is capable of indefinite duration. The rights and privileges of the corporation do not determine or vary on the death or change of the individual members. They continue as long as the corporation endures. * * * It was chiefly for the purpose of clothing bodies of men in succession with the qualities and capacities of one single, artificial, and fictitious being, that corporations were originally invented, and for the same convenient purpose they have been brought largely into use. By means of the corporation many individuals are capable of acting in perpetual succession like one single individual, without incurring any personal hazard or responsibility, or exposing any other property than what belongs to the corporation in its legal capacity." [6]

In People v. Assessors of Village of Watertown,[7] it was said by Bronson, J.: "A corporation aggregate is a collection of individuals united in one body, under such a grant of privileges as secures a

[5] 1 Kyd, Corp. 13. And see State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; In re Rieger, Kapner & Altmark (D. C.) 157 Fed. 609.

[6] 2 Kent, Comm. 267, 268.

[7] 1 Hill (N. Y.) 620.

succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person. It does not occur to my mind that anything else can be essential to the definition. Such a union as I have mentioned can only be effected under a grant of privileges from the sovereign power of the state. A corporation is, therefore, said to be a legal being, or the mere creature of law."

Chief Justice Baldwin of Connecticut recently defined a corporation as "an association of persons to whom the sovereign has offered a franchise to become an artificial, juridical person, with a name of its own, under which they can act and contract, and sue and be sued, and who have accepted the offer and effected an organization in substantial conformity with its terms." [8]

It seems, on the whole, most accurate to say that a modern private corporation is a group of persons authorized by sovereign authority to act as a juridical unit. This group is no more of a fiction than is a class in law school, a baseball team, a regiment, or any other familiar collective unit. In so far only as the law treats this group of persons as though it were but one person is there anything of fiction involved in the conception of a corporation. Some recent decisions, however, have declared that "a corporation is a mere conception of the legislative mind." [9]

The Corporation as a Legal Entity

These definitions show that a corporation is for many purposes, in the contemplation of law, an artificial person or entity, having an individuality separate and distinct from that of the members who compose it. Mr. Justice McKenna recently said: "Undoubtedly a corporation is in law, a person or entity entirely distinct from its stockholders and officers." [10] The existence of the members is, in law, and, for most purposes, in equity also, merged in that of the corporate body, and lost sight of. As a legal entity it takes and holds property, and conveys the same; it contracts obligations, and it sues and is sued, in its corporate name, in the same manner as a natural person. For these purposes the members of the corporation

[8] Mackay v. New York, N. H. & H. R. Co., 82 Conn. 73, 81, 72 Atl. 583, 24 L. R. A. (N. S.) 768.

[9] Vann, J., in People v. Knapp, 206 N. Y. 373, 99 N. E. 841, Ann. Cas. 1914B, 243. See also, Mioton v. Del Corral, 132 La. 730, 61 South. 771, where under Civ. Code La. art. 427, the court spoke of a corporation as "an intellectual body created by law."

[10] J. J. McCaskill Co. v. U. S., 216 U. S. 504, 514, 30 Sup. Ct. 386, 54 L. Ed. 590. See also, Hearst v. Putnam Min. Co., 28 Utah, 184, 77 Pac. 753, 66 L. R. A. 784, 107 Am. St. Rep. 698.

are not regarded. They compose the corporation, but they are not the corporation.[11]

In an English case, which serves as a good illustration of this characteristic of a corporation, suit was brought to compel customhouse officers to register a vessel belonging to a British corporation, and was resisted on the ground that, as some of the members of the corporation were foreigners, the vessel did not belong wholly to British subjects, as was required by statute to entitle it to registry. The court held, however, that the vessel belonged to the corporation, and not to the individual members, and was therefore entitled to registry, and that this would be so even if all the stock in the corporation had been owned by foreigners.[12]

This characteristic of a corporation, as a legal entity, separate and distinct from its members, is of peculiar importance with respect to the ownership and conveyance of corporate property, the effect of corporate contracts, and the right to maintain actions concerning corporate property and rights, and for corporate wrongs. For these purposes the law generally considers the corporate body only.[13] The members of a corporation do not take, nor can they grant, its property; but the corporation does so itself in its corporate name. The corporate property does not in any legal sense vest in or belong to the individual members, though they are interested in it to the extent that they may derive benefit from its increase, or suffer loss from its destruction.[14] They are in no legal sense, however, the owners of its property. As we have seen, for instance, property belonging to a British corporation belongs wholly to a British subject (the corporation), though some or even all of its members may be foreigners.[15] And in a recent Virginia case

[11] See The Queen v. Arnaud, 16 Law J. C. L. 50; SMITH v. HURD, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, Wormser Cas. Corporations, 375; Bronson, J., in People v. Assessors of Village of Watertown, 1 Hill (N. Y.) 620; and the cases cited in the following notes. Under Civ. Code La. art. 435, "corporations are intellectual beings different and distinct from the persons who compose them." Mioton v. Del Corral, 132 La. 730, 61 South. 771.

[12] The Queen v. Arnaud, supra. And see CONTINENTAL TYRE & RUBBER CO., LIMITED, v. DAIMLER CO., LIMITED, [1915] 1 K. B. 893, Wormser Cas. Corporations, 8.

[13] Post, p. 482.

[14] Present ownership not being necessary to give an insurable interest in property, it has been held that a stockholder has such a beneficial interest in the corporate property as to give him an insurable interest. Warren v. Davenport Fire Ins. Co., 31 Iowa, 464, 7 Am. Rep. 160; Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716.

[15] The Queen v. Arnaud, supra. And it has been held very recently that a corporation chartered in England, though composed almost entirely of alien enemies, may sue in the English courts. CONTINENTAL TYRE & RUBBER

it was held that a covenant providing that title to the realty should never vest in colored persons was not violated when a corporation "composed exclusively of negroes" took title, with knowledge of the restriction, in order to develop an amusement park for colored people. Caldwell, J., said: "Such a conveyance by no rule of construction vests the title to the property conveyed in a person or persons of African descent." [16] So, a member of a corporation has not such a distinct right in its property as to make his interest attachable for his debts.[17] And the corporation, and not the individual members, must bring trover for conversion of its property,[18] or replevin to recover possession of the same.[19] And the members of a corporation have no power to sell or convey its property, but all such transactions must be by and in the name of the corporation.[20] The members of a corporation cannot bind it by contracts entered into individually. A corporation, as we shall see,[21] may become bound by a contract entered into on its behalf by its promoters, by adopting it, or accepting the benefit of it; but here the corporation, by adoption, makes a contract itself. Contracts made by the members of a corporation as individuals, either before or after incorporation, do not bind the corporation,[22] nor do corporate

CO. v. DAIMLER CO., LIMITED, [1915] 1 K. B. 893, Wormser Cas. Corporations, 8.

[16] People's Pleasure Park Co. v. Rohleder, 109 Va. 439, 61 S. E. 794, rehearing denied 63 S. E. 981.

[17] Williamson's Syndics v. Smoot, 7 Mart. O. S. (La.) 34, 12 Am. Dec. 494. But this rule has been very largely modified by statutory enactments.

[18] Tomlinson v. Bricklayers' Union, No. 1, of Indiana, 87 Ind. 308.

[19] BUTTON v. HOFFMAN, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131, Wormser Cas. Corporations, 1. See, also, State ex rel. City of Tacoma v. Tacoma Ry. & Power Co., 61 Wash. 507, 112 Pac. 506, 32 L. R. A. (N. S.) 720, where the majority of the court followed the case last cited; Dunbar, J., dissenting.

[20] Wheelock v. Moulton, 15 Vt. 519; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261; Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473; Sellers v. Greer, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589. In Rough v. Breitung, 117 Mich. 48, 75 N. W. 147, Grant, C. J., said: "Stockholders do not own the corporate property, and cannot mortgage, sell, or convey it. The title is in the artificial being called the corporation, not in the stockholders."

[21] Post, p. 130.

[22] Davis v. Ravenna Creamery Co., 48 Neb. 471, 67 N. W. 436. In MOORE & HANDLEY HARDWARE CO. v. TOWERS HARDWARE CO., 87 Ala. 206, 6 South. 41, 13 Am. St. Rep. 23, Wormser Cas. Corporations, 4, a valid contract was entered into by competing firms, by which one of them agreed not to sell goods in a certain territory in opposition to the other. Shortly thereafter the members of this firm and others formed a corporation for carrying on the same general business, and announced their intention to handle the same goods formerly sold by the firm, and in the district in which the firm had bound them-

contracts bind the stockholders as individuals.[23] Nor can the declarations or admissions of individual members of a corporation, when they are not authorized to act as its agent in the matter, be received as evidence against the corporation, any more than the declarations and admissions of a stranger could be admitted.[24]

These rules are the same even when all the stock in the corporation is owned by one person, for this circumstance does not change his relation as a mere stockholder. The corporation is still a separate and distinct artificial person, in the eye of the law.[25] Thus, in a recent Louisiana case, it was held that a sole stockholder could not sue to recover damages to the corporation, and it was regarded as immaterial that plaintiff held all the stock; the corporation, and it alone, should sue.[26] And that the owner of all the stock is another corporation "makes no difference in principle." [27]

selves not to sell. It was held that, in the absence of allegations that the corporation was fraudulently created with the intent on the part of the stockholders to evade and avoid their obligations as individuals, and that the partners in the original firm had reserved to themselves interests in the business distinct from their interests as stockholders, the corporation could not be enjoined from carrying on the business. And see Erickson v. Revere Elevator Co., 110 Minn. 443, 126 N. W. 130. See also, article by I. Maurice Wormser, 24 Yale Law Journal, 177, 184, 185.

[23] Hall's Safe Co. v. Herring-Hall-Marvin Safe Co., 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. (N. S.) 1182; Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 273, 28 Sup. Ct. 288, 52 L. Ed. 481.

[24] Polleys v. Ocean Ins. Co., 14 Me. 141; Fairfield County Turnpike Co. v. Thorp, 13 Conn. 173.

[25] "The owner of all the capital stock of a corporation does not, therefore, own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists, he is a mere stockholder of it, and nothing else." BUTTON v. HOFFMAN, supra. And see Wheelock v. Moulton, supra; Baldwin v. Canfield, supra; Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387; City of Louisville v. McAteer, 81 S. W. 698, 26 Ky. Law Rep. 425, 1 L. R. A. (N. S.) 766; Palmer v. Ring, 113 App. Div. 643, 99 N. Y. Supp. 290; Brock v. Poor, 216 N. Y. 387, 111 N. E. 229. In Parker v. Bethel Hotel Co., supra, it was held that a stockholder of a corporation does not, by becoming owner of the entire stock, acquire an equitable estate in real property of the corporation which would enable him to make a conveyance thereof in his own name. But see Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336; Bundy v. Ophir Iron Co., 38 Ohio St. 300. For a collection of the authorities, see article by I. Maurice Wormser, 12 Columbia Law Rev. 496, 515–517.

[26] Mioton v. Del Corral, 132 La. 730, 61 South. 771. Civ. Code La. art. 432, provides: "Corporations must sue and be sued in their names." See, also, Aiello v. Crampton, 201 Fed. 891, 120 C. C. A. 189.

[27] Exchange Bank of Macon v. Macon Const. Co., 97 Ga. 1, 25 S. E. 326. And see Gramophone & Typewriter, Limited, v. Stanley, [1906] 2 K. B. 856, [1908] 2 K. B. 89; Salomon v. Salomon & Co., [1897] App. Cas. 22; New

On the same principle, the shares in a corporation organized for the sole purpose of holding and managing real estate, are personal property, and not real estate. The real estate is owned by the corporation, the artificial being, and not in any sense by the individual members, like partnership real estate, which is owned by the partners as tenants in common.[28]

It also follows from the distinction between the individuality of the corporation and that of its members that a corporation may convey its property to one or more of its members, or its members may convey to it, and it may enter into contracts with its members, without the conveyance being open to the objection that the same person is both grantor and grantee, or the contract being objectionable on the ground that it is a contract by a man with himself.[29]

It also follows from this characteristic of corporate bodies that a corporation may sue its members, and be sued by them.[30] So, actions by and against corporations are not in any sense actions by and against the stockholders. Thus, a sheriff, who owns stock in a corporation, is not a party to a suit by or against the corporation, within the meaning of a statute disqualifying an officer from serving process where he is a party to the suit.[31] For the same reason, it has been held that a justice who is related to a member of a corporation, or who is himself a member, is not disqualified to try an action by or against the corporation, under a statute disqualifying because of relationship to either of the "parties," [32] but the weight of authority is otherwise,[33] undoubtedly on

York Airbrake Co. v. International Steam Pump Co., 64 Misc. Rep. 347, 120 N. Y. Supp. 683.

[28] Russell v. Temple (Mass.) 3 Dane, Abr. 108.

[29] Pope v. Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; Foster v. Commissioners of Inland Revenue (1894) 1 Q. B. 516; Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; Com. v. New York, L. E. & W. R. Co., 132 Pa. 591, 19 Atl. 291, 7 L. R. A. 634; post, p. 320 et seq.

[30] Waring v. Catawba Co., 2 Bay (S. C.) 109; Pope v. Brandon, supra; Culbertson v. Wabash Nav. Co., Fed. Cas. No. 3,464; Geer v. Tenth School Dist. in Richmond, 6 Vt. 76; Sawyer v. Methodist Episcopal Soc. in Royalton, 18 Vt. 405; Rogers v. Danby Universalist Soc., 19 Vt. 187.

[31] President, etc., of Merchants' Bank v. Cook, 4 Pick. (Mass.) 405.

[32] Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315; Stuart v. Mechanics' & Farmers' Bank, 19 Johns. (N. Y.) 501.

[33] Washington Ins. Co. of City of New York v. Price, 1 Hopk. Ch. (N. Y.) 1; State ex rel. Colcord v. Young, 31 Fla. 594, 12 South. 673, 19 L. R. A. 636, 34 Am. St. Rep. 41; Inhabitants of Northampton v. Smith, 11 Metc. (Mass.) 390; Gregory v. Cleveland, C. & C. R. Co., 4 Ohio St. 675. In the first cited case, Chancellor Sanford refused to take jurisdiction on the ground that the shareholders were "the real litigants in the suit."

grounds of sound public policy, at least as to the latter proposition. In a Minnesota case it was held that the demands of stockholders individually cannot be interposed as equitable set-offs to a demand against the corporation, even though the plaintiff be insolvent.[34] The federal courts are given jurisdiction in certain cases of suits between citizens of different states. Within the meaning of the law, a corporation is a citizen of the state of its creation, and may sue a citizen of another state, though all of its members may be citizens of the latter state. The action is by the corporation, not by its members.[35]

A recent Massachusetts decision closely follows the entity doctrine. A South Dakota corporation conveyed all its property and assets to a new corporation of the same name organized under the laws of Maine. The latter company assumed all the liabilities of the former. It had "practically the same" stockholders, and the same officers and agents carried on the very same business, at the same place, in the same manner, and under the same management. It was held that the two corporations had separate and distinct existences and were not the same person at law or in equity, and could not be treated as one for any purpose. "They are in no respect the same person," said Sheldon, J.[36]

The Corporation as a Collection of Individuals

When it is thus said that a corporation is a legal entity, separate and distinct from the persons who compose it—that the individual existence of the members is merged in the artificial individuality of the corporate body—it must not be understood that the law cannot under any circumstances look behind this artificial entity, and notice the existence and acts of its members. One cannot shut his eyes to the fact that private corporations are all formed by an association of individuals, under authority of law, and that to this extent they are mere collections of individuals. The legal conception of a corporation as an entity distinct from its members has often been regarded as a mere fiction adopted by the law, for the purpose of enabling natural persons to transact business in this peculiar way; whenever it is necessary to do so, the law will look behind the corporate body, and recognize the members, and disregard the fiction.[37]

[34] Gallagher v. Germania Brewing Co., 53 Minn. 214, 54 N. W. 1115. And see Erickson v. Revere Elevator Co., 110 Minn. 443, 126 N. W. 130.

[35] Post, p. 82.

[36] Brighton Packing Co. v. Butchers' Slaughtering & Melting Ass'n, 211 Mass. 398, 97 N. E. 780. See also, Stone v. Cleveland, C., C. & St. L. R. Co., 202 N. Y. 352, 95 N. E. 816, 35 L. R. A. (N. S.) 770.

[37] Donovan v. Purtell, 216 Ill. 629, 75 N. E. 334, 1 L. R. A. (N. S.) 176; In

In a New York Case,[38] the state asked a forfeiture of the charter of a corporation because of its illegal conduct in entering into an unlawful association with other corporations and firms engaged in the same business. There had been no formal action by the defendant's trustees or directors, but the stockholders individually had transferred their stock to the parties representing the combination. It was contended that the combination was due to the acts of the stockholders, and not to any corporate action, and that, therefore, the corporation was not guilty of any misconduct. The court declined to take this view, and held that the misconduct of the stockholders, and of the officers in recognizing the transfers of stock, was the misconduct of the corporation.[39] A like question arose in an Ohio case, and a like decision was made.[40]

re Rieger, Kapner & Altmark (D. C.) 157 Fed. 609; Gay v. Hudson River Elec. P. Co., 187 Fed. 12, 15, 109 C. C. A. 66; Hunter v. Baker Motor Vehicle Co. (D. C.) 225 Fed. 1006. A corporation will be regarded as a legal entity distinct from its stockholders, only so long as it is not used to defeat public convenience, justify wrong, or defend crime, in which case it will be regarded as an association of persons. Smith v. Moore, 199 Fed. 689, 118 C. C. A. 127; Linn & Lane Timber Co. v. U. S., 236 U. S. 574, 35 Sup. Ct. 440, 59 L. Ed. 725, affirming decree 196 Fed. 593, 116 C. C. A. 267, affirming decree U. S. v. Smith (C. C.) 181 Fed. 545. See, also, McCaskill v. U. S., 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590; U. S. v. Lehigh Val. R. Co., 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458, per White, C. J.; Garrigues v. International Agricult. Corp., 159 App. Div. 877, 880, 144 N. Y. Supp. 982; Spokane Merchants' Ass'n v. Clere Clothing Co., 84 Wash. 616, 147 Pac. 414; Brock v. Poor, 216 N. Y. 387, 111 N. E. 229, dissenting opinion per Seabury, J. And the same courts have ignored the separate existence of a corporation which is used as a mere agent or instrumentality of a parent corporation. See In re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530. Compare In re WATERTOWN PAPER CO., 169 Fed. 252, 94 C. C. A. 528, Wormser Cas. Corporations, 33.

[38] PEOPLE v. NORTH RIVER SUGAR-REFINING CO., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843, Wormser Cas. Corporations, 20. See, also, People v. Kingston & M. Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551.

[39] It was said in this case: "There may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and, if illegal and injurious, may deserve and receive the penalty of dissolution. * * * The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what in a given case has been that collective action or agency. As between the corporation and those with

[40] See note 40 on following page.

"If any general rule can be laid down in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. This much may be expressed without approving the theory that the legal entity is a fiction, or a mental creation, or that the idea of indivisibility or intangibility is a sophism. A corporation, as expressive

whom it deals, the manner of its exercise usually is material; but, as between it and the state, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The state gave the franchise, the charter, not to the impalpable, intangible, and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, and redound to their benefit, to strengthen their hands, and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act collectively, as an aggregate body, without the least exception, and, so acting reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the state may review, and not be defeated by the assumed innocence of a convenient fiction."

[40] State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541. In this case it was said: "The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders by distinguishing between the corporate debts and property of the company and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice. It is in this sense that the maxim, 'In fictione juris subsistit æquitas,' is used, and the doctrine of fictions applied. But, when they are urged to an intent and purpose not within the reason and policy of the fiction, they have always been disregarded by the courts. * * * Now, so long as a proper use is made of the fiction that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but, where it is urged to an end subversive of its policy, * * * the fiction must be ignored." See, also, First Nat. Bank of Chicago v. Trebein Co., 59 Ohio St. 316, 52 N. E. 834; Martin v. D. B. Martin Co. (Del. Ch.) 88 Atl. 612; BOWDITCH v. JACKSON CO., 76 N. H. 351, 82 Atl. 1014, Ann. Cas. 1913A, 366, Wormser Cas. Corporations, 226.

of legal rights and powers, is no more fictitious or intangible than a man's right to his own home or his own liberty." [41]

Courts of equity, in numerous instances, look behind the corporation, and recognize the rights of the corporation as being in reality the rights of the individuals composing it. The rights of the members of a corporation, in their collective capacity, in its property, must generally be enforced, even in equity, through the corporation as a distinct legal person; but if, for any reason, this cannot be done, courts of equity will not allow the legal fiction of a distinct corporate entity to stand in the way of justice. Thus, though an action against the officers of a corporation for conversion of its property, or a suit in equity to enjoin them, must be brought in the name of the corporation if it can be done, yet, if the offending officers are a majority of the directors, and own a majority of the stock, so that an injured stockholder cannot obtain relief at law through the corporation, he may maintain a suit in equity in his own name.[42] On the other hand, if all the stockholders of a corporation are individually in such a position as to be without equity in regard to a particular matter, they cannot obtain equitable relief through the corporation, and in its name.[43]

CREATION OF CORPORATIONS

4. A corporation can be created only by or under authority from the state. It cannot be formed by mere agreement between the members.

In this respect a corporation is very different from an ordinary partnership. A partnership is formed by a mere agreement between the parties who become members, and no legislative authority is necessary. A corporation cannot be so formed. It can be

[41] Sanborn, J., in U. S. v. Milwaukee Refrigerator Transit Co. (C. C.) 142 Fed. 247, 255. And see opinion of Noyes, J., In re WATERTOWN PAPER CO., 169 Fed. 252, 94 C. C. A. 528, Wormser Cas. Corporations, 33. For a discussion of the cases, see article, "Piercing the Veil of Corporate Entity," 12 Columbia Law Rev. 496–518, by I. Maurice Wormser.

[42] Post, p. 482.

[43] Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co., 13 Colo. 587, 22 Pac. 954; Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716, per Pound, C., and see article by I. Maurice Wormser, supra, at pages 513, 514, for instances of analogous reasoning in courts of law.

created only by or under authority from the state conferred by the Legislature. The creation of corporations will be considered at length in a subsequent chapter.[44]

LIMITED POWERS OF CORPORATIONS

5. A corporation, being the mere creature of the Legislature, has such powers only as are expressly or impliedly conferred upon it by the charter or act of incorporation.

A common partnership has the same powers as the members would have individually. As its formation does not depend at all upon legislative authority, neither do its powers. A corporation, on the other hand, being the creature of the Legislature, has such powers, and such powers only, as are expressly or impliedly conferred upon it by the charter or act of incorporation. It cannot lawfully do acts which would be lawful for individuals, or even praiseworthy, unless the power to do them can be derived from its charter.[45]

ATTRIBUTES AND INCIDENTS OF A CORPORATION

6. The following powers and faculties, and these only, are essential to the existence of a corporation:

(a) To have continuous succession, under a special name, and in an artificial form, without being subject to dissolution or change of identity by the death, withdrawal, or legal disability of individual members.

(b) To take and grant property and contract obligations, within the limits of the power conferred upon it by its charter, and to sue and be sued, in its corporate name, in the same manner as an individual.

(c) To receive grants of privileges and immunities, and to enjoy them in common.

7. The following powers and faculties are incident to most private corporations, but are not essential to corporate existence:

(a) Transferability of shares.

(b) Exemption of the members from personal liability for the debts of the corporation beyond the amount of their respective proportions of the capital.

[44] Post, p. 34.

[45] Post, p. 142.

(c) Power to purchase and hold real estate.
(d) Power to use a common seal.
(e) Power to make by-laws.

8. The distinguishing characteristic of a corporation, "which makes it to be such, and not some other thing, in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial, individual existence."

Under this head we shall ascertain the attributes and incidents of a corporation, and the characteristics which distinguish it from other associations of individuals. A corporation is known to the law by the powers and faculties bestowed upon it expressly or impliedly, by the charter or act creating it. The words "corporation" or "incorporate" need not be used in its creation.[46] Nor, on the other hand, does the use of such words necessarily make the particular association a corporate body. The use of these or equivalent words may impliedly confer corporate powers and faculties, and therefore create a corporation, if there is nothing to show that powers and faculties essential to corporate existence were intended to be withheld; but if, in fact, essential powers and faculties are not conferred, then the body created or intended to be created is no corporation, according to many authorities, whatever may have been the intention of the legislature. On the other hand, even the express declaration of the legislature, in the act by which it creates or authorizes an association, that it shall not constitute or be considered a corporation, will not prevent the courts, at least in other jurisdictions, from holding that it is a corporation, if the attributes conferred upon it make it so.[47] In order, therefore, to determine

[46] Thomas v. Dakin, 22 Wend. (N. Y.) 9; Sutton's Hospital Case, 10 Coke, 23a, 28a; Conservators of the River Tone v. Ash, 10 Barn. & C. 349; Blanchard v. Kaull, 44 Cal. 440.

[47] Bronson, J., in People v. Assessors of Village of Watertown, 1 Hill (N. Y.) 620; Hand, Senator, in Gifford v. Livingston, 2 Denio (N. Y.) 395; Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. 585, 30 C. C. A. 293; Edgeworth v. Wood, 58 N. J. Law, 463, 33 Atl. 940; Liverpool & L. Life & F. Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 19 L. Ed. 1029. In the latter case an association created by the British Parliament was expressly declared not to be a corporation, but it was given many of the attributes necessary to make it one. It was held by the Supreme Court of the United States that, whatever might be the effect of such declaration in the British courts, it could not alter the essential nature of a corporation, or prevent the courts of another jurisdiction from inquiring into its true character, whenever it should come in issue; and it was held that the body was a corporation. But see Edwards v. Warren Linoline & Gasoline Works, 168 Mass. 564, 47

whether a particular association is a corporation or not, it is necessary to ascertain the properties essential to constitute such a body, and compare them with those conferred upon the association. If they exist in common or substantially correspond, the association is a corporation; otherwise, it is not.[48] As we shall see, many faculties are generally incident to a corporation, but are not essential to corporate existence. And, on the other hand, some faculties which are essential may exist also in an unincorporated association.

The powers and faculties generally specified as creating corporate existence are: (1) The capacity of perpetual succession; (2) the power to grant and receive, to contract, and to sue and be sued, in the corporate name; (3) the power to purchase and hold real and personal estate; (4) the power to have a common seal; and (5) the power to make by-laws. As was pointed out in a New York case,[49] however, these indicia were given by judges and elementary writers at a very early day. Since that time the institutions have greatly multiplied, their practical operation and use have been thoroughly tested, and their peculiar and essential properties are much better understood, and at the present time some of the powers above specified are recognized as wholly unessential.

Perpetual Succession

One of the chief attributes of a corporation, and one that is essential to corporate existence is the power or faculty of having perpetual succession,[50] under a special denomination, and in an artificial form, without being subject to dissolution or change of identity by reason of the death, legal disability, or withdrawal of members. In the case of an ordinary partnership, the withdrawal of a

N. E. 502, 38 L. R. A. 791; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842.

[48] Thomas v. Dakin, supra; Sutton's Hospital Case, supra; Conservators of the River Tone v. Ash, supra; Liverpool & L. Life & F. Ins. Co. v. Massachusetts, supra.

[49] Thomas v. Dakin, supra.

[50] It is generally said, as in the text, that a corporation has the faculty of "perpetual" succession, and a corporation has been described as an "immortal" being. It is not meant by this that a corporation must, but simply that it may, continue forever. Private corporations are generally limited in their duration to a certain number of years; and, even when not so limited, they may forfeit their right to corporate existence, and be dissolved. It might be preferable to use the term "continuing" rather than "perpetual." See State ex rel. Hines v. Scott County Macadamized Road Co., 207 Mo. 54, 105 S. W. 752, 13 Ann. Cas. 656. Eternal life is not an attribute in Illinois of corporate existence. People ex rel. v. Wayman, 256 Ill. 151, 99 N. E. 941.

member dissolves the firm. Even if the remaining partners continue to carry on the business as a firm, and under the same firm name, the identity of the firm is changed. The remaining partners constitute a new and distinct firm. Even if the outgoing partner transfers his interest with the consent of the other members so as to introduce the transferee into the partnership, there is, in law, a new partnership agreement, and a new firm. However numerous such changes in membership may be, and though there may be no break in the continuity of the business, nor change in the firm name, at each change an existing firm is dissolved, and a new one is formed.[51] So, where a partner dies, this will ordinarily dissolve the firm, and his interest in the property will go to his heirs and personal representatives. And there are some legal disabilities, which if they attach to a partner, will operate as a dissolution of the firm.[52]

This is not true of a corporation. Neither the existence of a corporation nor its identity is in any way affected or changed by the withdrawal of individual members. Unless prevented by the peculiar nature and object of the corporation,[53] any member may transfer his shares without the consent of his associates, and the transferee will come into the association as a member, without in any sense changing the identity or affecting the existence of the corporate body.[54] So, if a member dies, the existence or identity of the corporation is not affected; but whoever becomes the legal holder of the shares, which are transferred by operation of law like other personal property, succeeds to membership. As Blackstone put the matter, "All the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.[55] This mark of corporate existence may exist in unincorporated associations by statute.[56]

[51] Gilmore, Partnership, p. 578. It is permissible, it has been said, for parties to stipulate in a partnership agreement that the death of a member of the firm or an assignment by him of his interest shall not dissolve the partnership, but that the executors of the deceased partner or his assignee, as the case may be, shall succeed to membership. Warner v. Beers, 23 Wend. (N. Y.) 103, 146. Even in such a case as this, however, the identity of the firm is necessarily changed.

[52] Gilmore Partnership, pp. 573–575.

[53] Post, p. 19.

[54] Post, p. 19.

[55] 1 Bl. Com., 467, 468.

[56] Post, p. 22.

The Faculty of Acting as a Legal Entity

We have seen that a corporation can take and grant property and contract obligations within the limits authorized by its charter, and sue and be sued, in its corporate name, in the same manner as an individual.[57] In other words, it has the faculty of dealing and being dealt with as a distinct person in the eye of the law, apart from its members. In this respect a corporation differs widely from an ordinary partnership. If a firm takes a conveyance of property, it vests in the partners individually as tenants in common, each having an undivided interest therein. And each member of the firm may by his individual act transfer his interest in the firm property. When a firm enters into a contract, it is a joint contract, binding the partners as individuals. When suit is brought by or against a firm, it must, in the absence of statutory provision to the contrary, be brought by or against the members individually. In a word, the common law does not recognize a firm as a legal entity apart from the members, but deals with the members themselves individually.

It is altogether different in the case of a corporation. A corporation, in the exercise of its power to take and grant property, to enter into contracts, etc., acts, through its agents, as though it were an individual; in other words, as an artificial person. Being impersonal, it can act only by means of duly-appointed agents. But the acts of the agents are in law the acts of the corporation, and not the acts of the individual members. So, when a cause of action accrues in favor of or against a corporation, the corporate body sues or is sued in its corporate name, and the suit is not brought by or against the members individually.[58]

Special Denomination, or Corporate Name

A name is essential to a corporation, for without a name it could not be known, it could not contract, it could not make or take a conveyance of property, it could not sue or be sued; in short, it could do no act as an artificial person distinct from its members. "A corporation is a body politic, consisting of material bodies, which, joined together, must have a name to do things which concern the corporation, or else it is no corporation." [59]

[57] Ante, p. 5.

[58] Ante, p. 5.

[59] Conservators of the River Tone v. Ash, 10 Barn. & C. 349. And see Mariot v. Mascal, And. 206; post, p. 76. The fact that an association having all the essential attributes of a corporation conducts part of its business in its corporate name, and part in the name of its president for the time being—as where it contracts in its corporate name, and sues and is sued in the name of its president—in no degree changes the character of the body, for a corporation may have more than one name. "A corporation may have

The right to use a special name, to contract obligations under it, and the right and liability to sue and be sued by it, has been mentioned as a criterion of corporate existence; but it is not so. Unincorporated associations may be authorized by statute to use a special name, and to sue and be sued by it; and, by statute, in some states, a limited partnership may sue and be sued in the name of the general partner.

Transferability of Shares

A member of the firm cannot, unless there is a provision therefor in the partnership articles, transfer his membership to another, without the consent of the other members. In the case of most private corporations, on the other hand, the shares are transferable without the consent of the other shareholders.[60] Transferability of shares has been mentioned as one of the distinguishing features of a corporation, but it is not necessarily so. It is an incident of most private corporations, but it is by no means essential to corporate existence. For instance, it does not enter into the constitution of chartered colleges, academies, hospitals, and other corporate institutions founded by public endowment or private beneficence; nor of incorporated scientific and literary societies, or corporate societies for mutual benefit or charity, in the funds of which the members have a beneficial interest, such as mutual benefit insurance companies, trade unions, etc. The absence of this feature, therefore, does not show that the particular association is not a corporation. Nor, on the other hand, does the fact that shares are transferable show that the association is a corporate body, for the right to transfer may, if the parties choose, be provided for in partnership articles.[61] There is this difference, however, in most private corporations the transferability of shares is incidental,

more than one name. It may have one in which to contract, grant, etc., and another in which to sue and be sued. So, it may be known by two different names, and may sue and be sued in either; and the name of the president, his official name, or any other, will answer every purpose. The only material circumstance is a name or names of some kind in which all the affairs of the company may be conducted." Thomas v. Dakin, 22 Wend. (N. Y.) 9; Edgeworth v. Wood, 58 N. J. Law, 463, 33 Atl. 940; Liverpool & L. Life & F. Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 19 L. Ed. 1029.

In these cases, the statute provided for suits by and against the associations in the name of their principal officer, and the associations were allowed to contract in their artificial name. It was held that they were corporations. "If it can contract in the artificial name," it was said in the case last cited, "and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name."

[60] Post, p. 512. [61] Warner v. Beers, 23 Wend. (N. Y.) 103.

and need not be expressly provided for. In the case of a partnership an express provision is necessary to render the shares transferable.

Exemption of Members from Personal Liability

One of the most familiar distinctions, in popular understanding, between corporate bodies and common partnerships or other unincorporated associations, is the exemption of the members from personal liability for the debts of the association. In the case of a partnership, at common law, each member is personally liable for all the debts of the firm, after the joint assets have been exhausted. In the case of a corporation, at common law, the members of a business corporation are exempt from personal liability for the debts of the corporation beyond the amount of their respective proportions of the capital. If the stockholder has paid for his shares, he is not liable for any of the corporate indebtedness.

This has often been mentioned as peculiar to a private corporation, but it is not necessarily so. The exemption of members from personal liability is merely an incident to a corporation, in the absence of a statute altering the common-law rule. It is not an essential attribute. In many states statutes have been enacted, rendering the members of a private business corporation personally liable, to a greater or less extent, for its debts, where the corporate assets are insufficient to pay them in full. Such a statute does not in any sense change the character of the body as a corporation.[62] On the other hand, the liability of partners may be thus limited. The statutes relating to limited partnerships show that the partners may be exempted from liability beyond their shares in the joint fund, without converting such firms into bodies corporate. Besides this, persons have a natural right, unless restrained by legislative enactment, to contract to make payment only to the amount of certain specific funds.[63]

Power to Purchase and Hold Real Estate

Among the other powers which are usually attributed to corporations, but which are by no means essential to corporate existence, may be mentioned the power to purchase and hold real estate. This power generally exists, but it is altogether unessential, unless the purpose for which the corporation was created requires it to hold real estate.[64]

[62] Warner v. Beers, supra; Liverpool & L. Life & F. Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 19 L. Ed. 1029. See post, p. 703.

[63] Warner v. Beers, supra.

[64] Thomas v. Dakin, 22 Wend. (N. Y.) 9; post, p. 151.

Power to Use a Common Seal

So it is with the power to use a common seal. At common law a corporation has, as an incident, the power to use a seal whenever it is necessary in the transaction of its business; but the power may be dispensed with altogether, for it is well settled that corporations may, unless expressly restricted by their charter, contract by resolution or through agents, and without a seal.[65]

Right to Make By-Laws

The same may be said of the right to make by-laws. This power is generally incidental to a corporation, but it is not essential to corporate existence. It is unnecessary in all cases where the charter sufficiently provides for the government of the body.[66]

Conclusion as to Attributes Essential to Corporate Existence

In a leading New York case, it was said by Chief Justice Nelson: "The distinguishing feature [of a corporate body], far above all others, is the capacity conferred, by which a perpetual succession of different persons shall be regarded in the law as one and the same body, and may at all times act, in fulfillment of the objects of the association, as a single individual. In this way a legal existence, a body corporate, an artificial being, is constituted, the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man. While the aggregate means and influence of all are wielded in effecting it, the operation is conducted with the simplicity and individuality of a natural person. In this consists the essence and great value of these institutions. Hence it is apparent that the only properties that can be regarded strictly as essential are those which are indispensable to mold the different persons into this artificial being, and thereby enable it to act in the way above stated. When once constituted, the powers and faculties that may be conferred are various—limited or enlarged, at the discretion of the Legislature, and will depend upon the nature and object of the institution, which is as competent as a natural person to receive and enjoy them. We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity (1) to have perpetual succession under a special name, and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued, by its corporate name as an individual;

[65] Post, p. 194; dictum of Nelson, C. J., in Thomas v. Dakin, 22 Wend. (N. Y.) 9. A scroll may be adopted and used by a corporation as its seal. W. B. Conkey Co. v. Goldman, 125 Ill. App. 161.

[66] Post, p. 572; Thomas v. Dakin, supra.

and (3) to receive and enjoy in common grants of privileges and immunities." [67]

The Distinguishing Characteristic of a Corporation

As we have seen, many of the incidents of a corporation are not essential, and many of the essential attributes may also exist in the case of a common partnership or unincorporated joint-stock association. It is important, therefore, to find some characteristic of corporations that can be relied upon as a distinguishing mark. The only feature that can be thus relied upon is the existence of the corporation as an entity separate and distinct from the members who compose it. "The most peculiar and strictly essential characteristic of a corporate body, which makes it to be such, and not some other thing, in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial individual existence." [68]

The vital essentials, in the last analysis, are sovereign authorization and existence as a juridical entity.

Unincorporated Joint-Stock Companies

A joint-stock company is an unincorporated association of individuals for business purposes, resembling an ordinary partnership in many respects, but which, unlike an ordinary partnership, has a common fund or capital stock, divided into shares, which are apportioned among the members in proportion to their respective contributions, and which are assignable by the owner without the express consent of the other members. "The words 'joint-stock company' have never been used as descriptive of a corporation created by special act of the legislature, and, authorized to issue certificates of stock to its shareholders. They describe a partnership made up of many persons acting under articles of association, for the purpose of carrying on a particular business, and having a capital stock, divided into shares transferable at the pleasure of the holder." [69] These associations are nothing but large partnerships, and except in so far as the legislature has conferred special rights and privileges upon the members, they are subject to all the liabilities of partners.[70] Both in England and in this country

[67] Thomas v. Dakin, 22 Wend. (N. Y.) 9. To the same effect, see 1 Kyd, Corp. 70; Southern Pac. R. Co. v. Orton (C. C.) 32 Fed. 457, 473.

[68] Per Verplanck, Senator, in Warner v. Beers, 23 Wend. (N. Y.) 103. See, also, Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. 585, 30 C. C. A. 293.

[69] Attorney General v. Mercantile Marine Ins. Co., 121 Mass. 524, 526.

[70] Hedge & Horn's Appeal, 63 Pa. 273, where it is said that a joint-stock company is a partnership, the capital of which is divided into shares, so as to be transferable without the express consent of all the co-partners. And

statutes have been enacted conferring upon joint-stock companies many faculties possessed by corporations, and for this reason the resemblance between corporations and joint-stock companies is very close.[71] It is often difficult to distinguish them. The distinction, however, is often important.

Joint-stock companies are formed solely by agreement between the associates, and rest upon their common-law right to contract with each other, and do not depend at all, as in the case of a corporation, upon license or authority from the state. They are merely a peculiar kind of partnership.[72]

They do not act like a common partnership, in which each partner is the agent of the others in conducting the firm business; but they generally act by a board of trustees or directors, like a corporation, the shareholders having no power to bind the other members.[73]

It is generally provided by statute that, when a cause of action accrues in favor of or against a joint-stock company, action may be brought by or against it in the name of a certain officer. In the absence of such a provision, all the members would have to be made parties as in the case of an ordinary partnership.[74]

see Hoadley v. Essex County Com'rs, 105 Mass. 519, 526; Butterfield v. Beardsley, 28 Mich. 412; Wells v. Gates, 18 Barb. (N. Y.) 554; Rickart v. People, 79 Ill. 85; People ex rel. v. Rose, 219 Ill. 46, 76 N. E. 42.

[71] Thus, in Eliot v. Freeman, 220 U. S. 178, 31 Sup. Ct. 360, 55 L. Ed. 424, Justice Day, speaking of the federal Corporation Tax Law (Act Cong. Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [U. S. Comp. St. 1913, §§ 6300–6307]), said: "It was the purpose of the act to treat corporations and joint-stock companies, similarly organized, in the same way, and assess them upon the facility in doing business which is substantially the same in both forms of organization." And see ROBERTS v. ANDERSON, 226 Fed. 7, 141 C. C. A. 121, Wormser Cas. Corporations, 38.

[72] People ex rel. Winchester v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; Hoadley v. Essex County Com'rs, 105 Mass. 519, 526.

[73] Burnes v. Pennell, 2 H. L. Cas. 520; Bray v. Farwell, 81 N. Y. 600. The reason that each member of a common partnership may thus bind the others is because, by carrying on the business jointly as a firm, the members hold out to the world that each has authority to manage the partnership concerns. It could be stipulated, however, even in an ordinary partnership agreement, that only a certain member shall have authority to bind the firm, and such a stipulation would be effectual as against all persons with notice of it. Since a joint-stock company notoriously conducts its business only through its board of trustees or directors, the members, as such, have no power to bind it. Every person has notice of this. Burnes v. Pennell, supra.

[74] Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539, 542; ROBERTS v. ANDERSON, 226 Fed. 7, 141 C. C. A. 121, Wormser Cas. Corporations, 38. Cf. F. R. Patch Mfg. Co. v. Capeless, 79 Vt. 1, 63 Atl. 938.

As a joint-stock company is a partnership, the members, however numerous, are subject to all the ordinary liabilities of partners, except in so far as their liability may be limited by agreement with the other contracting party or by statute. They must generally be sued as partners, and each member is personally liable for all the debts of the company after the joint assets are exhausted.[75] This liability, however, may be limited by statute, or even by agreement between the associates if known to the person dealing with the company, without changing the company into a corporation. And, as has been seen, members of a corporation may, by statute, be made liable for its debts.[76]

As shown above, the shares in a joint-stock company are transferable by the holder without the consent of his associates. So, on the death of the holder, they may pass like other property. These associations, therefore, have the faculty of succession.[77]

How, then, it may well be asked, are we to always distinguish such an association from a corporation? The New York court has held that the distinction is in the fact "that the creation of the corporation merges in the artificial body, and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force." [78] "A joint-stock company," it has been said, "is a partnership, with some of the powers of a corporation." [79]

[75] Taft v. Ward, 106 Mass. 518; Tappan v. Bailey, 4 Metc. (Mass.) 529; Tyrrell v. Washburn, 6 Allen (Mass.) 466; Boston & A. R. Co. v. Pearson, 128 Mass. 445; Frost v. Walker, 60 Me. 468; Wells v. Gates, 18 Barb. (N. Y.) 554; Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108; Butterfield v. Beardsley, 28 Mich. 412; Robbins v. Butler, 24 Ill. 387.

[76] Ante, p. 20.

[77] See Burnes v. Pennell, 2 H. L. Cas. 520; Tenney v. New England Protective Union, Division No. 172, 37 Vt. 64; Willis v. Chapman, 68 Vt. 459, 35 Atl. 459; Matter of Jones, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476.

[78] People ex rel. Winchester v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183. And see Warner v. Beers, 23 Wend. (N. Y.) 103.

[79] People ex rel. Winchester v. Coleman, supra. In this case it was said: The distinction between a corporation and an unincorporated joint-stock association is "that the creation of the corporation merges in the artificial body, and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. * * * The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand, corporations have been created with positive provisions retaining more or less the individual liability of the members; and, on the other, the joint-stock companies have been clothed with most of the corporate attributes; but enough of the original difference remains to show that our legislation not only carefully preserves the distinction of names,

The same court, in a recent case,[80] considered the legal status of the Adams Express Company, a large joint-stock association. Judge O'Brien treated it as a "quasi corporation" saying: "A joint-stock company, whatever else may be said about it, is certainly for most, if not all practical purposes, a legal entity capable in law of acting and assuming legal obligations quite independent of the stockholders. The idea that these companies occupy some undefined and undefinable ground midway between a partnership and a corporation has practically faded away." On the other hand, Judge Bartlett stated: "It is unnecessary to point out in detail the very great difference between the joint-stock association and a corporation." And the United States courts have steadily refused to regard joint-stock companies as citizens for purposes of federal jurisdiction, although recognizing corporations as citizens for this purpose,[81] as we shall see.

but sufficient, also, of the original difference of character and quality to disclose a clear intent not to merge the two. We may thus see upon what the legislative intent to preserve them as separate and distinct is founded, and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new, or retention of the old, liability by an affirmative enactment which avoids the inherent effect of the corporate creation. In the other the common-law liability remains unchanged and unimpaired, and needing no statutory intervention to preserve or restore it. The debt of the corporation is its debt, and not that of its members. The debt of the joint-stock company is the debt of the associates, however enforced. The creation of the corporation merges and drowns the liabilities of its corporators. The creation of the stock company leaves unharmed and unchanged the liability of the associates. The one derives its existence from the contract of individuals; the other, from the sovereignty of the state. The two are alike, but not the same. More or less they crowd upon and overlap each other, but without losing their identity; and so, while we cannot say that the joint-stock company is a corporation, we can say, as we did say, in Van Aernam v. Bleistein, 102 N. Y. 360, 7 N. E. 537, that a joint-stock company is a partnership, with some of the powers of a corporation." See Oliver v. Liverpool & L. Life & Fire Ins. Co., 100 Mass. 531; Bray v. Farwell, 81 N. Y. 600.

[80] Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108, affirming 112 App. Div. 214, 98 N. Y. Supp. 353.

[81] Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; Thomas v. Board of Trustees of Ohio State University, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160; Rountree v. Adams Exp. Co., 165 Fed. 152, 91 C. C. A. 186. In the last cited case, Amidon, J., said: "The averment that the complainant is a joint-stock company is not equivalent to the statement that it is a corporation."

CORPORATION AS A "PERSON," "CITIZEN," ETC.

9. When the reason and design of a statutory or constitutional provision, reserving or conferring a right or remedy, or imposing a duty or liability, upon "persons," "citizens," "inhabitants," etc., applies to corporations, they are within the scope of the statute or constitution, though not specially referred to. A corporation can even be deemed "a responsible and respectable person."

A corporation, though a collection of individuals, has, as we have seen, a separate and distinct individuality. Though it is an artificial being, a mere creature of the Legislature, it is in law a person—an artificial person. "A corporation is an artificial person created by law for specific purposes, the limit of whose existence, powers, and liberties is fixed by its charter." [82] It is therefore held to be a "person," within the meaning of statutes, using that term when the purpose and reason of the law include corporations as well as natural persons.[83] Thus, where a statute prohibited any "person" from engaging in the business of banking, except under certain circumstances, but did not expressly refer to corporations, it was held that they were included under the term "person." [84] The rule may be laid down that whenever a statute conferring a right or remedy, or imposing a duty or liability, upon "persons," applies in reason and design to corporations, but not otherwise, they are to be deemed included, though not specially mentioned.[85]

[82] Fish, C. J., in Venable Bros. v. Southern Granite Co., 135 Ga. 508, 69 S. E. 822, 32 L. R. A. (N. S.) 446.

[83] Ang. & A. Corp. § 6.

[84] People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

[85] People v. Utica Ins. Co., supra; Denny Hotel Co. of Seattle v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130; School Directors of Carlisle Borough v. Carlisle Bank, 8 Watts (Pa.) 289; State v. President & Directors of Bank of Maryland, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; Fisher v. Horicon Iron & Mfg. Co., 10 Wis. 351; Planters' & Merchants' Bank of Mobile v. Andrews, 8 Port. (Ala.) 404; Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 Am. Dec. 124; Grand Gulf Bank v. Archer, 8 Smedes & M. (Miss.) 151; Baltimore & O. R. Co. v. Gallahue's Adm'rs, 12 Grat. (Va.) 655, 65 Am. Dec. 254; Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich, 153 Mass. 42, 26 N. E. 239. A corporation is a person, within the meaning of the constitutional provision that no state shall deny to any "person" within its jurisdiction the equal protection of its laws. Pembina Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct.

And a going corporation was held "a responsible and respectable person" in a recent English case.[86] The same is true of statutes using the word "inhabitant" or the word "occupier." [87] On the same principle, a corporation may be regarded as a "citizen," within the meaning of a statute using that term, though it does not expressly refer to corporations. The statute is to be construed as referring to them, if they are within its reason and design, but not otherwise. Thus, a corporation is to be deemed a "citizen," within the meaning of the acts of Congress defining the jurisdiction of the federal courts.[88] But it is not a "citizen," within the meaning of the provision of the federal constitution that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." [89] A corporation, it is held, is entitled to immunity under the Fourth Amendment which declares "the right of the people to be secure in their persons" against searches and seizures.[90]

KINDS OF CORPORATIONS

10. Corporations may be classified as follows:

(a) According to their membership, they are sole or aggregate.

(1) Corporations sole are composed of only one member at a time.

(2) Corporations aggregate are composed of more than one member.

(b) According to their object, they are ecclesiastical, eleemosynary, or civil.

(1) Ecclesiastical corporations, in England, are such as are created to carry out some religious object, and consist of spiritual members.

(2) Eleemosynary corporations are such as are created to carry out some charitable object.

(3) Civil corporations comprise all corporations other than those defined above.

255, 35 L. Ed. 1051; Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; post, p. 762.

[86] Willmott v. London Road Car Co., [1910] L. R. 2 Ch. D. 525.

[87] 2 Inst. 703; Rex v. Gardner, 1 Cowp. 79; Gormully & Jeffrey Mfg. Co. v. Pope Mfg. Co. (C. C.) 34 Fed. 818.

[88] Post, p. 82.

[89] Post, p. 762.

[90] Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652. A corporation is not a person under the Fifth Amendment, however. In re Bonn Hat Co. (C. C.) 184 Fed. 506.

(c) Civil corporations are divided into public and private corporations. There are also quasi public corporations.

(1) Public corporations are such as are created for the purpose of government and the management of public affairs, like cities and villages, etc., and banks, hospitals, etc., founded by the state, and managed by it for governmental purposes.

(2) Private corporations are such as are created for private purposes, as manufacturing, banking, and trading corporations. Religious and eleemosynary corporations are also included.

(3) Quasi public corporations, like railroad and canal companies, are such as are engaged in a private business affected with a public interest. They usually possess the right of eminent domain.

(d) Civil corporations are again divided into stock and nonstock corporations.

(1) In stock corporations, membership, with its attendant rights, privileges, and liabilities, is determined solely by the ownership of stock.

(2) In nonstock corporations, membership depends upon the consent and agreement of the associates.

11. Quasi corporations are bodies having some, but not all, of the powers and faculties of a corporation.

Sole and Aggregate Corporations

A corporation sole consists of a single member only at one time. When he dies, or for any other reason ceases to be a member, there is some other person who takes his place, so that the corporation, though it may consist of only one natural person, has perpetual or continuous succession.[91] The sovereign of England has always been regarded as a corporation sole, because of the office, which is clothed with perpetuity. A bishop, dean, parson, and vicar are also given in the English books as instances of corporations sole, and they and their successors take the corporate property and privileges in succession.[92] In this country the governor of a state has been held a quasi sole corporation.[93] There are also instances in the books of ministers of a parish, seised of parsonage lands in

[91] As to the distinction between corporations sole and aggregate, see Co. Litt. 250a; Overseers of Poor of City of Boston v. Sears, 22 Pick. (Mass.) 122.

[92] 1 Bl. Comm. 469; 2 Kent. Comm. 273.

[93] Governor v. Allen, 8 Humph. (Tenn.) 176. And see State of Indiana v. Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378.

the right of the parish, being held to be corporations sole.[94] For certain purposes, also, public officers have at times been expressly or impliedly created corporations sole by statute.[95] Unless authorized by statute, a corporation sole cannot take personal property in succession, but their capacity in this respect is limited to real property.[96]

In this country corporations sole are very rare. Almost all of our corporations are aggregate; that is, they consist of more than one member at a time.[97] Private civil corporations are all aggregate. The Legislature would, doubtless, have the power to create a sole corporation for private business purposes; but it is perhaps safe to say that it will never do so. It may happen in a stock corporation that, by the purchase of all the stock, the membership may be reduced to one person, making it a so-called "one-man company"; but this would not make it a corporation sole. The several shares would be treated as distinct, and liable to be again distributed by the sole owner.[98]

Religious, Eleemosynary, and Civil Corporations

In English law, corporations are divided into ecclesiastical and lay. The former were those of which the members were spiritual persons, and the object of the institution was also spiritual.[99] In this country we have no strictly ecclesiastical corporations in the sense of the English law. But we have religious corporations. These are private civil corporations created for the purpose of holding property in succession for advancing the particular tenets and articles of faith which the corporation was organized to uphold and advance. They are mere trustees of the property, and cannot divert it to other purposes.[1]

[94] Weston v. Hunt, 2 Mass. 500; Inhabitants of First Parish in Brunswick v. Dunning, 7 Mass. 445; Terrett v. Taylor, 9 Cranch (U. S.) 43, 46, 3 L. Ed. 650. Such a corporation exists at this day by statute in Kentucky, and perhaps in other states. See McCloskey v. Doherty, 97 Ky. 300, 30 S. W. 649.

[95] Thus, when a statute directs bonds for the public benefit to be made payable to a public officer, the officer is the real obligee, and the successor in office, whether described eo nomine in the statute or bond or not, may maintain an action on the bond, since the officer is quoad hoc a corporation sole. See Polk v. Plummer, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; Jansen v. Ostrander, 1 Cow. (N. Y.) 670.

[96] 2 Kent, Comm. 273, 274.

[97] Overseers of Poor of City of Boston v. Sears, 22 Pick. (Mass.) 122.

[98] Post, p. 294.

[99] 2 Kent, Comm. 274.

[1] Van Houten v. McKelway, 17 N. J. Eq. 126; Watson v. Jones, 13 Wall. (U. S.) 679, 20 L. Ed. 666; Robertson v. Bullions, 11 N. Y. 243. See Silsby v. Barlow, 16 Gray (Mass.) 329. Where there is a division in a church,

Lay corporations are divided into eleemosynary and civil corporations. Eleemosynary, or charitable, corporations are like religious corporations, except that the property is held in trust for certain designated charities. Their object is to provide for the perpetual distribution, or continuous distribution for a certain period, of the bounty of their founders to such objects as they direct. Hospitals, asylums, colleges, and universities are examples of eleemosynary corporations.[2]

All other corporations than ecclesiastical and eleemosynary are called "civil." Indeed, with us, religious corporations are civil.

The purpose for which a corporation is organized is primarily to be sought in its charter or articles of incorporation.[3]

Public and Private Corporations

By far the most important division of corporations is into public and private. It is of the latter class only that we are to treat. As between these two classes of corporations, there is a real divergence, both in the modes of operation, and in the principles of law which govern their acts, and their rights and obligations. Public corporations are such as are created for the purposes of government and the management of public affairs.[4] Private corporations are those founded for the management of affairs in which the members are interested as private persons. Counties, cities, towns, and villages are examples of public corporations. These are also called municipal corporations.

A bank, a hospital, or other institution may be a public, as distinguished from a private, corporation, and therefore within the

and part—even a majority—of the members secede, that portion of the church which remains in full connection with the body under which they were organized as a congregation continues the corporate existence, and is entitled to all the property and privileges of the corporation. Baker v. Fales, 16 Mass. 488; Gable v. Miller, 10 Paige (N. Y.) 627.

[2] TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, Wormser Cas. Corporations, 189; American Asylum for Education and Instruction of Deaf and Dumb v. President, Directors, etc., of Phœnix Bank, 4 Conn. 172, 10 Am. Dec. 112; Trustees of Phillips Academy v. King, 12 Mass. 546; Board of Education of State of Illinois v. Greenbaum, 39 Ill. 609; Board of Education v. Bakewell, 122 Ill. 339, 10 N. E. 378; Bakewell v. Board of Education (Ill.) 33 N. E. 186.

[3] Colgate v. U. S. Leather Co., 75 N. J. Eq. 229, 72 Atl. 126, 19 Ann. Cas. 1262.

[4] A "public corporation" is one created for political purposes, with political powers, to be exercised for purposes connected with the public good, in the administration of civil government, and is an instrument of the government, subject to control of the Legislature (quoting Words and Phrases, vol. 6, p. 5781). Phillips v. City of Baltimore, 110 Md. 431, 72 Atl. 902, 25 L. R. A. (N. S.) 711.

absolute control of the Legislature. If a corporation is founded for a public purpose, and the entire interest therein belongs to the government, it is a public corporation; but not if there are any private owners of stock or shares therein. A bank created by the government for its own purposes, and whose stock or shares are owned exclusively by the government, would be a public corporation; but a bank whose stock is owned partly by private persons is a private corporation, although it is erected by the government, and its object and operations partake of a public nature.[5] So, also, a hospital, asylum, college, university, or other charitable institution, created and endowed by the government alone for general charity, is a public corporation; but a hospital or asylum or institution of learning which is founded and endowed in whole or in part by private persons, though partly endowed by the government, is a private eleemosynary corporation, however general the charity may be.[6] Insurance, canal, railroad, steamship, bridge, and turnpike companies, the shares in which are owned in whole or in part by private individuals, are private corporations, though their uses are public in their nature.[7] These are sometimes called

[5] 2 Kent, Comm. 276; Per Story, J., in TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD, 4 Wheat. (U. S.) 518, 669, 4 L. Ed. 629, Wormser Cas. Corporations, 189; Bank of U. S. v. Planters' Bank, 9 Wheat. (U. S.) 907, 6 L. Ed. 244; Miners' Bank of Dubuque v. U. S., 1 G. Greene (Iowa) 553, 561; Huntington, C. & Q. Turnpike Road Co. v. Wallace, 8 Watts (Pa.) 316; Attorney General v. Simonton, 78 N. C. 57; President and Directors of State Bank v. Brown, 1 Scam. (Ill.) 106. Compare Bank of South Carolina v. Gibbs, 3 McCord (S. C.) 377; Bank of Alabama v. Gibson's Adm'rs, 6 Ala. 814. See 1 Thomp. Corp. § 24. A bank is not a public corporation because the state holds stock in it, if any stock is held by private individuals. "When a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." Bank of U. S. v. Planters' Bank, supra.

[6] TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD, 4 Wheat. (U. S.) 518, 630, 667, 4 L. Ed. 629, Wormser Cas. Corporations, 189; Regents of University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; State ex rel. Clark v. Maryland Institute for Promotion of Mechanic Arts, 87 Md. 643, 41 Atl. 126; Board of Education of State of Illinois v. Greenbaum, 39 Ill. 609; Board of Education v. Bakewell, 122 Ill. 339, 10 N. E. 378; Head v. Curators of University of Missouri, 47 Mo. 220; Society for the Propagation of the Gospel v. Town of New Haven, 8 Wheat. (U. S.) 464, 5 L. Ed. 662; Board of Trustees for Vincennes University v. Indiana, 14 How. 268, 14 L. Ed. 416; Downing v. Indiana State Board of Agriculture, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664; Lane v. Minnesota State Agricultural Soc., 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708. See 1 Thomp. Corp. §§ 25, 26. The Indiana Historical Society was recently held a private corporation. Bullock v. Billheimer, 175 Ind. 428, 94 N. E. 763.

[7] Tinsman v. Belvidere Delaware R. Co., 26 N. J. Law, 148, 69 Am. Dec. 565;

quasi public corporations. The reason is because the nature of their business constitutes them quasi public servants, and as such they are bound to serve the public on reasonable terms and with impartiality. The trustees or commissioners of public schools and universities are ordinarily regarded as public corporations or quasi corporations.[8]

A corporation may be a public or quasi public body in respect to some of its functions and powers, and a private corporation in respect to others. Thus it has been held that a municipal corporation, to which the Legislature has given the power to erect waterworks, for the private advantage and emolument of the municipality, is to be regarded quoad hoc a private corporation, and responsible, as such, for injuries inflicted in the management of the work.[9]

McCarter v. Firemen's Ins. Co., 74 N. J. Eq. 372, 73 Atl. 80, 29 L. R. A. (N. S.) 1194, 134 Am. St. Rep. 708, 18 Ann. Cas. 1048; Rundle v. Delaware & R. Canal, 1 Wall. Jr. 275, Fed. Cas. No. 12,139; Bonaparte v. Camden & A. R. Co., Baldw. 205, Fed. Cas. No. 1,617; Ten Eyck v. Delaware & R. Canal Co., 18 N. J. Law, 200, 37 Am. Dec. 233; Board of Directors for Leveling Wabash River v. Houston, 71 Ill. 318. A heating company has been held a public service corporation. State ex rel. v. Marion Light & Heating Co., 174 Ind. 622, 92 N. E. 731. See 1 Thomp. Corp. § 27. Contra, where a turnpike corporation consists solely of officers of the state, and is organized solely for the public benefit. Sayre v. Northwestern Turnpike Road, 10 Leigh (Va.) 454. A public service or quasi public corporation is one private in its ownership, but which has an appropriate franchise from the state to provide for a necessity or convenience of the general public, incapable of being furnished by private competitive business, and dependent for its exercise on eminent domain or governmental agency. Attorney General v. Haverhill Gaslight Co., 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266. A jockey club which conducts races is not a quasi public corporation. Corrigan v. Coney Island Jockey Club, 2 Misc. Rep. 512, 22 N. Y. Supp. 394.

[8] Trustees of Schools v. Tatman, 13 Ill. 27; Bradley v. Case, 3 Scam. (Ill.) 585; Mobile School Com'rs v. Putnam, 44 Ala. 506; Head v. Curators of University of Missouri, 47 Mo. 220; Trustees of University of Alabama v. Winston, 5 Stew. & P. (Ala.) 17.

[9] Bailey v. Mayor, etc., of City of New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669. In this case it was said that, if powers are granted to a municipal corporation for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character; "but if the grant is for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, quoad hoc, is to be regarded as a private company." See, also, De Voss v. City of Richmond, 18 Grat. (Va.) 338, 98 Am. Dec. 646; McCauley v. Mayor, etc., of City of New York, 67 N. Y. 602; Oliver v. City of Worcester, 102 Mass. 489, 499, 3 Am. Rep. 485; City of Memphis v. Kimbrough, 12 Heisk. (Tenn.) 133; People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; County of Richland v. County of Lawrence, 12 Ill. 8. Compare Mead v. City of New Haven, 40 Conn. 72, 16 Am. Rep. 14; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302. In De Voss v. City of Richmond, supra, it was held that a municipal corporation,

Stock and Nonstock Corporations

Private corporations are also divided into stock and nonstock corporations. In the former the membership, after incorporation, with its attendant rights, privileges, and liabilities, is determined by the ownership of stock. Any stockholder may transfer his stock, and the transferee will become a member, without regard to the consent of the other stockholders. This is the most common kind of private business corporation. In nonstock corporations there are no shares of stock to be transferred. Membership depends upon the consent of the associates. Incorporated mutual benefit associations are examples of this kind of private corporation.

Quasi Corporations

A quasi corporation is a body which has some, but not all, of the powers of a corporation. Towns, counties, and school districts, etc., are not strictly public corporations, but they have some of the powers of a corporation, as the faculty of succession, the power to sue and be sued as a body, etc. For this reason they are often called quasi corporations.[10] Other quasi corporations are overseers of the poor, county commissioners, and other public boards or officers.[11] The expression is not a particularly felicitous one, and it is sometimes loosely used.[12]

in exercising the power to borrow money and to issue bonds therefor, is not acting in its public capacity, but merely as a private corporation, and that it is therefore responsible as such for the act or default of its agent. And in Oliver v. City of Worcester, supra, a municipal corporation was held liable for injuries to a person from falling into an excavation on the grounds of a building which was only partly used for public purposes, the other part being rented to private individuals. Contra, where the building is used wholly for public purposes. Eastman v. Meredith, supra. And see Hill v. City of Boston, 122 Mass. 351, 23 Am. Rep. 332; Stilling v. Town of Thorp, 54 Wis. 532, 11 N. W. 906, 41 Am. Rep. 60; City of Chicago v. Turner, 80 Ill. 423; Symonds v. Board of Sup'rs of Clay County, 71 Ill. 357; Moulton v. Inhabitants of Scarborough, 71 Me. 269, 36 Am. Rep. 308.

[10] Ang. & A. Corp. §§ 23, 24; Riddle v. Proprietors of Merrimack River Locks and Canals, 7 Mass. 187, 5 Am. Dec. 35; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; Inhabitants of Fourth School Dist. v. Wood, 13 Mass. 199; Board of Com'rs of Hamilton Co. v. Mighels, 7 Ohio St. 109; Andrews v. Estes, 11 Me. 267, 26 Am. Dec. 521; McLoud v. Selby, 10 Conn. 390, 27 Am. Dec. 689; Gaskill v. Dudley, 6 Metc. (Mass.) 546, 39 Am. Dec. 750; Boone, Corp. § 10; note in 13 Am. Dec. 523.

[11] Polk v. Plummer, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; Overseers of the Poor of City of Boston v. Sears, 22 Pick. (Mass.) 122; Governor v. Allen, 8 Humph. (Tenn.) 176; Levy Court v. Coroner, 2 Wall. (U. S.) 501, 17 L. Ed. 851; Todd v. Birdsall, 1 Cow. (N. Y.) 260, 13 Am. Dec. 522; Vankirk v. Clark, 16 Serg. & R. (Pa.) 286.

[12] Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108 (see opinion of O'Brien, J.).

CHAPTER II

CREATION AND CITIZENSHIP OF CORPORATIONS

12. Creation—In General.
13–18. Power to Create.
14. State Legislatures.
15. Congress.
16. Territorial Legislatures.
17. Prescription.
18. Delegation of Power.
19–20. General and Special Laws.
21. Intention to Create.
22. Ratification of Claim to Corporate Existence.
23–24. Agreement between Corporation and State—Acceptance of Charter.
25. Place of Organization.
26. Compliance with Conditions Precedent.
27. Agreement between Corporators and Corporation.
28–29. Who may Become Corporators.
30. Purpose of Incorporation.
32–35. Corporate Name.
36–38. Residence and Citizenship of Corporations.
39. Extension of Charter—Creation of New Corporation.
40. Proof of Corporate Existence.

CREATION—IN GENERAL

12. To the creation or formation of a corporation, the following things are essential:
   (a) A grant of authority, or charter, from the state, this being the corporate franchise.
   (b) Acceptance of the grant, or an agreement between the state and the corporators.
   (c) An agreement between the corporators and the corporation.

POWER TO CREATE CORPORATIONS

13. It is essential to the existence of a corporation that it shall have been created or authorized by the state. Mere agreement between the members, as in the case of a partnership, is not enough. In this country such bodies can be created only by or under legislative enactment.

14. STATE LEGISLATURES—The State Legislatures have absolute and unlimited power to create corporations, except

in so far as they may be controlled by restrictions in the state or federal Constitution.

15. CONGRESS—Congress, acting as the Legislature of the United States, has the power to create a corporation, if its existence is an appropriate means of carrying into effect any of the powers conferred upon the United States government by the federal Constitution. As the local Legislature of the District of Columbia, it has the same power in the District as the state Legislatures have in the states, subject only to the restrictions of the federal Constitution.

16. TERRITORIAL LEGISLATURES—Territorial Legislatures, vested with general legislative powers, have the power to create corporations, which will not be affected by the admission of the territory into the Union, and the adoption of a state Constitution.

17. PRESCRIPTION—Long-continued use of corporate powers, and acquiescence on the part of the public, may raise a presumption of legislative authority in the case of public, and it seems, even in the case of private, corporations. These are corporations by prescription.

18. DELEGATION OF POWER—The Legislature cannot delegate its power to create corporations, but, in providing for the formation of a corporation, it may allow ministerial acts to be performed by courts or officers.

Individuals, under their right to make contracts and acquire property, have an absolute right to form partnerships, including joint-stock companies, for the purpose of carrying on any lawful business, and no authority from the state is necessary. But they have no such right to form a corporation, and conduct their business in that privileged mode, by a mere agreement between themselves. A corporation can be created only by the state—with us, by or under legislative authority.[1] The Legislature confers upon the individuals a corporate franchise, which, it has been well said, "is the right to exist as an entity for the purpose of doing things permitted by law." [2] Special authority seems not to have been nec-

[1] Stowe v. Flagg, 72 Ill. 397; People ex rel. v. Mackey, 255 Ill. 144, 99 N. E. 370; Medical Inst. of Geneva College v. Patterson, 1 Denio (N. Y.) 61; Myers v. Manhattan Bank, 20 Ohio, 283; McKim v. Odom, 3 Bland. (Md.) 407, 416; Ang. & A. Corp. § 66 et seq.

[2] State ex rel. Wear v. Business Men's Ass'n, 178 Mo. App. 548, 163 S. W. 901. The term "franchise" when applied to corporations has two well-

essary at one time under the Roman law, but later it was required even under that law;[3] and authority from the sovereign or state has always been necessary at common law. Lord Coke, in enumerating the things essential to a corporation, states the first to be "Lawful authority of incorporation," and he says that this may be "by four means—sc., by the common law, by the king himself, by authority of parliament, by the king's charter, and by prescription."[4] In England, the king, bishops, parsons, etc., were corporations by the common law. In this country there are no common-law corporations. All corporations, both public and private, are the creatures of the Legislature. There are a few corporations in this country which were chartered by the English crown or by Parliament before the Revolution, under the colony administration, and whose charters are still recognized.[5]

Corporations by Prescription

In England, both public and private corporations may exist by prescription; that is, they may have existed for so long a time that the king's consent will be presumed. Blackstone, after mentioning the king, bishops, and other common-law corporations sole, says: "Another method of implication, whereby the king's consent is presumed, is as to all corporations by prescription, such as the city of London, and many others, which have existed as corporations, time whereof the memory of man runneth not to the contrary, and therefore are looked upon in law to be well created; for though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one, and that, by the variety of accidents which a length of time may produce, the charter is lost or destroyed."[6] The same doctrine has frequently been applied in this country in the case of public corporations.[7] There seems to be no good reason

defined meanings, one pertaining to what is sometimes called the "primary franchise," or the right to exist as a corporation, and the other to the various privileges and powers, sometimes called "secondary franchises," which are obtained by the particular corporation, such as the right to occupy and use public places for the operation of a system of water or gas works, a railroad, etc. Cooper v. Utah Light & R. Co., 35 Utah, 570, 102 Pac. 202, 136 Am. St. Rep. 1075; Blackrock Copper Min. & Mill. Co. v. Tingey, 34 Utah, 369, 98 Pac. 180, 28 L. R. A. (N. S.) 255, 131 Am. St. Rep. 850; Cf. People v. Consolidated Gas Co., 130 App. Div. 626, 115 N. Y. Supp. 393.

[3] Tayl. Corp. § 4; 1 Wat. Corp. § 22.

[4] Sutton's Hospital Case, 10 Coke, 29b.

[5] TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, Wormser Cas. Corporations, 189.

[6] 1 Bl. Comm. 473.

[7] "Municipal corporations," said the Illinois court, "are created for the

for recognizing any distinction in this respect between public and private corporations for both are the creatures of the Legislature; and the doctrine has been applied to private corporations also,[8] but infrequently. To give rise to this presumption, the acts done must bear the impress of corporate acts; that is, they must be such as corporations are competent, and individuals incompetent, to perform.[9]

Power of the State Legislatures

The power of the state Legislatures to create corporations, and confer powers and privileges upon them, within the state, is absolute, except in so far as it may be restricted by the state or federal Constitution.[10] Municipal authorities are without power to create corporations, which may be done by the state alone.[11] In the absence of constitutional limitations, there is nothing to prevent the Legislature from creating a corporation, and conferring exclusive privileges upon it, in consideration of public services, though it may thus create a monopoly.[12]

public good—are demanded by the wants of the community; and the law, after long-continued use of corporate powers, and the public acquiescence, will indulge in presumptions in favor of their legal existence." Jameson v. People ex rel. Nettleton, 16 Ill. 257, 63 Am. Dec. 304. And see People v. Maynard, 15 Mich. 463, 470; Bow v. Allenstown, 34 N. H. 351, 69 Am. Dec. 489; Dillingham v. Snow, 5 Mass. 547.

[8] 2 Kent, Comm. 276, 277; Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58.

[9] Greene v. Dennis, supra.

[10] People ex rel. Stickney v. Marshall, 6 Ill. (1 Gilman) 672; Boca Mill Co. v. Curry, 154 Cal. 326, 97 Pac. 1117; Bell v. Bank of Nashville, Peck (Tenn.) 269. See Myers v. Manhattan Bank, 20 Ohio, 283.

[11] Shreveport Traction Co. v. Kansas City, S. & G. R. Co., 119 La. 759, 44 South. 457.

[12] Thomp. Corp. §§ 647–650. See State v. Milwaukee Gaslight Co., 29 Wis. 454, 9 Am. Rep. 598; Louisville Gas Co. v. Citizens' Gaslight Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516. Contra, Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 20. Thus, the Legislature may, in the absence of constitutional restrictions, grant a corporation the exclusive privilege of maintaining a railroad in the street. In re Philadelphia & T. R. Co., 6 Whart. (Pa.) 25, 36 Am. Dec. 202. And it may grant a corporation the exclusive privilege of manufacturing and selling illuminating gas in a city, and of constructing works and laying pipes for such purpose. State v. Milwaukee Gaslight Co., supra; Louisville Gas Co. v. Citizens' Gaslight Co., supra; New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co., supra. Contra, Norwich Gaslight Co. v. Norwich City Gas Co., supra. And it may grant the exclusive privilege of supplying a city with water, and of constructing works and laying pipes for that purpose. New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273, 2 L. Ed. 525. In most states, perhaps, there are constitutional provisions prohibiting the Legislature from granting exclusive privileges to

In all of the state Constitutions some limitations on the power of the Legislature to create corporations, and grant privileges to them, will be found. In some states, for instance, it is declared that no act of incorporation shall be passed unless with the assent of two-thirds of each house.[13] And in most states, as we shall presently see at some length, the Legislature is prohibited from creating corporations, with some exceptions, by special act, but must provide for their formation, if at all, by general laws.[14] In most states there is a constitutional provision that no bill passed by the Legislature shall contain more than one subject, and that this subject shall be clearly expressed in its title. This applies, of course, to acts in relation to corporations.[15] The only restrictions upon the

any man or set of men, except in consideration of public services. Such a provision would not prevent the granting of exclusive privileges, like those referred to above, to water and gas companies, for the services in such cases are public. The Legislature, however, could not grant exclusive privileges in matters not of such character. It could not, for instance, allow a corporation to charge a greater rate of interest than is allowed by the general law. Gordon v. Winchester Building & Accumulating Fund Ass'n, 12 Bush. (Ky.) 110, 23 Am. Rep. 713.

[13] See, as to this provision, 1 Thomp. Corp. §§ 632–636. Some of the courts have held that this provision is aimed at special acts only, and that it does not prohibit the passing of general incorporation laws by a mere majority vote. Gifford v. Livingston, 2 Denio (N. Y.) 380; Palmer v. Lawrence, 5 N. Y. 389. Others have held that it covers all laws for the creation of corporations, general as well as special. FALCONER v. CAMPBELL, 2 McLean, 195, Fed. Cas. No. 4,620, Wormser Cas. Corporations, 46; Green v. Graves, 1 Doug. (Mich.) 361. It has been held that this provision does not prevent the Legislature from creating more than one corporation by the same act, provided the act is passed by the necessary two-thirds majority; and that, therefore, it does not prevent the Legislature from passing general laws for the formation of corporations. FALCONER v. CAMPBELL, supra; Thomas v. Dakin, 22 Wend. (N. Y.) 9.

[14] Post, p. 43.

[15] As to this provision, see 1 Thomp. Corp. §§ 607–627. See, also, State of Illinois v. Illinois Cent. R. Co. (C. C.) 33 Fed. 730, 765; People ex rel. Drake v. Mahaney, 13 Mich. 481; Astor v. New York Arcade Ry. Co., 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789. Under Const. N. Y. art. 3, § 16, the restriction is made to apply only to private or local bills. The provision must receive "a fair and reasonable construction—one which will repress the evil designed to be guarded against, but which at the same time will not render it oppressive or impracticable." Belleville & I. R. Co. v. Gregory, 15 Ill. 20, 58 Am. Dec. 589. This provision does not prohibit an act of incorporation from granting various powers; nor does it require all the powers granted to be enumerated in the title. 1 Thomp. Corp. § 613. See Lockhart v. City of Troy, 48 Ala. 579; Montgomery Mut. Building & Loan Ass'n v. Robinson, 69 Ala. 413. While the subject must be expressed in the title, "the adjuncts to that subject, or the modus operandi, need not be." City of Ottawa v. People ex rel. Caton, 48 Ill. 233. The Constitution "does not require that the subject of the bill must be specifically and exactly expressed

power of the several states, in the creation of corporations, that are to be found in the federal Constitution, relate to the purposes for which corporations may be formed. No state can create a cor-

in the title; hence we conclude that any expression in the title which calls attention to the subject of a bill, although in general terms, is all that is required." Johnson v. People, 83 Ill. 431. And see Jones v. Aspen Hardware Co., 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220. In Mississippi & R. R. Boom Co. v. Prince, 34 Minn. 79, 24 N. W. 361, an act entitled "An act relating to the Mississippi Boom Corporation" (Sp. Laws 1879, c. 316) which, in addition to provisions relating to the powers and duties of that corporation, embraced a separate section imposing additional duties upon another corporation, was held void as to such section because the subject-matter thereof was not embraced in the title. And in Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102, an act (Pub. Acts 1881, No. 274) amending an act for the incorporation of manufacturing companies, so as to include corporations for mercantile business, the title of the amended act (Pub. Acts 1875, No. 187) being "An act for the incorporation of manufacturing companies" and being unchanged, was held void. This clause of the Constitution is "construed liberally in favor of the validity of enactments; and the fact that many things of a diverse nature are authorized or required to be done is unimportant, provided that doing of them may fairly be regarded as in furtherance of the general subject of the enactment." Blake v. People, to Use of Caldwell, 109 Ill. 504.

The following acts have been sustained as embracing only one subject, which was embraced in its title: "An act to incorporate the Firemen's Benevolent Association, and for other purposes" (Laws 1852, p. 65), which contain a provision requiring the agents of all foreign insurance companies doing business in Chicago to pay to the association a certain per cent. of all premiums received by them. Firemen's Benevolent Ass'n v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115. "An act to amend an act entitled 'An act to incorporate the Northwestern University'" (Laws 1855, p. 483), which contained a prohibition against the sale of intoxicating liquors within a certain distance of the university. O'Leary v. Cook County, 28 Ill. 534. An act providing for the incorporation of mutual fire insurance companies, and repealing certain existing acts, which, in the absence of such express repeal, would be repealed by implication. Tolford v. Church, 66 Mich. 431, 33 N. W. 913. "An act to authorize the organization and incorporation of annuity, safe-deposit and trust companies" (Laws 1883, c. 107), granting to such corporations power to act as guardian, etc. The latter section of the act, said the court, "is but an enumeration of the powers granted to such corporations, and it was never before heard that, in a general law for the organization of a particular class of corporations, the powers granted to them should be detailed in the title of the act." Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418. In Wardle v. Townsend, 75 Mich. 385, 42 N. W. 950, 4 L. R. A. 511, it was held that the title, "An act to provide for the incorporation of mutual fire insurance companies, and defining their powers and duties" (Pub. Acts 1873, No. 82), was sufficient to embrace provisions for winding up such companies when insolvent, for their examination by the insurance commissioner, the appointment of a receiver, and the assessment of policy holders to pay liabilities.

The following acts have been held void as embracing more than one subject: An act incorporating, or reviving the charters of, several distinct cor-

poration for a purpose that is expressly or impliedly prohibited by that instrument.[16]

Power of Congress and of Territorial Legislatures

The Congress of the United States derives all its powers from the federal Constitution, but it is not limited to the powers expressly conferred upon it by that instrument. There is a general clause giving it the power to pass all necessary and proper laws for carrying its powers into execution.[17] Indeed, it has such power independently of this clause, for a grant of power necessarily implies the grant of all usual and proper means for its execution. Thus, though the power is nowhere expressly conferred, Congress, acting as the legislative body of the federal government, can create a corporation, when its existence is necessary or proper to enable the federal government to execute the powers expressly or impliedly conferred upon it by the Constitution. It can thus create a corporation as a means, but not as an end.[18] If the creation of a

porations. Ex parte Conner, 51 Ga. 571. Contra, People v. Ottawa Hydraulic Co., 115 Ill. 281, 3 N. E. 413. "An act to provide for the incorporation of merchants' mutual insurance companies and to regulate the business of insurance by merchants' and manufacturers' mutual insurance companies" (Pub. Acts 1883, No. 175). Skinner v. Wilhelm, 63 Mich. 568, 30 N. W. 311. "An act to incorporate the Blooming Grove Park Association" (Act March 23, 1871 [P. L. 441]) is unconstitutional, as not expressing the subject in the title; the term "park" not being applicable to private inclosures, nor to a game and fish preserve. Com. v. Hazen, 207 Pa. 52, 56 Atl. 263. By the weight of authority, an act incorporating a railroad company may also provide for municipal aid. 1 Thomp. Corp. § 614; Phillips v. Covington & C. Bridge Co., 2 Metc. (Ky.) 219; Phillips v. Town of Albany, 28 Wis. 340; Mahomet v. Quackenbush, 117 U. S. 508, 6 Sup. Ct. 858, 29 L. Ed. 982. Contra, People ex rel. Standerfer v. Hamill, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280 (but see Board of Sup'rs of Schuyler County v. People ex rel. Rock Island & A. R. Co., 25 Ill. 182); Peck v. City of San Antonio, 51 Tex. 490.

[16] 1 Mor. Priv. Corp. § 14.

[17] Const. U. S. art. 1, § 8.

[18] McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. Ed. 579. See as to national corporations, 1 Thomp. Corp. §§ 665–683. Under this implied grant of power, congress has created a United States banking corporation. McCulloch v. Maryland, supra; Osborn v. Bank of U. S., 9 Wheat. (U. S.) 738, 6 L. Ed. 204. And see State ex rel. Wilcox v. Curtis, 35 Conn. 374, 95 Am. Dec. 263. So, under the power to regulate commerce, it has created corporations with power to construct railways and highways across the various states and territories. Union Pac. R. Co. v. Lincoln County, 1 Dill. 314, Fed. Cas. No. 14,378; Thomson v. Union Pacific R. Co., 9 Wall. 579, 19 L. Ed. 792; California v. Central Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; Indiana v. U. S., 148 U. S. 148, 13 Sup. Ct. 564, 37 L. Ed. 401. Under the same power, Congress may incorporate a company to construct and maintain a bridge over navigable waters between states. LUXTON v. NORTH RIVER BRIDGE CO., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808,

corporation is an appropriate means to carry into effect any of the powers conferred upon the federal government by the Constitution, the degree of its necessity is a question within the discretion of Congress, and not a question of judicial cognizance.[19]

Congress also has the power to create corporations in the District of Columbia, and it has the same power in this respect as the state Legislature has in a state, subject only to the restrictions of the federal Constitution.[20] In the exercise of this power, however, it acts, not as the Legislature of the United States, but as the local Legislature of the District.[21]

It has been held that territorial Legislatures have the power to create corporations under the general legislative powers conferred upon them by Congress in the organic act; and a corporation created by a territorial Legislature is not affected by the admission of the territory into the Union, and the adoption of a state Constitution, but after the change is considered a corporation of the state.[22] Territorial Legislatures are now expressly authorized to provide for the formation of corporations by general laws, but prohibited from granting private charters or special privileges.[23]

A corporation created by the government of the United States is a creature of federal sovereignty alone, and is controllable by, and amenable to, the federal government only.[24]

Delegation of Power by the Legislature

It was formerly asserted in England that the act of incorporation must be the immediate act of the king himself, and that he could not grant a license to another to create a corporation.[25] But the law has since been settled to the contrary, and it is now held that the king may not only grant a license to a subject to create a par-

Wormser Cas. Corporations, 52. In all of these instances, the creation by Congress of the corporation is merely the means adopted in order to achieve the end in view, as to which end Congress has been vested with express power under the federal Constitution's various clauses.

[19] McCulloch v. Maryland, supra.

[20] 1 Thomp. Corp. § 682; Hadley v. Freedman's Savings & Trust Co., 2 Tenn. Ch. 122.

[21] Id.

[22] Vincennes University v. Indiana, 14 How. (U. S.) 268, 273, 14 L. Ed. 416; Kansas Pac. Ry. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794; 1 Thomp. Corp. § 681.

[23] Rev. St. U. S. § 1889 (U. S. Comp. St. 1913, § 3478). A territorial act authorizing the organization of corporations for certain purposes cannot be held invalid or in excess of the powers conferred in territories by Congress, when ratified and confirmed by act of Congress. Colorado Springs Co. v. American Pub. Co., 97 Fed. 843, 38 C. C. A. 433.

[24] State ex rel. Wilcox v. Curtis, 35 Conn. 374, 95 Am. Dec. 283.

[25] Case of Sutton's Hospital, 10 Coke, 27.

ticular corporation, but may give a general power by charter to erect corporations indefinitely on the principle, "Qui facit per alium facit per se;" the person to whom the power is delegated being regarded merely as an instrument in the hands of the government.[26] In this country our federal and state Constitutions vest the law-making power exclusively in the federal Congress and the state Legislatures, and the English rule does not obtain. With us, corporations are created by the Legislatures, and not otherwise. To establish a corporate body is to enact a law, and no power but the Legislature can do this. The maxim, "Delegata potestas non potest delegari," applies.[27]

This principle does not prevent the Legislature from delegating the performance of purely ministerial acts in the formation of corporations. Thus, it may enact a general law authorizing persons to form themselves into a corporation by complying with certain formalities, as by filing in a certain court of record, or with the secretary of state or some other officer, a petition setting forth the objects of the proposed corporation, and other facts, and providing for the making of an order by the court directing the petition to be entered of record, or the issuance of a certificate by the secretary or other officer, showing that the statute has been complied with, and declaring that the persons thus seeking to incorporate shall thereupon become a corporation. A corporation thus formed is really created by the Legislature, and not in any sense by the court or officer upon whom the ministerial duties are imposed. No discretionary power is conferred upon them. They are merely required to perform ministerial acts, and a writ of mandamus would lie to compel them to do so.[28] But these acts, though ministerial

[26] Franklin Bridge Co. v. Wood, 14 Ga. 80; Ang. & A. Corp. 74; 1 Kyd, Corp. 50; 1 Bl. Comm. 474.

[27] Boca Mill Co. v. Curry, 154 Cal. 326, 97 Pac. 1117; State v. Simons, 32 Minn. 540, 21 N. W. 750. Under Const. N. Y. art. 9, § 2, the regents of the University of the State of New York are constituted a corporation, and they have repeatedly created educational corporations. A dictum recognizing this power is found in Cowen, J.'s opinion in Thomas v. Dakin, 22 Wend. (N. Y.) 9, at page 110.

[28] Franklin Bridge Co. v. Wood, 14 Ga. 80; In re New York El. R. Co., 70 N. Y. 327; Heck v. McEwen, 12 Lea (Tenn.) 97; State ex rel. v. Taylor, 55 Ohio St. 61, 44 N. E. 513; People ex rel. U. S. Grand Lodge O. B. A. v. Payn, 161 N. Y. 229, 55 N. E. 849; Cf. People ex rel. Barney v. Whalen, 119 App. Div. 749, 109 N. Y. Supp. 555, affirmed short 189 N. Y. 560, 82 N. E. 1131, where the certificate contained unauthorized provisions and a writ of mandamus was refused. In Granby Mining & Smelting Co. v. Richards, 95 Mo. 106, 8 S. W. 246, it was held that, where the powers of a corporation, and the procedure by which it can be brought into existence, are prescribed by the Legislature, the fact that the Legislature, in the same act, gives such corpora-

in character, should not be perfunctorily performed. Thus, where the statute required the written approval of a justice of the Supreme Court of the certificate of incorporation of a membership corporation, approval should be withheld where the elemental substance of the statute was not complied with, though the face of the statutory formula was followed.[29]

GENERAL AND SPECIAL LAWS

19. In the absence of constitutional limitations, corporations may be created under general or by special laws. In most states, however, the Legislature is prohibited by the Constitution from creating corporations, with certain exceptions, otherwise than under general laws.

20. By the weight of authority, such a provision does not prohibit a special act which merely grants additional powers and privileges to an existing corporation, but it does prohibit a special act so amending the charter of an existing corporation as to make it in effect a different corporation.

Corporations are created either by a special act of the Legislature or under a general law. A special act creates a particular corporation. A general law does not of itself directly create a corporation, but authorizes incorporation by providing that any persons who comply with its terms shall thereby become incorporated. A general law authorizing the formation of corporations defines the purposes for which they may be formed, and prescribes the steps that must be taken to form them. It generally requires articles of association to be executed by the corporators, and filed in some public office, or court, and often fixes the minimum number of residents of the state who shall execute such articles. The articles are usually required to set forth the names of the corporators and their residences, the name by which the proposed corporation shall be known, and its principal place of business, the object and purpose of the association, which, of course, must not

tion the power to dispose of special stock which is to form no part of the general stock of the corporations, and permits the holders of such special stock to become a distinct corporation, is not such a delegation of legislative power as to render an organization formed under the special stock clause invalid.

[29] In re Wendover Athletic Ass'n, 70 Misc. Rep. 273, 128 N. Y. Supp. 561. Cf. State ex rel. College of Bishops of M. E. Church, South, v. Board of Trust of Vanderbilt University, 129 Tenn. 279, 164 S. W. 1151.

be other than is authorized by the law under which it is formed,[30] the period of time for which the corporation is to exist, the number of directors, and the names of those who are to act as such until an election is had pursuant to the articles. If the body is to be a stock corporation, it is usually required that the articles shall state the amount of the capital stock, the number of shares, and the amount that is to be paid in before doing business. Of course, the requirements will vary greatly in the different states, and in different statutes in the same state,[31] and as will be shown, the requirements of the statute must be complied with in order to form a legal corporation,[32] i. e., a corporation de jure.

In order, for example, to form the ordinary private corporation for pecuniary profit, in New York, three or more natural persons, of full age, at least two-thirds of whom must be citizens of the United States and at least one of whom must be a resident of New York state, are required to make, sign, and acknowledge a certificate of incorporation which must contain the name of the proposed corporation; its purpose; the amount of capital stock, and, if any thereof be preferred, the nature of the preference; the number of shares of which the capital stock shall consist; the amount of capital with which business will be begun (not less than five hundred dollars); the city or town where the principal office of the corporation is to be located; its duration; the number of directors (not less than three); the names and addresses of the directors for the first year; the names and addresses of the subscribers, and a statement of the number of shares which each agrees to take. Other fundamental matters, as, for instance, where directors shall meet, may also be provided for. Every such certificate of incorporation must be filed in the office of the Secretary of State, to be recorded

[30] Post, p. 70.

[31] The following sections taken from a New Hampshire statute (Gen. Laws 1878, c. 152) are a good illustration of a general law:

"Section 1. Any five or more persons of lawful age may, by written articles of agreement, associate together for agricultural, educational, or charitable purposes, or for carrying on any lawful business, except banking and the construction and maintenance of a railroad; and when such articles have been executed and recorded in the office of the clerk of the town in which the principal business is to be carried on, and in that of the secretary of state, they shall be a corporation, and such corporation, its officers and stockholders, shall have all the rights and powers, and be subject to all the duties and liabilities of similar corporations, their officers and stockholders, except so far as the same are limited or enlarged by this chapter.

"Sec. 2. The object for which the corporation is established, the place in which its business is to be carried on, and the amount of capital stock to be paid in, shall be distinctly set forth in its articles of agreement."

[32] Post, p. 57.

and indexed by him. A certified copy of such certificate, or a duplicate original thereof, must also be filed in the office of the clerk of the county in which the principal office of the corporation is to be located. All taxes and fees must be paid before first filing the certificate, and no corporate powers or privileges can be exercised till this is done.[33] The New York procedure, thus briefly outlined, is reasonably typical of that in the majority of the states. It is simple and intelligible, and free from complexities.

Constitutional Restriction

In most states there is a constitutional provision that corporations, generally with some exceptions, shall not be created or formed by special act, but must be formed under general laws.[34] Where there is such a provision as this, the Legislature, of course, has no power to create corporations, other than of the kind excepted, by a special act. The object of this provision is obvious. It is chiefly to prevent the granting of special privileges to one body of men, without giving all others the right to obtain them on the same conditions; and perhaps it is partly to prevent bribery and corruption of legislators. The modern policy is one of equal favors to all and special privileges to none, so far as feasible. But although more readily and equitably attainable, the franchise of incorporation, in its essential nature, remains the same.[35]

Where the provision of the Constitution is that corporations "shall not be created" or "formed" by special act, it prevents the formation of a corporation by the acceptance after the adoption of the Constitution of a special act offering a charter passed before its adoption, for "the restraint is plainly imposed upon the creation —the organization—of the corporation itself."[36] It is otherwise where the provision is that the Legislature shall "pass no special act conferring corporate powers," for here the restraint is only imposed on future legislative action.[37]

[33] See General Corporation Law N. Y. (Consol. Laws, c. 23) §§ 4, 5; Business Corporation Law N. Y. (Consol. Laws, c. 4) § 2; as to fees of secretary of state, see Executive Law N. Y. (Consol. Laws, c. 18) § 26, and of county clerk, see Code Civ. Proc. N. Y. § 3304.

[34] For an index to the constitutional provisions of the various states on this subject, see 10 Cyc. 172.

[35] But see Horton, C. J.'s opinion in State ex rel. v. Western Irrigating Canal Co., 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166; 2 Mor. Priv. Corp. § 923.

[36] State ex rel. Weir v. Dawson, 16 Ind. 40; STATE ex rel. CARLTON v. DAWSON, 22 Ind. 272, Wormser Cas. Corporations, 59; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415. Contra, State ex rel. White v. Hancock, 2 Pennewill (Del.) 252, 45 Atl. 851.

[37] State ex rel. Drake v. Roosa, 11 Ohio St. 16; State ex rel. Weir v. Dawson, supra.

The question has often arisen whether a constitutional prohibition against the creation or formation of a corporation by special act prohibits the Legislature from passing a special act conferring additional privileges or powers upon a corporation previously created, or amending the charter of an existing corporation. It is sufficiently clear on principle, and has frequently been decided, that, where a corporation has already been created, a special act regulating it, or conferring new and additional grants, privileges, or powers, without changing the organization of the corporate body, is not within the prohibition.[38] It has been held, for instance, that the Constitution does not prohibit a special act conferring upon an existing railroad corporation authority to change the line of its road,[39] or to purchase the railroad and franchises of another company;[40] nor a special act extending the duration of an existing corporation,[41] or changing, or authorizing it to change, its name;[42] nor a special act changing the character of an existing corporation, as from a mutual benefit or nonstock corporation to a stock corporation.[43] As was said by Judge Sawyer: "The word 'create' has a clear, well-settled, and well-understood signification. It means to bring into being; to cause to exist; to produce; to make, etc. To my apprehension, it appears to be one thing to create, or bring into being, a corporation, and quite another to deal with it as an existing entity—a person—after it is created, by regulating its intercourse, relations and acts as to other existing persons, natural and artificial."[44]

The Legislature, however, cannot resort to any subterfuge to avoid the constitutional prohibition. If by a special act it undertakes to so amend or alter the charter of an existing corporation as in effect to create a new corporate body, it violates the Constitution, and the act is void. "A prohibition from creating corpora-

[38] Attorney General v. North America Life Ins. Co., 82 N. Y. 172.

[39] Southern Pac. R. Co. v. Orton (C. C.) 32 Fed. 457.

[40] Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895.

[41] Cotton v. Mississippi & Rum River Boom Co., 22 Minn. 372. Compare Logan v. Western & A. R. Co., 87 Ga. 533, 13 S. E. 516.

[42] Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895; Hazelett v. Butler University, 84 Ind. 230; Attorney General v. Joy, 55 Mich. 94, 20 N. W. 806. And see Pacific Bank v. De Ro, 37 Cal. 538; Rosenthal v. Madison & I. Plank-Road Co., 10 Ind. 358.

[43] St. Paul Fire & Marine Ins. Co. v. Allis, 24 Minn. 75.

[44] In Southern Pac. R. Co. v. Orton, supra. See, also, Wallace v. Loomis, 97 U. S. 154, 24 L. Ed. 895; Attorney General v. North America Life Ins. Co., 82 N. Y. 172; In re New York El. R. Co., 70 N. Y. 327; St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581; State ex rel. Circuit Attorney of Tenth Judicial Circuit v. Cape Girardeau & S. L. R. Co., 48 Mo. 468.

tions by special act undoubtedly does not, in terms, prohibit the Legislature from passing a special law altering the charter of an existing corporation; but it is plain that a constitutional provision cannot be avoided, and practically annulled, by a subterfuge. A special law altering the character of an existing corporation, and practically changing it, must therefore be deemed in violation of a constitutional prohibition against the creation of corporations by special act. If this were not so, organizations formed under the general laws might be treated merely as the rough material out of which corporations might afterwards be fashioned at pleasure under special acts of the Legislature, and the constitutional provision would become an empty form." [45]

Some of the cases do not recognize this distinction, but hold broadly that the Constitution prohibits a special act granting an existing corporation any new franchises—"that there is no distinction, as respects the constitutional inhibition, between a grant of corporate powers and privileges and the grant of corporate charters de novo." [46]

A special act waiving a failure to comply with conditions precedent in the attempted organization of a particular corporation under a general law is not unconstitutional under this clause; [47] but it is otherwise if the Legislature, by special act, attempts to ratify a claim to corporate existence which is altogether unauthorized.[48]

In some states the language of the Constitution is different from the provision we have been discussing; the Legislature being prohibited from passing any special act "conferring corporate powers," or "granting corporate powers or privileges." Some of the courts regard this as broader than the prohibition against the "creation" of corporations, and have held that the Legislature is thereby

[45] 1 Mor. Priv. Corp. § 12. For cases in which special acts in reference to existing corporations have been held void, see Ex parte Pritz, 9 Iowa, 30; Town of McGregor v. Baylies, 19 Iowa, 43; City and County of San Francisco v. Spring Valley Waterworks, 48 Cal. 493, overruling California State Tel. Co. v. Alta Tel. Co., 22 Cal. 398 (but see the criticism of this case in Southern Pac. R. Co. v. Orton [C. C.] 32 Fed. 457, 467); Green v. Knife Falls Boom Corp., 35 Minn. 155, 27 N. W. 924; Astor v. New York Arcade Ry. Co., 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789.

[46] See Green v. Knife Falls Boom Corp., supra; City and County of San Francisco v. Spring Valley Waterworks, supra; Attorney General v. Chicago & N. W. Ry. Co., 35 Wis. 560.

[47] Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120; State ex rel. Sanche v. Webb, 110 Ala. 214, 20 South. 462; McAuley v. Columbus, C. & I. C. Ry. Co., 83 Ill. 348; Syracuse City Bank v. Davis, 16 Barb. (N. Y.) 188.

[48] Oroville & V. R. Co. v. Supervisors of Plumas County, 37 Cal. 354.

prohibited "from either creating corporations, or conferring upon the same corporate powers," by special act.[49] This would seem to be the reasonable construction, but the weight of opinion seems to be in favor of holding such provisions merely equivalent to the prohibition against their "creation." [50]

An act is not "special," within the meaning of the Constitutions, if it operates alike and uniformly throughout the state upon like facts. An act, to be general, need not apply to every person or every corporation in the state. It is sufficient if it applies to every person or corporation who or which comes within the relations or circumstances provided for,[51] if the classification "has some reasonable foundation in the nature of things, and is not arbitrarily made to afford means of evading the constitutional inhibition." [52] The fact that the Legislature expressly declares a special act to be

[49] Atkinson v. Marietta & C. R. Co., 15 Ohio St. 21. And see German-American Inv. Co. v. City of Youngstown (C. C.) 68 Fed. 452. That such a clause prohibits a special act conferring upon an existing corporation the power to issue bonds, see School Dist. No. 56 v. St. Joseph F. & M. Ins. Co., 103 U. S. 707, 26 L. Ed. 601.

[50] Attorney General v. Chicago & N. W. Ry. Co., 35 Wis. 425; Brady v. Moulton, 61 Minn. 185, 63 N. W. 489; North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750.

[51] 1 Thomp. Corp. §§ 592–602; Hazelett v. Butler University, 84 Ind. 230; Attorney General ex rel. Nelson v. McArthur, 38 Mich. 204; Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418; Delaware Bay & C. M. R. Co. v. Markley, 45 N. J. Eq. 139, 16 Atl. 436; City of Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337. In Attorney General ex rel. Nelson v. McArthur, supra, it was held that the constitutional limitation upon the creation of corporations except by general laws does not apply to incorporation acts to enable operations to be carried on in specific localities that cannot be carried on anywhere else. "The great purpose of the provision," said Graves, J., "was to introduce a system of legislation in regard to the institution of corporations which would exclude the corruption and party favoritism which had too often accompanied the method previously in vogue, and to secure, as far as practicable, for all the people of the state, an equality of opportunity and a guard against sectional discriminations. It was determined that corporations of the class in question should owe their erection to general laws, and not to special acts, and, within this principle, that no law, general in form, should be allowed to localize the specific work or business of the corporation within narrower bounds than it would naturally be bound to occupy if not thus localized by enactment. At the same time, it was not designed to hinder the confinement of the specific work or business of the corporation, by the terms of the law, within a given section, in any case when, in consequence of natural conditions, such work or business could not be carried on elsewhere."

[52] 1 Thomp. Corp. §§ 593, 598; Atlantic City Water-Works Co. v. Consumers Water Co., 44 N. J. Eq. 427, 15 Atl. 581; Weinman v. Wilkinsburg & E. L. Ry. Co., 118 Pa. 192, 12 Atl. 288; Thomas v. Wabash, St. L. & P. R. Co. (C. C.) 40 Fed. 126, 7 L. R. A. 145. In Frye v. Partridge, 82 Ill. 267, an act for estab-

general cannot make it so. If it were held otherwise, it would be an easy matter to defeat the constitutional inhibition.[53]

In some states, special laws relating to corporations are prohibited only where general laws can be made applicable. Under such a provision, though there are some decisions to the contrary, it has generally been held that it is exclusively for the Legislature, and not for the courts, to say whether a special law is necessary.[54]

Constitutional prohibitions against creating corporations, or granting corporate powers, by special act, are not to be construed as retrospective, so as to render invalid and take away a previous grant of corporate powers to corporations organized and in actual operation.[55]

INTENTION TO CREATE A CORPORATION

21. No particular form of words is necessary to the creation of a corporation. All that is necessary is that such an intention on the part of the Legislature shall clearly appear from the act.

In creating a corporation the Legislature generally uses language which admits of no doubt, as the words "incorporate," "found,"

lishing a single ferry at a designated point on a particular river was held void as a local and special act.

[53] City and County of San Francisco v. Spring Valley Waterworks, 48 Cal. 493; Belleville & I. R. Co. v. Gregory, 15 Ill. 20, 58 Am. Dec. 589. Where an act granted to three persons "and their assigns" the exclusive right to supply a town with water, prescribing certain duties, and authorizing the town "to purchase all the works and franchises" granted after 15 years, and a corporation was organized 3 years later and became owner of the franchises through mesne conveyances, and it did not appear that any of the original grantees had any interest in the corporation, or had caused it to be formed, it was held that the original grant was not the creation of a corporation by special act. San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075.

[54] Carpenter v. People, 8 Colo. 116, 5 Pac. 828; Gentile v. State, 29 Ind. 409; State ex rel. Johnson v. Hitchcock, 1 Kan. 178, 81 Am. Dec. 503; Knowles v. Board of Education, 33 Kan. 692, 7 Pac. 561; State ex rel. Henderson v. Boone County Court, 50 Mo. 317, 11 Am. Rep. 415; Evans v. Job, 8 Nev. 322. Contra, State ex rel. Pell v. Mayor, etc., of City of Newark, 40 N. J. Law, 71; Ex parte Pritz, 9 Iowa, 30; Von Phul v. Hammer, 29 Iowa, 222; Thomas v. Board of Com'rs of Clay County, 5 Ind. 4 (since overruled). In New York the question is expressly left to the judgment of the Legislature alone. People v. Bowen, 21 N. Y. 517; Smith v. Havens Relief Fund Soc., 44 Misc. Rep. 594, 90 N. Y. Supp. 168. It was formerly so in Illinois. Johnson v. Joliet & C. R. Co., 23 Ill. 202.

[55] State of Illinois v. Illinois Cent. R. Co. (C. C.) 33 Fed. 730, 769.

"erect," etc.; but no particular form of words is ever necessary.[56] All that is necessary is that it shall appear that the Legislature intended to create a corporation. Such an intention is shown whenever all the powers and faculties essential to the existence of a corporation are conferred, though the words "corporation" or "incorporate" are not used in the statute.[57] "Whenever it is apparent that the intention of the Legislature will be defeated if certain parties are not found to possess corporate powers, they will be held to be created a corporation." [58] Thus, a grant to certain persons by the state, of property or powers which they cannot hold or exercise unless they have a corporate character, will confer such a character.[59] If no intention to create a body corporate is expressed, and the powers conferred may be exercised as well by an unincorporated association, an intention to create a corporation will not be inferred.[60]

RATIFICATION OF CLAIM TO CORPORATE EXISTENCE

22. Recognition and ratification by the Legislature of a claim of corporate existence render the body a corporation. But where the claim is wholly without authority, and the constitution prohibits the creation of corporations by special act, recognition and ratification by special act are not effectual.

[56] 10 Coke, 30.

[57] Thomas v. Dakin, 22 Wend. (N. Y.) 9; Conservators of River Tone v. Ash, 10 Barn. & C. 349; Dean v. Davis, 51 Cal. 406; Mahoney v. Bank of State, 4 Ark. 620; Smith v. Havens Relief Fund Soc., 44 Misc. Rep. 594, 90 N. Y. Supp. 168; Sibley v. Penobscot Lumbering Ass'n, 93 Me. 399, 45 Atl. 293

[58] Bow v. Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

[59] Bow v. Allenstown, supra; Dean v. Davis, 51 Cal. 410; DUNN v. UNIVERSITY OF OREGON, 9 Or. 357, Wormser Cas. Corporations, 57; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109. "Whenever the language manifests the intention of the government to confer corporate privileges, they may be conferred without the adoption of any particular technical phraseology or minutely descriptive language. It is indeed a principle of law that has been often acted on, that where rights, privileges, and powers are granted by law to an association of persons by a collective name, and there is no mode by which such rights can be enjoyed, or such powers exercised, without acting in a corporate capacity, such associations are, by implication, a corporation, so far as to enable them to exercise the rights and powers granted." Ang. & A. Corp. §§ 77, 78.

[60] Thus, where the executive council of Massachusetts passed a resolution as follows: "Advised, that a company of artillery be established by Watertown, agreeable to military law"—it was held that the intention to make the company a corporation could not be inferred. Shelton v. Banks, 10 Gray (Mass.) 401. And see Stebbins v. Jennings, 10 Pick. (Mass.) 172.

Express ratification by the Legislature of a claim to corporate existence, or an implied ratification by recognition of the claim and of the pretended corporation as a legally existing one, as by empowering it to do acts which only a corporate body can do, renders the body a legal corporation as fully as if originally created by the Legislature; and this is true even where the claim is without any authority whatever.[61] And such a ratification relates back, and renders previous acts of the body as a corporation valid corporate acts.[62] In like manner, failure to comply with conditions precedent in an attempted organization of a corporation under an act of the Legislature may be waived by the Legislature, and so cured, in the case of any particular corporation, by a statute expressly approving and ratifying its organization, or impliedly doing so by recognizing it as valid.[63] To constitute a ratification of a claim to corporate existence, it must, of course, clearly appear that the Legislature intended to recognize the corporation as existing.[64]

As was stated in a former section, a special act waiving a failure to comply with conditions precedent in the attempted organization of a corporation under a general law is not a violation of the constitutional prohibition against the "creation" of corporations by special act; but it is otherwise if the Legislature, by special act, attempts to ratify a claim to corporate existence that is altogether unauthorized.[65]

[61] Jameson v. People ex rel. Nettleton, 16 Ill. 257, 63 Am. Dec. 304; Illinois Grand Trunk R. Co. v. Cook, 29 Ill. 237; People ex rel. Gridley v. Farnham, 35 Ill. 562; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; Basshor v. Dressel, 34 Md. 503; Attorney General v. Joy, 55 Mich. 94, 20 N. W. 806; St. Louis R. Co. v. Northwestern St. L. Ry. Co., 2 Mo. App. 69; People v. Perrin, 56 Cal. 345; Williams v. Union Bank, 2 Humph. (Tenn.) 339; Society for Propagation of Gospel in Foreign Parts v. Town of Pawlet, 4 Pet. (U. S.) 480, 501, 7 L. Ed. 927; Atlantic & P. R. Co. v. City of St. Louis, 66 Mo. 228; Boykin v. State, 96 Ala. 16, 11 South. 66; McDougald v. Bellamy, 18 Ga. 411; State ex rel. Sanche v. Webb, 110 Ala. 214, 20 South. 462; Town of Andes v. Ely, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. Ed. 996; People v. Detroit, G. H. & M. R. Co., 157 Mich. 144, 121 N. W. 814. Compare People v. Kingston & M. Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551. An act amending the charter of an alleged corporation, being a recognition of its corporate existence, cures any defects in the original incorporation. Snell v. City of Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858.

[62] See the cases cited above.

[63] Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120; McAuley v. Columbus, C. & I. C. Ry. Co., 83 Ill. 348; Kanawha Coal Co. v. Kanawha & O. Coal Co., Fed. Cas. No. 7,606; Smith v. Havens Relief Fund Soc., 44 Misc. Rep. 594, 90 N. Y. Supp. 168.

[64] Thornton v. Marginal Freight Ry. Co., 123 Mass. 32; Green v. Seymour, 3 Sandf. Ch. (N. Y.) 285.

[65] Ante, p. 47, and cases there cited.

AGREEMENT BETWEEN CORPORATION AND STATE—ACCEPTANCE OF CHARTER

23. It is essential to the formation of a private corporation that there shall be consent on the part of the persons composing it, as well as on the part of the state. There must be an agreement between the corporators in their collective capacity, or the corporation and the state. Therefore—

(a) When a charter is offered by the Legislature, it must be accepted, to have any effect.

(b) Until acceptance, the state may withdraw the offer, as by repeal of the law, or adoption of a constitutional provision rendering it void.

(c) The offer will lapse because not accepted within a specified time, or within a reasonable time where no time is specified.

(d) The charter must be accepted, if at all, unconditionally and according to its terms, and by those persons to whom it is made.

(e) In the absence of provision to the contrary, acceptance of a charter may be presumed from acts of the corporators; and it will be presumed where they organize, and proceed to execute the powers conferred.

24. The above rules apply equally to acts of the Legislature amending existing charters.

It is commonly said that corporations are created by an act of the sovereign—in this country, by an act of the Legislature—and in a sense this is true. But it is not to be understood from this that the Legislature can bring a private corporation into existence of its own accord, and without the consent of the members who compose it. The consent of the Legislature is essential to the existence of a corporation; but it is equally essential, in the case of private corporations, that there shall be consent upon the part of the persons incorporated. The charter of a private corporation has been regarded as a contract between the corporation and the state; and we may therefore apply to the formation of a private corporation the principles governing offer and acceptance in the formation of contracts.

If persons apply to the Legislature for a charter, this is sufficient evidence of consent on their part, and, when the charter is granted, no acceptance of it by them, other than will be implied

from their previous application, need be shown.[66] Indeed, they may be considered as having made an offer, and the state as having accepted it. If, however, without such application, the Legislature offers a charter, either to particular persons by a special act, or to persons or a class of persons generally by a general law, an acceptance must be shown. Until acceptance, the offer of a charter, either by a general or a special law, can have no effect whatever.[67] An act of the Legislature authorizing persons to become a body corporate by complying with certain terms and conditions is, until accepted by the persons authorized, nothing but an offer on the part of the state, which may be withdrawn by it at any time; and it is withdrawn, so as to be no longer open for acceptance, by a repeal of the act by the Legislature, or by the adoption of a constitutional provision rendering such an act void.[68]

It is also the rule in the formation of corporations, as it is in the formation of contracts generally, that the offer of a charter by the state must be accepted according to its terms. It cannot be accepted conditionally or on terms varying from the offer, nor can it be accepted in part and rejected in part, unless this is allowed by the act.[69] On the same principle, the offer, if made to particular

[66] Perkins v. Sanders, 56 Miss. 733; Society of Middlesex Husbandmen and Manufacturers v. Davis, 3 Metc. (Mass.) 133; City of Atlanta v. Gate City Gaslight Co., 71 Ga. 106; STATE ex rel. CARLTON v. DAWSON, 22 Ind. 272; Wormser Cas. Corporations, 59. By incorporating under a general incorporation act, the corporation accepts the provisions of such act as part of its charter. Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; Ozan Lumber Co. v. Biddie, 87 Ark. 587, 113 S. W. 796.

[67] State ex rel. Weir v. Dawson, 16 Ind. 40; STATE ex rel. CARLTON v. DAWSON, 22 Ind. 272, Wormser Cas. Corporations, 59; Smith v. Silver Valley Min. Co., 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760; Bagg's Case, 1 Rolle, 224; Hammond v. Jethro, 2 Brownl. & G. 100; Rex v. Amery, 1 Term R. 575; Rutter v. Chapman, 8 Mees. & W. 25; FALCONER v. CAMPBELL, Fed. Cas. No. 4,620, Wormser Cas. Corporations, 46; Ellis v. Marshall, 2 Mass. 269, 3 Am. Dec. 49; Yeaton v. Bank of Old Dominion, 21 Grat. (Va.) 593; President, etc., of Lincoln & Kennebec Bank v. Richardson, 1 Greenl. (Me.) 79, 10 Am. Dec. 34; Shortz v. Unangst, 3 Watts & S. (Pa.) 45; Haslett's Ex'rs v. Wotherspoon, 1 Strob. Eq. (S. C.) 209; Willis v. Chapman, 68 Vt. 459, 35 Atl. 459. "The mere grant of a charter, where it does not appear upon the face of the incorporating act, or otherwise, that the named corporators applied for it, does not create the corporate body. Something more must be done. There must be at least an acceptance of the grant by a majority of the corporators before corporate life and existence can begin." Per Miller, J., in Smith v. Silver Valley Min. Co., supra.

[68] State ex rel. Weir v. Dawson, supra; STATE ex rel. CARLTON v. DAWSON, supra; Aspinwall v. Daviess County Com'rs, 22 How. (U. S.) 364, 16 L. Ed. 296; Gillespie v. Ft. Wayne & S. R. Co., 17 Ind. 243. Ante, p. 45.

[69] Rex v. Westwood, 4 Barn. & C. 781, 7 Bing. 1; Lyons v. Orange, A. & M.

persons, must be accepted by them. If it appears to be the intention that all shall accept, it cannot be accepted by a part, only, of those to whom it is offered.[70] General laws authorizing the formation of corporations are general offers to any persons who may bring themselves within their provisions. If conditions precedent are prescribed in the statute, or certain acts are required to be done, they are terms of the offer, and must be complied with.[71] The state's offer of a charter must be accepted within the time specified in it, or, if no time for acceptance is specified, it must be accepted within a reasonable time. If it is not so accepted, the offer will lapse, and will be no longer open for acceptance.[72]

The acceptance of a charter may be inferred from the acts of the corporators; and a written instrument or note of acceptance is not indispensable, unless made so by the terms of the act.[73] Any act on the part of the corporators, which shows an unequivocal intention to accept, is sufficient; as, for instance, where they proceed to execute the powers conferred by the charter offered them.[74] If such acts are shown, acceptance will be presumed.[75] It has been said that stronger proof of acceptance is required where the corpo-

R. Co., 32 Md. 18, 29; Bonaparte v. Baltimore, H. & L. R. R. Co., 75 Md. 340, 23 Atl. 784.

[70] Ang. & A. Corp. 25; Cook, Stock, Stockh. & Corp. Law, § 649; Mor. Priv. Corp. § 22; Rex v. Amery, 1 Term R. 589. But cf. McGinty v. Athol Reservoir Co., 155 Mass. 183, 29 N. E. 510.

[71] Post, p. 57; Fire Department of New York v. Kip, 10 Wend. (N. Y.) 266; Quinlan v. Houston & T. C. Ry. Co., 89 Tex. 356, 34 S. W. 738.

[72] State v. Bull, 16 Conn. 179; Bonaparte v. Baltimore, H. & L. R. R. Co., 75 Md. 340, 23 Atl. 784.

[73] Rex v. Amery, 1 Term R. 575; Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 64, 70, 6 L. Ed. 552; Gleaves v. Brick Church Turnpike Co., 1 Sneed (Tenn.) 491. "It has long been the received opinion that there must be an acceptance, but the mode of proving it has always been left open. In general, the acceptance of a charter has been proven by evidence of acting under it." Per Lord Tenterden, C. J., in R. v. Hughes, 7 B. & C. 708, 718.

[74] See, in addition to the cases cited above, Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; State ex rel. Perkins v. Montgomery Light Co., 102 Ala. 594, 15 South. 347; Jackson v. Walsh, 75 Md. 304, 23 Atl. 778; St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581; Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74; Com. ex rel. Claghorn v. Cullen, 13 Pa. 133, 53 Am. Dec. 450; Russell v. McLellan, 14 Pick. (Mass.) 63; Society of Middlesex Husbandmen and Manufacturers v. Davis, 3 Metc. (Mass.) 133; McKay v. Beard, 20 S. C. 156. Signing the articles of association, and complying with all the other requirements of a general law authorizing the formation of corporations, is clearly sufficient evidence of acceptance. Glymont Improvement & Excursion Co. v. Toler, 80 Md. 278, 30 Atl. 651; Benbow v. Cook, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454.

[75] Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 64, 70, 6 L. Ed. 552.

ration is created by special act than where it is organized under a general incorporation law.[76]

Act Amending Charter

The rule that a charter must be accepted before it can have any effect applies to acts of the Legislature extending a charter that has expired, or is about to expire.[77] It also applies to acts amending existing charters under a right reserved to the state when the charter was granted;[78] for, though the state may reserve the right to amend the charter of a private corporation, it cannot compel the members to accept the charter as amended, any more than it could compel them to accept the original charter. If they do not choose to adopt the amendment, they may give up their charter altogether. The acceptance of an amendment, like the acceptance of an original charter, may be implied from the conduct of the corporation or its members, and it will be conclusively presumed if the powers conferred by the amendatory act are exercised.[79]

The acceptance of an amendatory act, as we shall see, must generally be by the shareholders, and not by the board of directors. It must be so if it changes the constitution of the corporation. Thus, if an act of the Legislature authorizes a corporation to increase its capital stock, the directors cannot make the increase without the assent of the shareholders unless this power was expressly conferred upon the directors.[80] If, however, action by the stockholders is not required by the act itself, and the act merely

[76] Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74.

[77] President, etc., of Lincoln & Kennebec Bank v. Richardson, 1 Greenl. (Me.) 79, 10 Am. Dec. 34.

[78] Com. ex rel. Claghorn v. Cullen, 13 Pa. 133, 53 Am. Dec. 450; Kenosha, R. & R. I. R. Co. v. Marsh, 17 Wis. 13; post, p. 269.

[79] Com. ex rel. Claghorn v. Cullen, supra. And see Jackson v. Walsh, 75 Md. 304, 23 Atl. 778; Illinois River R. Co. v. Zimmer, 20 Ill. 654; Owen v. Purdy, 12 Ohio St. 73; ante, p. 54, and cases there cited in notes 73–75. In Miller v. American Mut. Acc. Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765, it was held that an insurance company, by issuing policies and continuing business after an act amending the charters of such companies, passed in pursuance of a right of amendment reserved to the state in the general incorporation law, which amendment the company was therefore bound to adopt if it wished to continue business, thereby accepted the amendment.

[80] Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90; Chicago City R. Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. Ed. 902. And see Commercial Nat. Bank v. Weinhard, 192 U. S. 243, 24 Sup. Ct. 253, 48 L. Ed. 425; Clark v. Brown (Tex. Civ. App.) 108 S. W. 421, 437. Directors cannot accept a fundamental amendment. Venner v. Atchison, T. & S. F. R. Co. (C. C.) 28 Fed. 581.

grants an additional privilege which is within the scope of the general authority of the board of directors—as, where an act authorizes a railroad company to take, for a station, land belonging to another railroad company, and the by-laws vest in the directors the power to take lands and locate stations—it has been held that their acts alone will be sufficient evidence of acceptance.[81]

PLACE OF ORGANIZATION

25. The acceptance of the charter by the corporators, and other acts necessary to the organization of the corporation, must take place within the state.

The officers of a corporation may perform acts as agents of the corporation outside of the state of its creation, unless prohibited by local legislation; but no strictly corporate act can be done outside of the state.[82] The reason is, as we shall presently show, that a corporation can have no legal existence outside of the boundaries of the sovereignty by which it was created.[83] Acceptance of a charter, and organization under it, are strictly corporate acts, and must, to be effective, take place within the state. Thus, where a charter was granted by the state of North Carolina, and the corporators, who were authorized to act as directors until others should be elected, assembled in Baltimore, and there passed resolutions of acceptance, and performed the other acts necessary to organize the corporation, it was held that the proceedings were void, and that the pretended corporation had no legal existence.[84]

[81] Eastern R. Co. v. Boston & M. R., 111 Mass. 125, 15 Am. Rep. 13. As to the power of directors, see post, p. 609.

[82] Miller v. Ewer, 27 Me. 509, 46 Am. Dec. 619; Freeman v. Machias Water Power & Mill Co., 38 Me. 343; Smith v. Silver Valley Min. Co., 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760. Cf. Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74. Post, p. 585.

[83] Post, p. 82.

[84] Smith v. Silver Valley Min. Co., 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760. And see Miller v. Ewer, 27 Me. 509, 46 Am. Dec. 619. Compare Ohio & M. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128; Heath v. Silverthorn Lead Mining & Smelting Co., 39 Wis. 146. In Glymont Improvement & Excursion Co. v. Toler, 80 Md. 278, 30 Atl. 651, it was held that, though the directors of a corporation held their first meeting and organized outside the state, organization within the state was shown by the fact that ever since its incorporation the corporators and their successors had exercised corporate rights of every kind under the charter, had issued certificates of stock under the corporate seal, had expended money in developing its property, that a board of directors had been annually elected by the stockholders within the

COMPLIANCE WITH CONDITIONS PRECEDENT

26. Where the law authorizing the formation of a corporation prescribes formalities to be observed as conditions precedent to becoming a corporation, a compliance therewith is essential to the legal existence of a corporation. But—

(a) A substantial compliance is sufficient.

(b) The legal existence of a corporation is not affected by noncompliance with provisions that are merely directory, and not mandatory.

(c) Nor is it affected by noncompliance with conditions subsequent. This includes conditions precedent to the right to do business, which are not intended as conditions precedent to incorporation de jure.

(d) A corporation de facto may exist notwithstanding noncompliance with conditions precedent; and in such a case the validity of the existence of the corporation can be questioned only by the state in a direct proceeding brought for that purpose.

(e) A person may be estopped from denying that an association is a corporation by dealing with it, or holding it out, as a corporation.

Since it lies entirely with the state whether it will create a corporation or not, it has a right to impose any conditions it may see fit in the charter or act authorizing incorporation, and a substantial compliance therewith by the corporators is essential to the legal existence of a corporation; that is to say, to its existence as a corporation de jure. In Attorney General v. Hanchett [85] a Michigan statute declared that whenever the common council of a city should, by resolution, declare that it was expedient to have waterworks constructed, but that it was inexpedient for the city to construct such works, it should be lawful for private individuals to organize a water company in the manner therein set forth. The defendants sought to organize a corporation under this statute, and assumed to act as such, without any resolution as required by the statute. In proceedings by the state, the defendants were ousted from the exercise of corporate powers on the ground that such a resolution by the common council of the city was a condi-

state, and the directors so elected controlled and managed the property and affairs of the corporation.

[85] 42 Mich. 436, 4 N. W. 182.

tion precedent to the legal existence of a corporation under the statute. And so it has been held where the statute required that there should be a certain number of associates;[86] that there should be written articles of agreement between the corporators;[87] that the articles of association should set forth certain facts;[88] that they should be subscribed by the corporators,[89] and acknowledged by them,[90] or verified;[91] that the articles or a certificate should

[86] Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342; State v. Critchett, 37 Minn. 13, 32 N. W. 787. Post, p. 68 et seq.

[87] Utley v. Union Tool Co., 11 Gray (Mass.) 139; Unity Ins. Co. v. Cram, 43 N. H. 636. Where the statute requires written articles of association, "it is obvious that the three or more persons must sign and execute these articles in such a manner as to come within the well-established rules of law prescribing the elements necessary to constitute a signing or execution which will make the paper executed the legal and binding instrument of the person who executes it. Their signatures must not be procured, without fault on their part, by fraud; nor must they be affixed with the understanding and upon condition that the paper signed is not to take legal effect, and be valid and binding, either presently, or at some fixed and definite time, or upon the happening of some contingency or fulfillment of some condition within the bounds of possibility. Nor is it obvious how such an instrument as this, more than any other, can have life and binding force, if executed only to take effect upon the happening of some event, unless it is shown that the event has happened." Corey v. Morrill, 61 Vt. 598, 17 Atl. 840.

[88] As that they should set forth the number of directors and their names, Reed v. Richmond St. R. Co., 50 Ind. 342; or that they should give the names and places of residence of the subscribers to stock, Busenback v. Attica & B. Gravel Road Co., 43 Ind. 265; Miller v. Wild Cattle Gravel Road Co., 52 Ind. 51; or should state the manner of carrying on the business, State ex rel. Attorney General v. Central Ohio Mut. Relief Ass'n, 29 Ohio St. 399; or the place of carrying on the business, Harris v. McGregor, 29 Cal. 124; Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342; Kennett v. Woodworth Mason Co., 68 N. H. 432, 39 Atl. 585; or the purposes of the incorporation, West v. Bullskin Prairie Ditching Co., 32 Ind. 138; O'Reiley v. Draining Co., Id. 169; Attorney General v. Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287; In re Crown Bank, 44 Ch. Div. 634; or the fact that a majority of the associates were present and voted at the election of directors, People ex rel. Fraser v. Selfridge, 52 Cal. 331.

[89] Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 8 N. W. 772, 41 Am. Rep. 85; Lawrie v. Silsby, 76 Vt. 240, 56 Atl. 1106, 104 Am. St. Rep. 927. Articles may be signed by the corporators by their usual signatures, and the use of initials to designate their Christian names is not objectionable. State ex rel. Collins v. Beck, 81 Ind. 500. Signature by mark is sufficient. Board of Trustees of Seventh Street Colored M. E. Church v. Campbell, 48 La. Ann. 1543, 21 South. 184.

[90] Doyle v. Mizner, 42 Mich. 332, 3 N. W. 968; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 8 N. W. 772, 41 Am. Rep. 85; People v. Montecito Water Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172; People ex rel. v. Cheeseman, 7 Colo. 376, 3 Pac. 716; People ex rel. Weatherly v. Golden Gate Lodge No. 6, 128 Cal. 257, 60 Pac. 865.

[91] Wall v. Mines, 130 Cal. 27, 62 Pac. 386.

be recorded or filed in a certain court or office;[92] that notice of organization, setting forth certain facts, should be published.[93]

So, it was recently held, the corporation does not have a de jure existence, though the secretary of state has issued a certificate of complete organization of the corporation, until it records this certificate in the office of the recorder of deeds in the county where the principal office of the company is located, as required by statute.[94] And, for the default, the state may revoke the charter.

Sometimes, subscriptions to stock to a certain amount are required as a condition precedent;[95] and it is sometimes required that a certain percentage of the stock subscribed shall be paid up,

[92] Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 8 N. W. 772, 41 Am. Rep. 85; Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362; Bigelow v. Gregory, 73 Ill. 197; Hurt v. Salisbury, 55 Mo. 311; Walton v. Riley, 85 Ky. 413, 3 S. W. 605; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Gade v. Forest Glen Brick & Tile Co., 165 Ill. 367, 46 N. E. 286; Bergeron v. Hobbs, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85; Card v. Moore, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed 173 N. Y. 598, 66 N. E. 1105; Borough of Braddock v. Penn Water Co., 189 Pa. 379, 42 Atl. 15; Lusk v. Riggs, 70 Neb. 713, 97 N. W. 1033; Elgin Nat. Watch Co. v. Loveland (C. C.) 132 Fed. 41. Compare Granby Mining & Smelting Co. v. Richards, 95 Mo. 106, 8 S. W. 246; In re Shakopee Mfg. Co., 37 Minn. 91, 33 N. W. 219. As to filing copy with the secretary of state, see First Nat. Bank of Davenport v. Davies, 43 Iowa, 424; Indianapolis Furnace & Mining Co. v. Herkimer, 46 Ind. 142; Garnett v. Richardson, 35 Ark. 144; Ragland v. Doolittle, 100 Miss. 498, 56 South. 445. And compare Mokelumne Hill Canal & Mining Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Walton v. Riley, 85 Ky. 413, 3 S. W. 605. The corporation, under some statutes, comes into existence before filing the certificate, filing the certificate being required as evidence of the corporate existence, which dates from the time fixed in the certificate. See Vanneman v. Young, 52 N. J. Law, 403, 20 Atl. 53. Under a statute providing that the existence of the corporation should date from the filing of the charter in the office of the secretary of state, held that the filing of the charter was essential to bring the corporation into existence. Bank of De Soto v. Reed, 50 Tex. Civ. App. 102, 109 S. W. 256.

[93] Clegg v. Hamilton & Wright Grange Co., 61 Iowa, 121, 15 N. W. 865.

[94] People ex rel. v. Mackey, 255 Ill. 144, 99 N. E. 370; Clinton Co. v. Schwartz, 175 Ill. App. 577; Hamill v. Watts, 180 Ill. App. 279. Cf. Marshall v. Keach, 227 Ill. 35, 81 N. E. 29, 118 Am. St. Rep. 247, 10 Ann. Cas. 164.

[95] See post, p. 381; People ex rel. Plumas County v. Chambers, 42 Cal. 201; Sweney v. Talcott, 85 Iowa, 103, 52 N. W. 106; Lake Ontario, A. & N. Y. R. Co. v. Mason, 16 N. Y. 451; Franklin Fire Ins. Co. of Baltimore v. Hart, 31 Md. 59; Peyton v. Minong Lumber & Lath Co., 149 Wis. 66, 135 N. W. 518. In Holman v. State, 105 Ind. 569, 5 N. E. 702, it was held that where the state, by quo warranto, directly challenged the right of persons to act as a corporation, and it appeared that many of the subscribers for the stock were notoriously insolvent, and had no expectation, at the time they subscribed, of ever paying their subscription, thus leaving the amount subscribed in good faith less than that required by the statute, a judgment of ouster was proper.

or shall be paid in cash.[96] For example, the Illinois statutes require that the entire capital stock be subscribed and at least one-half be paid in before the issuance of a certificate of complete organization by the secretary of state. In the absence of such a requirement in the statute, subscriptions to stock are not a condition precedent to corporate existence; but the corporation may be organized, and the stock, or part of it, may be subscribed afterwards.[97] Illustrations of conditions precedent might be multiplied almost indefinitely.[98]

[96] People ex rel. Plumas County v. Chambers, 42 Cal. 201; Munich Reinsurance Co. v. United Surety Co., 113 Md. 200, 77 Atl. 579. In the last cited case, the court said that "the Legislature was interested in having such amount of capital paid up as would protect the public in dealing with a corporation." But in the absence of such legislative intention, no part of the capital stock need be paid in before the charter is granted and the corporation begins business. Wikle v. Avary, 12 Ga. App. 148, 76 S. E. 1039.

[97] Perkins v. Sanders, 56 Miss. 733; Hammond v. Straus, 53 Md. 1; Proprietors of City Hotel in Worcester v. Dickinson, 6 Gray (Mass.) 586; Minor v. Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. Ed. 47; Johnson v. Kessler, 76 Iowa, 411, 41 N. W. 57; National Bank of Jefferson v. Texas Investment Co., 74 Tex. 421, 12 S. W. 101; Singer Mfg. Co. v. Peck, 9 S. D. 29, 67 N. W. 947; American Radiator Co. v. Kinnear, 56 Wash. 210, 105 Pac. 630, 35 L. R. A. (N. S.) 453; W. L. Wells Co. v. Gastonia Cotton Mfg. Co., 198 U. S. 177, 25 Sup. Ct. 640, 49 L. Ed. 1003. Where no provision was made in the articles for the incorporation of a creamery association or in the by-laws for issuance and payment of capital stock, and none was subscribed for, the association did not become a corporation. Byronville Creamery Ass'n v. Ivers, 93 Minn. 8, 100 N. W. 387.

[98] See Capps v. Hastings Prospecting Co., 40 Neb. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. Rep. 677; Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; Heinig v. Adams & Westlake Mfg. Co., 81 Ky. 300. A certificate of incorporation, which provides that the corporate affairs shall be controlled by its president, vice president, and attorney, instead of providing for a board of directors, or trustees, as required by the statute, is insufficient to create a corporation de jure. Bates v. Wilson, 14 Colo. 140, 24 Pac. 99. Under an act prohibiting corporations from exercising powers until a certain bonus tax is paid, payment of the tax was held a prerequisite to corporate existence, thus preventing the birth of "wild cat" companies. Maryland Tube & Iron Works v. West End Imp. Co., 87 Md. 207, 39 Atl. 620, 39 L. R. A. 810. See, also, Cleaveland v. Mullin, 96 Md. 598, 54 Atl. 665; National Shutter Bar Co. v. G. S. F. Zimmerman & Co., 110 Md. 313, 73 Atl. 19; Jones v. Aspen Hardware Co., 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220; Scheidel Coil Co. v. Rose, 242 Ill. 484, 90 N. E. 221. A corporation has no de jure existence until the secretary of state has issued the certificate required by a statute providing that, on the filing of a certified copy of the articles filed in the county clerk's office with the secretary of state, he must issue to the corporation a certificate that a copy of the articles, containing the required statement of facts, has been filed in his office, and "thereupon" the persons signing the articles, and their associates and successors shall be a body corporate. Wall v. Mines, 130 Cal. 27, 62 Pac. 386.

The fact that the articles of association include a claim of greater powers than the law allows does not render the incorporation invalid, if the excessive part of the claim can be rejected as surplusage.[99]

Substantial Compliance with the Statute is Sufficient

In organizing a corporation under either a general or a special law, only a substantial compliance with the provisions of the statute is required, even as against the state. Thus, it has been held that the organization of a corporation is sufficient where the requirements of the statute are all observed, but not in the order prescribed;[1] that, where the statute requires the directors to be named in the articles of association, it is a sufficient compliance with the statute if the articles are adopted at the time of electing directors.[2] Many other cases may be cited to the same effect.[3] As was said in a California case, however: "Because a substantial compliance will do, it does not follow that any positive statutory requirement

[99] 1 Thomp. Corp. § 229; Eastern Plank Road Co. v. Vaughan, 14 N. Y. 546; Shick v. Citizens' Enterprise Co., 15 Ind. App. 329, 44 N. E. 48, 57 Am. St. Rep. 230. People ex rel. v. Cheeseman, 7 Colo. 376, 3 Pac. 716, under a statute incorporation for the period of 20 years, the articles of association provided for a corporate existence for 50 years. The court held that the corporation could exist for 20 years. The fact that one of the purposes of incorporation set forth in a charter is unauthorized by the statute under which the incorporation is effected does not invalidate the rest of the charter. Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch. App.) 56 S. W. 35.

[1] Eakright v. Logansport & N. I. R. Co., 13 Ind. 404.

[2] Eakright v. Logansport & N. I. R. Co., supra.

[3] Roman Catholic Orphan Asylum v. Abrams, 49 Cal. 455; People v. Stockton & V. R. Co., 45 Cal. 306, 313, 13 Am. Rep. 178; Oroville & V. R. Co. v. Supervisors of Plumas County, 37 Cal. 354; Thornton v. Balcom, 85 Iowa, 198, 52 N. W. 190; State ex rel. Attorney General v. Wood, 13 Mo. App. 139; Id., 84 Mo. 378; Buffalo & P. R. Co. v. Hatch, 20 N. Y. 157; Rogers v. Danby Universalist Soc., 19 Vt. 187; Seaton v. Grimm, 110 Iowa, 145, 81 N. W. 225; Commercial Nat. Bank of Council Bluffs v. Gilinsky, 142 Iowa, 178, 120 N. W. 476, 134 Am. St. Rep. 406; Carpenter v. Frazier, 102 Tenn. 462, 52 S. W. 858; Thomas v. Wilcox, 18 S. D. 625, 101 N. W. 1072. Failure of the notary's certificate of acknowledgment of articles of association to show that the persons acknowledging the same were personally known to him. People ex rel. v. Cheeseman, 7 Colo. 376, 3 Pac. 716. In State ex rel. Attorney General v. Wood, supra, it was held that a statutory requirement that one-half of the capital stock shall be "actually paid up in lawful money of the United States," is substantially complied with if the corporation has property the market value of which is greater than the par value of the stock. A statement in the articles that the limit of indebtedness shall be "two-thirds of the amount of the capital stock subscribed" is a sufficient compliance with a requirement that the highest amount of indebtedness to which the corporation is at any time to subject itself must be stated. Park v. Zwart, 92 Iowa, 37, 60 N. W. 220.

can be omitted, on the ground that it is unimportant. They are conditions precedent to acquiring a statutory right, and none can be dispensed with by the court." [4]

Provisions That are Merely Directory

It is not every provision in a charter or act of incorporation setting out formalities to be observed that is to be regarded as mandatory, so that a compliance therewith will be held a condition precedent. If the provision is mandatory, failure to comply substantially with its requirements will prevent the corporators from becoming a corporation de jure. If the provision is merely directory, on the other hand, failure to comply with it will not be fatal. Whether a particular provision is mandatory or merely directory must be determined by ascertaining the intention of the Legislature, to be gathered from the statute and its purpose; and in the cases on this point we must expect to find some conflicting decisions. The distinction may be illustrated by two Massachusetts cases. In Utley v. Union Tool Co.,[5] the alleged corporation was an association which had undertaken to assume corporate powers under a statute authorizing three or more persons, who had entered into "articles of agreement in writing" for the transaction of certain kinds of business, to organize in a manner prescribed by the statute, and thereby become a corporation. The court held that written articles of agreement were essential to constitute a corporation and that these articles must fix the amount of the capital stock,

[4] People v. Montecito Water Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172. In this case the statute required the articles of association, to be subscribed by five or more persons, and acknowledged by each. It was held that where five persons subscribed the articles, but only four persons acknowledged them, there was not a substantial compliance. For other cases on this point, see Clegg v. Hamilton & Wright Grange Co., 61 Iowa, 121, 15 N. W. 865; People ex rel. Weatherly v. Golden Gate Lodge No. 6, 128 Cal. 257, 60 Pac. 865. In State ex rel. Attorney General v. Central Ohio Mut. Relief Ass'n, 29 Ohio St. 399, it was held that a certificate of incorporation setting forth that "the manner of carrying on the business shall be such as the association shall from time to time prescribe by rules, regulations, and by-laws, not inconsistent with the laws of the state," was not a substantial compliance with a requirement that the certificate should show "the manner of carrying on the business of said association." And see In re Crown Bank, 44 Ch. Div. 634. Under a statute providing that a copy of the articles, verified under oath by two or more of the signers of the same, shall be recorded in the registry of deeds, the recording of the original was held not a substantial compliance. Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324. The act of the secretary of state in filing and recording articles not such as required by law is a nullity. Kinston & C. R. Co. v. Stroud, 132 N. C. 413, 43 S. E. 913.

[5] 11 Gray (Mass.) 139.

and set forth distinctly the purpose for which, and the place in which, the corporation was established. "There is an obvious reason," it was said, "for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings are to rest, and is designed to take the place of a charter act of incorporation, by which corporate rights and privileges are usually granted." On the other hand, in Newcomb v. Reed,[6] where an act of incorporation provided that the first meeting should be called by a majority of the persons named in the act of incorporation, and the call was signed by only one of the persons named, it was held that this provision was merely directory, and a failure to comply therewith did not prevent the corporation from coming into existence.[7] It did not relate to the essence of the thing to be done, but merely to the proper and orderly conduct of incidentals of organization.

Where the statute required that, ten days prior to the first meeting of the subscribers, notice of the meeting be given by mail to each of them, and in lieu thereof personal notice was given to each subscriber, the company was regarded as one de jure, since the provision was merely directory.[8] It was not for the benefit of the public, but merely for the benefit of the subscribers, and its benefit could be waived by them.

Present Grant with Conditions Subsequent—Conditions Precedent to Doing Business

Acts authorizing the formation of a corporation, and prescribing conditions precedent to its coming into existence, must be distinguished from acts creating a corporation, and giving it a present corporate existence, but prescribing conditions to be subsequently complied with. In the latter case, acceptance of the grant is all that is necessary to the creation of a corporation. Noncompliance with a condition subsequent does not affect the existence of the corporation, though it may be ground for a proceeding by the state to forfeit the charter. An act of the Legislature of Missouri (Laws 1856–57, p. 107), incorporating a railroad company, declared that

[6] 12 Allen (Mass.) 362.

[7] See, also, Walworth v. Brackett, 98 Mass. 96; Cross v. Pinckneyville Mill Co., 17 Ill. 54; Proprietors of City Hotel in Worcester v. Dickinson, 6 Gray (Mass.) 586, 593; Eakright v. Logansport & N. I. R. Co., 13 Ind. 404; Humphreys v. Mooney, 5 Colo. 282; Braintree Water Supply Co. v. Town of Braintree, 146 Mass. 482, 16 N. E. 420.

[8] Butler Paper Co. v. Cleveland, 220 Ill. 128, 77 N. E. 99, 110 Am. St. Rep. 230. And see Commercial Nat. Bank of Council Bluffs v. Gilinsky, 142 Iowa, 178, 120 N. W. 476, 134 Am. St. Rep. 406; Kwapil v. Bell Tower Co., 55 Wash. 583, 104 Pac. 824.

"a company is hereby created, called the 'St. Joseph & Iowa Railroad Company,'" and designated the first board of directors, but imposed no conditions precedent. It did provide, however, that the directors should meet and organize as a board of directors, and open books for subscriptions to stock, and fixed a time within which the company should commence and complete its road. It was held that these were merely conditions subsequent; that the act was a present grant of corporate powers; and that the corporation came into existence on acceptance of the charter.[9]

Conditions precedent to the formation of a corporation must be distinguished from conditions precedent to the right to engage in business after the corporation has been formed. The latter are conditions subsequent, a noncompliance with which, while it may give the state a right to maintain proceedings to forfeit the charter, does not, in the absence of such proceedings, in any way affect the legal existence of the corporation. The case of Harrod v. Hamer[10] illustrates this distinction. A statute of Wisconsin (Rev. St. 1858, c. 73, § 17) provided that, before any corporation organized thereunder should "commence business," the officers should cause the articles of association to be published in the papers, make a certificate setting forth the purpose for which the corporation was formed and certain other facts, and deposit the same with certain public officers. It was held that a failure to comply with these conditions did not affect the legal existence of the corporation.[11] "There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but are not made prerequisites to the assumption of corporate powers."[12]

[9] St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 582. See, also, Cheraw & C. R. Co. v. White, 14 S. C. 51; Toledo & Ann Arbor R. Co. v. Johnson, 49 Mich. 148, 13 N. W. 492. For other illustrations of conditions subsequent, see Boston Acid Mfg. Co. v. Moring, 15 Gray (Mass.) 211; Schenectady & Saratoga Plank-Road Co. v. Thatcher, 11 N. Y. 102; Merrick v. Reynolds Engine & Governor Co., 101 Mass. 381.

[10] 32 Wis. 162.

[11] See, also, In re Shakopee Mfg. Co., 37 Minn. 91, 33 N. W. 219; Baker v. Backus' Adm'r, 32 Ill. 79; Lord v. Essex Bldg. Ass'n No. 4, 37 Md. 320; Hammond v. Straus, 53 Md. 1, 11; Holmes v. Gilliland, 41 Barb. (N. Y.) 568; Hughesdale Mfg. Co. v. Vanner, 12 R. I. 491; Granby Mining & Smelting Co. v. Richards, 95 Mo. 106, 8 S. W. 246; Sparks v. Woodstock Iron & Steel Co., 87 Ala. 294, 6 South. 195; Portland & G. Turnpike Co. v. Bobb, 88 Ky. 226, 10 S. W. 794. But see Bigelow v. Gregory, 73 Ill. 197; Hurt v. Salisbury, 55 Mo. 311; Eisfeld v. Kenworth, 50 Iowa, 389.

[12] Mokelumne Hill Canal & Mining Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Hyde v. Doe, 4 Sawy. 133, Fed. Cas. No. 6,969; State v. Twin Vil-

Who may Object—Corporation de Facto—Estoppel

While conditions precedent must always be performed, in order that a corporation may have a legal existence, it does not follow that objection to the existence of a corporation on this ground can be raised by any and every person, and in every proceeding. The objection may always be raised by the state in a direct proceeding brought by it to test the right to corporate existence, as in quo warranto proceedings, or proceedings in the nature of quo warranto.[13] Even the state, however, cannot always raise the objection; and there are many cases in which private individuals cannot object at all, though in a direct proceeding by the state it might be held that there was no legal incorporation.[14]

We shall presently see, that if there has been a bona fide attempt to incorporate, under a law authorizing incorporation, and the law has been so far complied with as to make the association what is called a "corporation de facto," the only way in which its corporate existence can be questioned is in a direct proceeding by the state, brought for that purpose. Private individuals cannot raise the objection in such a case, either directly or indirectly, and nobody can raise the objection collaterally. If failure to comply with conditions precedent prevents the coming into existence of any corporation either de jure or de facto, then, on principle and in reason, the question may be raised collaterally as well as directly, and by private individuals as well as by the state, unless there is something to operate as an estoppel. When a private individual, therefore, raises the objection that conditions precedent have not been complied with, the question, in the absence of elements of estoppel, is whether or not there is a corporation de facto. If there is, he cannot object; otherwise, he can.

Where there is not even a corporation de facto, a private person may, according to many cases, be barred from raising the objection on the ground that he is estopped by his conduct, as by hav-

lage Water Co., 98 Me. 214, 56 Atl. 763. And see W. L. Wells Co. v. Gastonia Cotton Mfg. Co., 198 U. S. 177, 25 Sup. Ct. 640, 49 L. Ed. 1003, construing the Mississippi statute and making sharply the precise distinction noted in the text.

[13] Attorney General v. Hanchett, 42 Mich. 436, 4 N. W. 182; People v. Montecito Water Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172; State ex rel. Attorney General v. Central Ohio Mut. Relief Ass'n, 29 Ohio St. 399; People ex rel. Fraser v. Selfridge, 52 Cal. 331; People ex rel. Plumas County v. Chambers, 42 Cal. 201. It is unnecessary in quo warranto to discuss whether the corporation had become one de facto. Attorney General ex rel. Linnell v. Gay, 162 Mich. 612, 127 N. W. 814. The only question is whether it is one de jure.

[14] Post, p. 97 et seq.

ing dealt with the pretended corporation as a corporation, or by having held it out to the public as a legally constituted corporation.

There is much confusion, and some direct conflict, in the decisions, on the law governing corporations de facto, and on the question of estoppel to deny corporate existence. These questions will be discussed in the next chapter.[15]

AGREEMENT BETWEEN CORPORATORS AND CORPORATION

27. An agreement between the corporators and the corporation, creating a contractual relation between them, is essential to the creation of a private corporation.

It is essential to the existence of a private corporation that there shall be an agreement between the corporators and the corporation, creating a contractual relation between them. There can be no such thing as a corporation aggregate without members, and a person cannot become a member except by his own agreement or contract. Some writers and some of the cases say that there must be an agreement between the members, creating a contractual relation between them,[16] but this is inaccurate. There is ordinarily no contract between individual members in the formation of a corporation. The contract is between each individual member and the whole body of members in their collective capacity, represented by the corporation; that is, between each member and the corporation. A subscription for shares, for instance, in the organization of a corporation, is not a contract between the subscriber and the other subscribers individually, but it is a contract between each subscriber and the corporate body. This subject will be explained at length in a subsequent chapter.[17]

[15] Post p. 97.

[16] 1 Mor. Priv. Corp. § 24. And see Lauman v. Lebanon Val. R. Co., 30 Pa. 42, 72 Am. Dec. 685; Green v. Knife Falls Boom Corp., 35 Minn. 155, 27 N. W. 924.

[17] Post, p. 320.

WHO MAY BECOME CORPORATORS

28. Unless excluded by the statute, any person who has the capacity to enter into contracts may be a corporator.

29. If a statute provides that a certain number of persons may organize a corporation, the prescribed number of bona fide corporators is necessary.

Capacity of the Corporators

It is an implied term in every statute authorizing the formation of corporations, and not expressly providing otherwise, that the corporators shall be persons who are sui juris, and competent to enter into a valid contract, though the statute may in terms say nothing at all about their capacity.[18] Thus, it is implied that the corporators shall be of full age.[19]

Corporations are composed generally of natural persons in their natural capacity; but they may be composed of persons in their political and artificial capacity, as other corporations. In the time of Edward VI, a hospital corporation was established and chartered in England, composed of the mayor, citizens, and commonalty of London; and the same is true of a number of colleges, universities and hospitals, both in England and in this country.[20] The universities of Oxford and Cambridge are corporations composed of many colleges which are separate and distinct corporations. In some jurisdictions one business corporation is allowed to take shares in another.[21] It has been very generally held in this country, however, that, in the absence of express provision to that effect in the statute, a private business corporation cannot become a member of another corporation by subscribing for shares, as it is considered that public policy restricts the right to form a corporation to persons acting individually, and in their natural capacity.[22] This rule is not affected by the fact that the statute allows "persons" to incorporate; and that there is another statute declaring that the term "person" may be construed to include corporations as

[18] In re Globe Mut. Ben. Ass'n, 63 Hun, 263, 17 N. Y. Supp. 852, affirmed 135 N. Y. 280, 32 N. E. 122, 17 L. R. A. 547; Hamilton & Flamborough Road Co. v. Townsend, 13 Ont. App. R. 534, 16 Am. & Eng. Corp. Cas. 645.

[19] Id.

[20] Regents of University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 393, 31 Am. Dec. 72.

[21] Post, p. 183.

[22] Post, p. 183. See Denny Hotel Co. of Seattle v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130; Central R. Co. of New Jersey v. Pennsylvania R. Co., 31 N. J. Eq. 475.

well as individuals, as this does not require such a construction in all cases.[23]

A Tennessee statute providing generally for incorporation by petition to the chancery court was recently held to contemplate the incorporation only of actual persons, so that Methodist Episcopal church conferences could not associate for the purpose of incorporation.[24] The court said: "The conferences, whether incorporated or mere voluntary associations, were not competent to form an association with each other for the purpose of incorporation.

Unless the statute expressly requires that the individuals organizing a corporation shall be residents of the state, a corporation may be formed by nonresidents, and, in so far as that state is concerned, it can make no difference that the place of business of the corporation is to be in the state of the corporators' residence.[25] Whether or not the corporation will be recognized as valid by the latter state is a different question, and depends upon whether such an incorporation was an evasion of, and a fraud upon, its laws.[26] In most states a certain number of the corporators are required to be residents. Thus, in New York, at least two-thirds of them must be citizens of the United States and at lease one of them a resident of New York.[27]

Number of Corporators

Generally, the statutes authorizing the formation of corporations require expressly that there shall be at least a certain number of corporators, and such a requirement must be complied with. If less than the required number of persons attempt to organize under the statute, no corporation will come into existence.[28]

[23] Denny Hotel Co. of Seattle v. Schram, supra.

[24] State ex rel. College of Bishops of M. E. Church, South, v. Board of Trust of Vanderbilt University, 129 Tenn. 279, 164 S. W. 1151, especially page 1164.

[25] Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; Lancaster v. Amsterdam Improv. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322. Where citizens of one state desire to do business under a charter obtained in another state, whose laws seem to them more favorable than the laws of the state in which they reside, they may incorporate under the laws of that state by complying therewith. Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74. Cf. Wonderly v. Booth, 36 N. J. Law, 250.

[26] Demarest v. Flack, supra.

[27] General Corporation Law N. Y. (Consol. Laws, c. 23) § 4. As to proof of this, see In re Wendover Athletic Ass'n, 70 Misc. Rep. 273, 128 N. Y. Supp. 561.

[28] Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342; State v. Critchett, 37 Minn. 13, 32 N. W. 787. In the absence of fraud, the objection cannot be raised that six of the seven required stockholders are "straw" men, hav-

In a recent Missouri case, the incorporators "were merely the employés about the building wherein was located the office of the lawyer who prepared the articles of incorporation." The court decided that the corporation was not invalidated by this circumstance that the original incorporators were not the substantial owners, but mere "dummies" so to speak.[29]

It is safe to say that in few states is there to-day a statute authorizing a single individual to form himself into a corporate body, and thus change his status and liabilities in business transactions.[30] It must not be supposed, however, that the state has no power to constitute a single person a private corporation. The state may, if the Legislature sees fit, and there are no constitutional restrictions, grant a charter, as a private business corporation, to one man alone, and leave it optional with him whether he will associate other persons with him, or have succession without doing so. In such a case it was said: "The grant being to one person, * * * the inference necessarily is that it was the intention of the Legislature to permit that one person or his successor to exercise all the corporate powers, and to make his acts, when acting upon the subject-matter of the corporation, and within its sphere of action and grant of power, the acts of the corporation." [31] A statute is not to be construed as authorizing a single individual to form and become a corporation, unless such an intention on the part of the Legislature is clear. Thus, it has been held that one person alone cannot organize a corporation under a statute authorizing "any number of persons" to associate themselves and become incorporated; since it is against the policy and intent of the law to permit a single individual to conduct his business in the name of and as a corporation, so as to exempt himself from the liabilities of other natural persons.[32] On the other hand, the House of Lords has distinctly recognized the validity of the so-called "one-man company." [33]

ing no real interest. Salomon v. Salomon & Co., 13 Times L. R. 46, L. R. [1897] Appeal Cas. 22, reversing Broderip v. Salomon, L. R. [1895] 2 Ch. 323, 72 L. T. Rep. 755. Ante, p. 57.

[29] State v. Miner, 233 Mo. 312, 135 S. W. 483; Salomon v. Salomon & Co., supra. But compare, Donovan v. Purtell, 216 Ill. 629, 75 N. E. 334, 1 L. R. A. (N. S.) 176.

[30] But, in Iowa, apparently there is such a statute. Code 1897, § 1608. See Parker's Corporation Manual (16th Ed.) p. 351. And see Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 9.

[31] Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656. And see Day v. Stetson, 8 Greenl. (Me.) 365.

[32] Louisville Banking Co. v. Eisenman, 94 Ky. 83, 21 S. W. 531, 1049, 19 L. R. A. 684, 42 Am. St. Rep. 335; Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336.

[33] Salomon v. Salomon & Co., L. R. [1897] App. Cas. 22, reversing Brod-

Where a corporation is legally organized by the requisite number of persons, the fact that one person thereafter becomes the owner of all the shares does not dissolve it.[84]

PURPOSE OF INCORPORATION

30. Since legislative authority is essential to a valid incorporation the purpose for which a corporation is formed must come within the purposes authorized by the statute.

Since there can be no valid incorporation without legislative authority, it follows that the object of a proposed corporation must be such as the statute authorizes. The question always is whether the object is or is not authorized.[85]

The difficulty in this connection, and the only difficulty, is in determining, on a construction of the statute, whether the purpose of particular associations, as set forth in the articles of association or certificate, is within the statute. Some cases are very clear. Thus, there can be no doubt but that a statute authorizing corporations for manufacturing purposes does not authorize a corporation for banking, or for constructing and operating a railroad. Sometimes, however, the construction of the statute and application of the rule is difficult. A statute authorizing the formation of corporations "for buying, selling, exchanging and dealing in all kinds of property, real or personal, or both," is very broad. Perhaps it might be held to authorize a manufacturing or banking corporation; but it does not authorize a corporation "to encourage frugality and economy in its members; to create, husband, and distribute funds from monthly installments, dues, or investments from its members; to purchase, take, hold, sell, convey, lease, rent, and mortgage real estate and personal property; to loan surplus accumulations; and to carry on and conduct a general investment business"—for the primary object of such an association is to obtain money from its members, and the disposal of the money ob-

erip v. Salomon, L. R. [1895] 2 Ch. 323; Gramophone & Typewriter, Limited, v. Stanley, L. R. [1906] 2 K. B. 856, affirmed L. R. [1908] 2 K. B. 89. And see Werner v. Hearst, 177 N. Y. 63, 69 N. E. 221.

[84] Post, p. 294.

[85] State ex rel. Lederer v. International Inv. Co., 88 Wis. 512, 60 N. W. 796, 43 Am. St. Rep. 920; People ex rel. Kasson v. Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124; Indiana Bond Co. v. Ogle, 22 Ind. App. 593, 54 N. E. 407, 72 Am. St. Rep. 326; Dittman v. Distilling Co. of America, 64 N. J. Eq 537, 54 Atl. 570; Johnston v. Townsend, 103 Tex. 122, 124 S. W. 417.

tained by it is merely an incidental or secondary object.[86] Nor, for the same reason, is such a corporation authorized by a statute providing for the formation of corporations "for loaning money on securities or otherwise," or "for the maintenance of any benevolent or charitable institution." [87] Other decisions are given below.[88]

[86] Id. [87] Id.

[88] A corporation to build and maintain an opera house and lecture hall is authorized by a statute allowing incorporation for the support of any educational or literary undertaking, or for the promotion of music or other fine arts. Seymour Opera-House Co. v. Wooldridge (Tex. Civ. App.) 31 S. W. 234. A statute authorizing the formation of a corporation for the transaction of any manufacturing or mining business does not authorize incorporation for two businesses—one of manufacturing and the other of mining. Johnston v. Townsend, 103 Tex. 122, 124 S. W. 417. A statute allowing corporations to carry on an "industrial pursuit" authorizes corporations to carry on the express business, Wells, Fargo & Co. v. Northern Pac. R. Co. (C. C.) 23 Fed. 469; or a mercantile business for the sale of goods, Agua Fria Copper Co. v. Bashford-Burmister Co., 4 Ariz. 203, 35 Pac. 983; Carver Mercantile Co. v. Hulme, 7 Mont. 566, 19 Pac. 213. Under a statute allowing corporations for any lawful enterprise, business, pursuit, or occupation, a corporation may be formed to guaranty the bonds of a university. Maxwell v. Akin (C. C.) 89 Fed. 178. A statute authorizing "manufacturing" companies includes electric light and gas companies. Beggs v. Edison Electric Illuminating Co., 96 Ala. 295, 11 South. 381, 38 Am. St. Rep. 94; Nassau Gaslight Co. v. City of Brooklyn, 89 N. Y. 409; People ex rel. Brush Electric Mfg. Co. v. Wemple, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708. But see Com. v. Northern Electric Light & Power Co., 145 Pa. 105, 22 Atl. 839, 14 L. R. A. 107. "Manufacturing" includes the production of ice by artificial means, but it has been held that it does not include the collection, storage, preparation for market, and transportation of naturally formed ice. People v. Knickerbocker Ice Co., 99 N. Y. 181, 1 N. E. 669. Contra, Attorney General v. Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287. It also includes the manufacture of lumber, flour, and meal. Cross v. Pinckneyville Mill Co., 17 Ill. 54. A statute authorizing corporations for "manufacturing" purposes does not authorize a corporation for the purpose of carrying on a manufacturing business, and also another and independent business not properly incident to or connected with manufacturing. State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510. A statute authorizing corporations "for the erection of buildings" was held to authorize corporations for erecting buildings as a business only. People v. Troy House Co., 44 Barb. (N. Y.) 625. In Guadalupe & S. A. R. Stock Ass'n v. West, 70 Tex. 391, 7 S. W. 817, it was held that a corporation organized to protect the personal property of its members from violence, theft, etc., to raise money for necessary expenses by assessments, and confer with the state officers, employ counsel, police, and detectives, when necessary to the prosecution of criminals, though somewhat novel and peculiar, was authorized by a statute providing that private corporations might be formed for mutual profit or benefit, not inconsistent with the constitution and laws of the state. That an educational institution is not a corporation "for pecuniary profit," though fees are charged for tuition, see Santa Clara Female Academy v. Sullivan, 116

Where the object of an attempted incorporation cannot be brought within any of the purposes specifically mentioned in the statute, it is often sought to sustain the incorporation under a general clause contained in the statutes of most states. The construction of such clauses has given rise to conflicting decisions. In Wisconsin, a statute (Rev. St. 1878, § 1771), after specifying certain purposes for which corporations might be formed, added the general clause, "or for any lawful business or purpose whatever." The Wisconsin court, construing this clause held that, "by a well-settled rule of construction, these general words extend only to things of a kindred nature to those specifically authorized by the section. 'Noscitur a sociis.' Any other construction would enable parties, by mere agreement, to form a corporation for any conceivable 'business or purpose whatever,' not in violation of law. Certainly the Legislature never intended to grant such unlimited authority." [39] This construction is certainly questionable.

A better decision was made by the Missouri court in construing a general clause which authorized the formation of corporations "for any other purpose intended for pecuniary profit or gain not otherwise specially provided for, and not inconsistent with the Constitution and laws of this state." Rev. St. 1889, § 2771, subd. 11. It was held that this authorized a corporation as the words of the clause imported, and should not be construed and limited to corporations of the kind specially mentioned in the preceding clauses.[40] And it has been held that a statute authorizing corporations "for mining, manufacturing, and other industrial pursuits" did not limit the purpose to such industrial pursuits as mining and manufacturing, but extended to the express business, or any other industrial pursuit.[41] There are many other cases in which the stat-

Ill. 375, 6 N. E. 183, 56 Am. Rep. 776. A "mutual reliance society," constituted for pecuniary gain cannot be formed under an act for the incorporation of benevolent, charitable, scientific, and missionary societies. People v. Nelson, 46 N. Y. 477. In Virginia it was recently held that a charter of incorporation may be granted to an association of persons to conduct any business that an individual may lawfully conduct. Hanger v. Com., 107 Va. 872, 60 S. E. 67. As to the purposes for which corporations may be formed, see, generally, 10 Cyc. pp. 160–165.

[39] State ex rel. Lederer v. International Inv. Co., 88 Wis. 512, 60 N. W. 798, 43 Am. St. Rep. 920. Even under this construction, it is held that a statute authorizing the formation of corporations for the purpose of building and operating telegraph lines, or for any other lawful business, etc., authorizes a corporation for building and operating a telephone line, as that is of a kindred nature. Wisconsin Tel. Co. v. City of Oshkosh, 62 Wis. 32, 21 N. W. 828.

[40] State ex rel. Walker v. Corkins, 123 Mo. 56, 27 S. W. 363.

[41] Wells Fargo & Co. v. Northern Pac. R. Co. (C. C.) 23 Fed. 469, 474.

ute has been similarly construed.[42] The question in all cases is what was the intention of the Legislature, and not what, in the opinion of the court, the Legislature ought to have intended.

In Texas it was recently decided that an automobile club could not be formed under a statute permitting the formation of bicycle clubs and other innocent sports. The court's theory was that bicycling as a distinct sport was alone intended and that the rule of ejusdem generis did not apply.[43] The dissenting opinion aptly characterized the result reached by the majority as "strained and very technical."

Formation for Unlawful Purposes

The formation of a corporation is not permitted where the real purpose of the corporation is to cloak an illegal object or an unlawful business; and in such case the existence of the corporation as a legal entity will be disregarded, and the acts of the real parties dealt with as if no corporation had been formed.[44] Thus, where a corporation was organized in another state and a claim then was transferred to it, for the sole purpose of invoking the jurisdiction of the federal courts on the ground of diversity of citizenship, the scheme failed and the suit was not entertained.[45]

A corporation formed by the various manufacturers and sellers of a product, for the purpose of getting control of the manufacture and sale of the product, so as to stifle competition, and control the supply and price, is illegal, as being contrary to public policy, because it creates a monopoly, and is in restraint of trade. In Distilling & Cattle Feeding Co. v. People,[46] in which quo warranto proceedings were brought against the defendant corporation to oust it from the exercise of corporate franchises, it appeared that a trust combination was organized in order to obtain control of

[42] York Park Bldg. Ass'n v. Barnes, 39 Neb. 834, 58 N. W. 440; National Bank of Jefferson v. Texas Investment Co., 74 Tex. 421, 12 S. W. 101; Brown v. Corbin, 40 Minn. 508, 42 N. W. 481; Vokes v. Eaton, 119 Ky. 913, 85 S. W. 174, 27 Ky. Law Rep. 358.

[43] Smith v. Wortham, 106 Tex. 106, 157 S. W. 740.

[44] First Nat. Bank of Chicago v. Trebein Co., 59 Ohio St. 316, 52 N. E. 834; United States v. Milwaukee Refrigerator Transit Co. (C. C.) 142 Fed. 247; Higgins v. California Petroleum & Asphalt Co., 147 Cal. 363, 81 Pac. 1070; Donovan v. Purtell, 216 Ill. 629, 75 N. E. 334, 1 L. R. A. (N. S.) 176; In re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530. And see United States v. Northern Securities Co. (C. C.) 120 Fed. 721; Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. See 10 Cyc. 161, and article by I. Maurice Wormser, 12 Columbia Law Rev. 496 (June, 1912).

[45] Miller & Lux v. East Side Canal & Irrigation Co., 211 U. S. 293, 29 Sup. Ct. 111, 53 L. Ed. 189.

[46] 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200.

the manufacture and sale of distillery products, by purchasing the stock of various distillery companies, and placing it in the hands of trustees. The trust combination was then changed into the defendant corporation, which was organized, owned, and controlled by the trustees of the combination, and all the property controlled by the combination was transferred to it. The corporation was held illegal, as creating a monopoly, and was ousted from the exercise of corporate franchises.[47]

The Supreme Court of the United States recently ignored the form of corporate organization where it had been resorted to in an endeavor to evade a federal statute. The so-called "commodities clause" of the Hepburn Act (Act Cong. June 29, 1906, c. 3591, 34 Stat. 585 [U. S. Comp. St. 1913, § 8563, par. 6]), makes it unlawful for any railroad company to transport in interstate commerce any article "manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect." The government's bill alleged that the Lehigh Valley Railroad Company owned substantially all of the stock in a coal company whose coal it was transporting, and that the railroad company had organized and was using, the coal company simply as a dummy device and a cloak in order to circumvent the provisions of the "commodities clause." The Supreme Court held that no such evasion could succeed, that the fraudulent intent and purpose vitiated the entity existence of the coal company, and that, as Chief Justice White said, the two corporations were "one for all purposes." [48]

So a corporation formed by its promoters through fraudulently procuring a certificate of incorporation is held a nullity; Johnson, J., saying: "A certificate of incorporation procured by fraud prac-

[47] See, also, People v. North River Sugar-Refining Co., 121 N. Y. 587, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; People ex rel. Peabody v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; State v. Nebraska Distilling Co., 29 Neb. 700, 46 N. W. 155; People v. Milk Exchange, 145 N. Y. 269, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609; Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189; State v. Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 126, 623, 136 Am. St. Rep. 514. Post, p. 301.

[48] U. S. v. Lehigh Valley R. R. Co., 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458. Cf. U. S. v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836. A corporation is not illegal, unless its end in view or the means which it proposes to employ to attain that end are illegal. New York Motion Picture Co. v. Universal Film Mfg. Co., 77 Misc. Rep. 581, 137 N. Y. Supp. 278.

ticed on the state officers, as in the present instance, will be treated as so much waste paper, and the courts will refuse to acknowledge that an artificial infant of such parentage ever was born." [49] And the rule is and should be, the same where the sole object of organizing the corporation is improperly to evade a statute, consummate a fraud, achieve or perpetuate monopoly, or hinder and delay creditors, as has been already seen.

A corporation cannot be formed to practice law nor to hire lawyers to carry on the practice of law for it,[50] nor can it organize to practice medicine or dentistry by hiring doctors or dentists to act for it.[51]

And in Illinois it is the rule that a corporation cannot be created to acquire and hold real estate,[52] though it may hold such amount of land as is essential to carry out its authorized objects. But a corporation cannot be formed in Illinois to buy and sell real estate, to operate therein, or to erect and maintain an office building for tenants. In most states, the law is wisely otherwise.

[49] Todd v. Ferguson, 161 Mo. App. 624, 144 S. W. 158. And see Stockton v. Central R. Co. of New Jersey, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716, per Pound, C.

[50] In re Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879; In re Associated Lawyers' Co., 134 App. Div. 350, 119 N. Y. Supp. 77; In re Bensel, 68 Misc. Rep. 70, 124 N. Y. Supp. 726; In re City of New York, 144 App. Div. 107, 128 N. Y. Supp. 999. Cf. In re Creditor's Audit & Adjustment Ass'n, 72 Misc. Rep. 461, 131 N. Y. Supp. 263.

[51] People v. John H. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697; Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429; State Electro-Medical Institute v. State, 74 Neb. 40, 103 N. W. 1078, 12 Ann. Cas. 673. In authorizing the formation of corporations for "any lawful business," the Legislature does not intend to include the learned professions.

[52] Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. 167; People ex rel. v. Shedd, 241 Ill. 155, 89 N. E. 332; People ex rel. v. Cowan, 247 Ill. 357, 93 N. E. 349; Walker v. Taylor, 252 Ill. 424, 96 N. E. 1055.

CORPORATE NAME

32. A corporation must have a corporate name.

33. Ordinarily the corporators may select any name they choose. But—

(a) Sometimes there are statutory restrictions in this respect, and the statute must be complied with.

(b) By the common law, and by statute in some states, a corporation may not adopt the same, or substantially the same, name as that of another corporation chartered or authorized to do business by the same state.

34. A corporation may acquire a name by user or reputation and it may thus be known by several names.

35. When a name has been given to a corporation in its creation, it cannot be changed without legislative authority.

As was stated in explaining the attributes of a corporate body, it is essential to the existence of such a body that it shall have some name by which it may be known and have succession, and under which it can contract and sue and be sued.[53]

Ordinarily, in organizing a corporation, the corporators may select any name they choose for the body, but in some states the choice is to some extent limited by statute. In Connecticut it was, and is perhaps still, required that the name of every corporation organized under the general laws shall commence with the word "The" and end with the word "Company" or "Corporation." A Kentucky statute provides that every corporation doing business in the state shall print or paint upon its principal place of business its corporate name, and immediately thereunder the word "Incorporated." Defendant painted upon its place of business its corporate name and immediately following it the letters "Inc." This was held, with questionable soundness, not to be a compliance with the statute.[54] A recent amendment to the New York General Cor-

[53] Ante, p. 18. "The names of corporations are given of necessity, for the name is, as it were, the very being of the Constitution; for, though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts; for it is nobody to plead and be impleaded to take and give, until it hath gotten a name." 2 Bac. Abr. tit. "Corporations," c. 1. "The identity of name is the principal means for effecting that perpetuity of succession, with members frequently changing, which is an important purpose of incorporation." Reg. v. Registrar, 10 Q. B. 839.

[54] Com. v. American Snuff Co., 125 Ky. 350, 101 S. W. 364, 30 Ky. Law Rep.

poration Law provides that no corporation, except a religious or charitable corporation, shall "be authorized to do business in this state unless its name has such word or words, abbreviation, affix or prefix, therein or thereto, as will clearly indicate that it is a corporation as distinguished from a natural person, firm or copartnership." Under this statute, an application of the "American Cigar Lighter Company" for leave to change its name to the "Electric Cigar Lighter Company" was recently denied.[55] Justice Delany said: "Colloquially used, 'company' imports 'corporation'; but does it necessarily involve that meaning in law? I think not, for we know that such a word is frequently used by individuals and partnerships, even though subject to certain statutory requirements. The law in question is designed to cover just such instances." And in many jurisdictions the use of the word "Limited" in conjunction with the corporate name is made a requisite, in order to apprise persons in general of the circumstance that there exists only corporate liability. This seems proper and desirable legislation, since it apprises all desiring to enter into business relations with the associates of their limitation of all personal liability.

Name of Another Corporation

In some states it is expressly provided by statute that no corporation shall adopt the same name that is being used at the time by another corporation.[56] This, or a similar provision, it has been held, prevents the selection of a name that is substantially, though not exactly, the same as that of another corporation.[57]

1373. A corporation having more than one principal place of business must comply with the statute at each place. Com. v. Nebo Consol. Coal & Coking Co., 141 Ky. 493, 133 S. W. 221.

[55] In re American Cigar Lighter Co., 77 Misc. Rep. 643, 138 N. Y. Supp. 455, interpreting General Corporation Law N. Y. (Consol. Laws, c. 23) § 6, as amended by Laws 1911, c. 638, and Laws 1912, c. 2. But see Report of Attorney-General N. Y., Jan. 8, 1912, holding that the use of the word "Company" in a corporate name, not immediately preceded by the word "and," is a sufficient compliance.

[56] See Elgin Butter Co. v. Elgin Creamery Co., 155 Ill. 127, 40 N. E. 616; State v. McGrath, 92 Mo. 355, 5 S. W. 29; Illinois Watch Case Co. v. Pearson, 140 Ill. 423, 31 N. E. 400, 16 L. R. A. 429; Corning Glass Works v. Corning Cut Glass Co., 197 N. Y. 173, 90 N. E. 449.

[57] Thus, it was held that, where there was a corporation by the name of "Kansas City Real Estate and Stock Exchange," the secretary of state would not be compelled by a writ of mandamus to issue a certificate of incorporation to the "Kansas City Real Estate Exchange." State v. McGrath, supra. The Supreme Court of Illinois, however, held that such a statute did not prevent the incorporation of the "Elgin Butter Company" and the "Elgin Creamery Company." Elgin Butter Co. v. Elgin Creamery Co., supra. The "Corning Glass Works" was refused an injunction to prevent the use by the de-

At common law, and independently of any statute, a corporation has an exclusive right to the use of its name, and it will be protected by a court of equity, by injunction, against its use by another corporation. "The name of a corporation is a necessary element of its existence, and, aside from any statute, the right to its exclusive use will be protected upon the same principles that persons are protected in the use of trade-marks." [58]

In North Carolina it was recently held that a corporation did not acquire by the mere adoption of a corporate name the exclusive right to use the same, or such a property right therein as would be protected by injunction in the absence of actual user.[59] The court said: "The property right in the name of a corporation, as in a trade-mark, is acquired, not simply by adoption, but by using it." On the other hand, it has been decided that the purchaser of a corporation's property and franchises, thereby acquiring its good will and the right to use its name, was entitled to enjoin another corporation from using the name, although the purchaser had never made any use whatever thereof.[60]

Where it is found that a name adopted by a corporation is so nearly similar to that of a prior corporation engaged in the same line of business as to constitute unfair competition, the equity court should require that the name be changed so as to clearly and unmistakably distinguish the two corporations. It should not permit the use of the same name with only qualifying words to show that the second company is a different one, as this might still be deceptive to the public.[61] A recent decision of the United States Supreme Court is difficult to reconcile with this principle. The

fendant of the name "Corning Cut Glass Company," since one was in the business of glass manufacturing and the other in the distinct business of the manufacture of cut glass. Corning Glass Works v. Corning Cut Glass Co., supra.

[58] State v. McGrath, 92 Mo. 355, 5 S. W. 29; Newby v. Oregon Cent. Ry. Co., Deady, 609, Fed. Cas. No. 10,144; Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324; R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 17 C. C. A. 579, 70 Fed. 1017; Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; Red Polled Cattle Club of America v. Red Polled Cattle Club of America, 108 Iowa, 105, 78 N. W. 803; Rome Machine & Foundry Co. v. Davis Foundry & Machine Works, 135 Ga. 17, 68 S. E. 800. See 10 Cyc. 151.

[59] Blackwell's Durham Tobacco Co. v. American Tobacco Co., 145 N. C. 367, 59 S. E. 123.

[60] Metropolitan Telephone & Telegraph Co. v. Metropolitan Telephone & Telegraph Co., 156 App. Div. 577, 141 N. Y. Supp. 598.

[61] L. Martin Co. v. L. Martin & Wilckes Co., 75 N. J. Eq. 39, 71 Atl. 409, reversed 75 N. J. Eq. 257, 72 Atl. 294, 21 L. R. A. (N. S.) 526, 20 Ann. Cas. 57; Longenecker v. Longenecker Bros. (Sup.) 140 N. Y. Supp. 403.

"L. E. Waterman Company" had an established fountain pen business. An individual, one A. A. Waterman, had a similar small and unsuccessful one. Defendant corporation, The "Modern Pen Company," bought out the business of A. A. Waterman for the sole and express purpose of employing in its fountain pen business the name of "Waterman." The court held that the "L. E. Waterman Company" was not entitled to relief beyond requiring the defendant to state, "Not connected with the L. E. Waterman Company." [62] The result reached seems unfortunate and justly open to criticism.

A foreign corporation authorized to do business may enjoin the use unfairly of its name by a domestic corporation. Thus the "United States Lighting & Heating Company," a Maine corporation, was held entitled to restrain the use of an identical name by a company organized under the laws of New York.[63]

The right to relief against unfair and misleading use of a corporate name extends to benevolent, charitable, social, and fraternal corporations, as well as to those organized for pecuniary profit.[64] Thus, the "Benevolent and Protective Order of Elks" was held entitled to restrain the use of the name "Improved Benevolent and Protective Order of Elks of the World" by a negro organization.[65]

[62] L. E. Waterman Co. v. Modern Pen Co., 235 U. S. 88, 35 Sup. Ct. 91, 59 L. Ed. 142.

[63] United States Light & Heating Co. v. United States Light & Heating Co. of New York (C. C.) 181 Fed. 182. And see Goddard v. American Peroxide & Chemical Co., 67 Misc. Rep. 279, 122 N. Y. Supp. 360.

[64] Daughters of Isabella No. 1 v. National Order, Daughters of Isabella, 83 Conn. 679, 78 Atl. 333, Ann. Cas. 1912A, 822; Emory v. Grand United Order of Odd Fellows, 140 Ga. 423, 78 S. E. 922; International Committee of Y. W. C. A. v. Y. W. C. A. of Chicago, 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888; People ex rel. Felter v. Rose, 225 Ill. 496, 80 N. E. 293 (mandamus refused since public might be misled); Salvation Army in U. S. v. American Salvation Army, 135 App. Div. 268, 120 N. Y. Supp. 471; Id., 141 App. Div. 931, 126 N. Y. Supp. 1145; San. Francisco Oyster House v. Mihich, 75 Wash. 274, 134 Pac. 921 (use of similar name enjoined, though defendants acted innocently in taking it); see notes, 8 Col. Law Rev. 514, 9 Col. Law Rev. 334. Where a Massachusetts corporation assumed a name similar to that of a New York corporation, without objection from any one, an injunction does not lie to prevent its continued use. Council of Jewish Women v. Boston Section, Council of Jewish Women, 212 Mass. 219, 98 N. E. 862. Where "the words are all generic in character and of common use" relief will be denied. New Thought Church v. Chapin, 159 App. Div. 723, 144 N. Y. Supp. 1026.

[65] Benevolent & Protective Order of Elks v. Improved Benevolent & Protective Order of Elks of the World, 205 N. Y. 459, 98 N. E. 756, Ann. Cas. 1913E, 639, modifying judgment 136 App. Div. 896, 120 N. Y. Supp. 1113. See, also, Benevolent & Protective Order of Elks of the United States of

A corporation was organized in New York in 1892 under the name of "The Society of the War of 1812" for the purpose of commemorating that war and for other patriotic objects. In 1896 another corporation was organized in New York under the name of "The Society of the War of 1812 in the State of New York." The similarity of the names tended to breed confusion and to affect injuriously the conduct of the affairs of the older corporation. Neither corporation had any power to engage in any commercial business or trade. The older corporation succeeded in an action brought to restrain the other from using the words "The Society of the War of 1812" as part of its corporate name.[66] A similar decision was rendered in New Jersey where defendant corporation, the "Cape May Yacht & Country Club," formed by seceding members from complainant corporation, the "Cape May Yacht Club," adopted the similar name and a pennant differing only in the color of one star.[67]

Acquisition by User and Reputation

Generally, a name is given to a corporation when it is created, whether by a special act or under a general law. If this is not done, however, it may, in the absence of statutory regulations, acquire a name by user or by reputation;[68] and it has been held that it may thus be known by several names,[69] and contract accordingly, and that contracts so entered into are valid when unaffected by fraud.[70] The proper test is whether in the particular transaction the name is used in good faith by the company adopting it as descriptio personæ. However, a lower court in New York decided recently that a corporation bearing the name of the "Scarsdale Publishing Company—The Colonial Press" cannot use in contracting only part of the name given to it, and that a contract sign-

America v. Improved Benevolent & Protective Order of Elks of the World, 122 Tenn. 141, 118 S. W. 389.

[66] Society of the War of 1812 v. Society of the War of 1812 in the State of New York, 46 App. Div. 568, 62 N. Y. Supp. 355.

[67] Cape May Yacht Club v. Cape May Yacht & Country Club, 81 N. J. Eq. 454, 86 Atl. 972.

[68] Dutch West India Co. v. Van Moses, 1 Strange, 612; Anon., 3 Salk. 102; Smith v. Tallassee Branch of Central Plank Road Co., 30 Ala. 650; South School Dist. v. Blakeslee, 13 Conn. 227; Sykes v. People, 132 Ill. 32, 23 N. E. 391.

[69] Anon., 3 Salk. 102; Minot v. Curtis, 7 Mass. 441; Society for Propagating the Gospel v. Young, 2 N. H. 310; Ferry v. Cincinnati Underwriters, 111 Mich. 261, 69 N. W. 483.

[70] William Gilligan Co. v. Casey, 205 Mass. 26, 91 N. E. 124; Standard Distilling & Distributing Co. v. Springfield Coal Mining & Tile Co., 146 Ill. App. 144.

ed in the name of "The Colonial Press" does not bind the corporation.[71] No fraud appeared. The decision is unduly technical.

Change of Name

Where a name has been given to a corporation in its creation, it cannot, unless authorized by statute, change its name, either directly, as by resolution, or indirectly, by the use of another.[72] Such a change must be made, if at all, under legislative authority, and the statute must be complied with.[73] Any act which provides that an existing corporation shall or may change its name, changes, in an essential particular, the organic law of such corporation, and is therefore an amendment of its charter, and subject to all the rules relating to amendments.[74] A change of its name does not change the identity of the corporation, or affect its liability previously created or its title to property.[75] It is not in any sense the creation of a new corporation, and therefore the change may be authorized by a special act without violating the constitutional provision that corporations shall be created only under general law.[76]

In changing its name a corporation must not propose to use a name so closely resembling the name of another corporation that its adoption would tend to deceive the public to the injury of the latter corporation. However, evidence as to the practical cessation of business on an active scale by the latter corporation is competent on the issue of deception and injury.[77] Thus, where the "Los Angeles Trust Company" applied for leave to change its name to the "Los Angeles Trust & Savings Bank," proposing to conduct a savings bank as well as a trust department, and the "Los Angeles Savings Bank," which had transferred practically all its business to another bank and took no new business and had only a small amount on deposit, resisted the application on the ground that the proposed name too closely resembled its own, the application was allowed.[78]

[71] Scarsdale Pub. Co. v. Carter, 63 Misc. Rep. 271, 116 N. Y. Supp. 731.

[72] Sykes v. People, 132 Ill. 32, 23 N. E. 391; Reg. v. Registrar, 10 Q. B. 839. Cf. Richards v. Minnesota Savings Bank, 75 Minn. 196, 77 N. W. 822.

[73] In New York the court is authorized to grant a corporation an order to change its name where it appears "that there is no reasonable objection." This leaves the question whether a change shall be allowed within the discretion of the court. In re United States Mercantile Reporting & Collecting Agency, 115 N. Y. 176, 21 N. E. 1034.

[74] Sykes v. People, 132 Ill. 32, 23 N. E. 391.

[75] Girard v. Philadelphia, 7 Wall. (U. S.) 1, 19 L. Ed. 53; South Carolina Mut. Ins. Co. v. Price, 67 S. C. 207, 45 S. E. 173; Wilhite v. Convent of Good Shepherd, 117 Ky. 251, 78 S. W. 138, 25 Ky. Law Rep. 1375.

[76] Ante, p. 45.

[77] In re Los Angeles Trust Co., 158 Cal. 603, 112 Pac. 56. [78] Id.

Effect of Misnomer

Misnomer of a corporation in a bond, note, or other deed or contract, does not vitiate it; but the corporation may sue or be sued thereon in its true name, with an allegation and proof that it is the party intended. Nor will a grant to or by a corporation be avoided because of a misnomer. And a devise or legacy to a corporation is good if the corporation is so described that it can be identified. In all of these cases parol evidence is admissible to explain the ambiguity and identify the corporation.[79]

In legal proceedings, corporations must be correctly named. In a suit against a corporation, a misnomer not in substance is ground for plea in abatement; but if the corporation appears, and does not plead in abatement, it cannot afterwards object. If the misnomer is substantial, the proceedings will not affect the corporation. The same principle applies to criminal prosecutions, to writs of execution, mandamus, etc., and to judgments, against a corporation.[80]

RESIDENCE AND CITIZENSHIP OF CORPORATIONS

36. A corporation has no legal existence beyond the boundaries of the state by which it was created. In so far as it can be a citizen, resident, or inhabitant, it is a citizen, resident, or inhabitant of that state, and of that state only, though it may do business in another.

37. Where corporations are formed by corresponding legislation in different states—as where corporations of different states are consolidated under similar acts in each state, or where one state makes a corporation of another state, as there conducted, a corporation of its own—the legal effect is that there is a separate corporation in each state.

38. An act merely recognizing a foreign corporation, and allowing it to do business in the state, is a mere license, and not a charter, and does not change its character as a foreign corporation.

[79] Hager's-Town Turnpike Road Co. v. Creeger, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495; President, etc., of Berks & Dauphin Turnpike Road v. Myers, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402; President, etc., of Mount Palatine Academy v. Kleinschnitz, 28 Ill. 133; Medway Cotton Manufactory v. Adams, 10 Mass. 360; President, etc., of Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; New York Institution for the Blind v. How's Ex'rs, 10 N. Y. 84; Society for Propagating the Gospel v. Young, 2 N. H. 310; 1 Thomp. Corp. §§ 294, 295.

[80] See McGary v. People, 45 N. Y. 155; Glass v. Turnpike Co., 32 Ind. 376;

A corporation, as we have seen, has an individuality separate from that of the members who compose it. It acts and is regarded, for many purposes, as a distinct person, having many of the rights, and being subject to many of the liabilities, of natural persons. It is important, therefore, to determine the residence or citizenship of corporations. The question has generally arisen in connection with the question of jurisdiction of suits by and against corporations in the federal courts, but it may arise in many other ways.

Domicile—Residence—Habitat

"A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." [81] It may therefore be stated as a rule that a corporation has its domicile in the state which created it, and that it cannot acquire a domicile in another state, although it may have an office and do business there.[82] Thus

Woodrough & Hanchett Co. v. Witte, 89 Wis. 537, 62 N. W. 518; Precious Blood Soc. v. Elsythe, 102 Tenn. 40, 50 S. W. 759; 1 Thomp. Corp. §§ 290–293.

[81] "In Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 588, 10 L. Ed. 274, Chief Justice Taney said: 'It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting to another.' This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it." Shaw v. Quincy Min. Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768, per Gray, J. Post, p. 758. In England, the theory that a corporation cannot exist outside the state of its creation seems no longer to be held. A foreign corporation, doing business in England, it seems, may be sued without its consent. Newby v. Van Oppen, L. R. 7 Q. B. 293; La Bourgogne, [1899] A. C. 431. And it is a person residing in the kingdom within the meaning of the income tax act. De Beers, etc., Mines, Ltd., v. Howe, [1906] A. C. 455.

[82] Germania Fire Ins. Co. v. Francis, 11 Wall. (U. S.) 210, 20 L. Ed. 77; Olson v. Buffalo Hump. Min. Co. (C. C.) 130 Fed. 1017; Chafee v. Fourth Nat. Bank of New York, 71 Me. 514, 36 Am. Rep. 345; Baltimore & O. R. Co. v. Glenn, 28 Md. 287, 92 Am. Dec. 688; Merrick v. Van Santvoord, 34 N. Y. 208; Aspinwall v. Ohio & M. R. Co., 20 Ind. 492, 83 Am. Dec. 329; Duke v. Taylor, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; Boston Investment Co. v. City of Boston, 158 Mass. 461, 33 N. E. 580; Bergner & Engel Brewing Co. v. Dreyfus, 172 Mass. 154, 51 N. E. 531, 70 Am. St. Rep. 251; Ireland v. Globe Milling & Reduction Co., 19 R. I. 180, 32 Atl. 921, 29 L. R. A. 429, 61 Am. St. Rep. 756; People ex rel. Home Life

a domestic corporation was deemed to have a legal residence in California, although it did no business there and its officers, agents, and stockholders resided outside the state. It was regarded as still "constructively present therein." [83]

And for the same reason a corporation cannot be a resident of another state than that in which it was incorporated. As recently remarked by Cornish, J.: "The residence of a corporation is in the state of its creation, although it may carry on business in another state." [84] Such is the uniform construction of statutes in which the term "resident" or "nonresident" is used, where the question is presented whether a foreign corporation is included in the term.[85] A foreign corporation doing business in a state through an agent, however, may be subject to the jurisdiction for purposes of process and suit, if the law makes provision for the service of process; [86] and for this purpose a foreign corporation is declared to be "found" [87] in or to be a resident [88] of a state in which it does business.

So, under the act of Congress requiring suits in the federal courts, with certain exceptions, to be brought in the district whereof the defendant is an inhabitant, a corporation, for the purpose of suits

Ins. Co. v. Home Life Assur. Co., 111 Mich. 405, 69 N. W. 653; Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74.

[83] McKendrick v. Western Zinc Min. Co., 165 Cal. 24, 130 Pac. 865; Baumgarten v. Alliance Assur. Co. (C. C.) 153 Fed. 301. "Domestic corporations, like individuals, have a location or residence in some county in the state." Greacen v. Buckley & Douglas Lumber Co., 167 Mich. 569, 133 N. W. 538, per Ostrander, C. J. The domicile is fixed by where its chief corporate activities are conducted, by "where its real trade and business is carried on," rather than "where only its corporate or directors' meetings are held or its records are kept." Collector of Taxes of Boston v. Proprietors of Mt. Auburn Cemetery, 217 Mass. 286, 104 N. E. 750. This is also its domicile for purposes of taxation. Milliken v. Southern Nat. Life Ins. Co., 155 Ky. 529, 159 S. W. 1141. And see Lemon v. Imperial Window Glass Co. (D. C.) 199 Fed. 927.

[84] Squire & Co. v. City of Portland, 106 Me. 234, 76 Atl. 679, 30 L. R. A. (N. S.) 576, 20 Ann. Cas. 603.

[85] Stafford v. American Mills Co., 13 R. I. 310; Hammond Beef & Provision Co. v. Best, 91 Me. 431, 40 Atl. 338, 42 L. R. A. 528; People ex rel. Thurber, Whyland Co. v. Barker, 141 N. Y. 118, 35 N. E. 1073, 23 L. R. A. 95; Shepard & Morse Lumber Co. v. Burleigh, 27 App. Div. 99, 50 N. Y. Supp. 135; Boyer v. Northern Pac. R. Co., 8 Idaho, 74, 66 Pac. 826, 70 L. R. A. 691; Keystone Driller Co. v. Superior Court of City and County of San Francisco, 138 Cal. 738, 72 Pac. 398.

[86] Post, p. 787.

[87] Blackburn v. Selma M. & M. R. R. Co., 2 Flip. 525, Fed. Cas. No. 1,467; Hayden v. Androscoggin Mills (C. C.) 1 Fed. 93.

[88] Williams v. East Tennessee, V. & G. Ry. Co., 90 Ga. 519, 16 S. E. 303.

against it in the federal courts, is an inhabitant of the state of its creation, and of that state only, though it may be doing business in other states, and may have an agent there, and may have submitted, in the other states, to the jurisdiction of their courts.[89]

Citizenship

Strictly speaking, a corporation is not a citizen within the federal Constitution.[90] For the purpose of determining the jurisdiction of the federal courts of suits by and against corporations, however, a corporation "is to be regarded as if it were a citizen of the state where it was created." [91] This result is reached by the federal courts either by arbitrarily regarding a corporation as "capable of being treated as a citizen of that state, as much as a natural person," [92] or else by means of a unique legal fiction. This fiction is that the citizenship of each and all of the incorporators is that of the state creating the corporation. "In such a case it is regarded as a suit brought by or against the stockholders of the corporation; and, for the purposes of jurisdiction, it is conclusively presumed that the stockholders are citizens of the state which, by its laws, created the corporation." [93]

However, corporations are not treated by the federal courts as citizens within the purview of article 4, § 2, of the United States Constitution, to the effect that the "citizens of each state shall be

[89] Post, pp. 758, 799.

[90] Post, p. 762.

[91] Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354; Ohio & M. R. Co. v. Wheeler, 1 Black (U. S.) 297, 17 L. Ed. 130; Louisville, C. & C. R. Co. v. Letson, 2 How. (U. S.) 497, 11 L. Ed. 353; Shaw v. Quincy Min. Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; note to St. Louis, I. M. & S. Ry. Co. v. Newcom, 6 C. C. A. 174, 56 Fed. 951; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; Hammond Beef & Provision Co. v. Best, 91 Me. 431, 40 Atl. 338, 42 L. R. A. 528. See Bank of U. S. v. Deveaux, 5 Cranch (U. S.) 61, 3 L. Ed. 38; Marshall v. Baltimore & O. R. Co., 16 How. (U. S.) 314, 327, 14 L. Ed. 953. For this reason it must appear somewhere (anywhere) in the pleadings, in an action against a corporation in a federal court, in what state it was created, if the only ground for federal jurisdiction is diverse citizenship. Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207; St. Louis, I. M. & S. Ry. Co. v. Newcom, supra. An averment that a defendant corporation is a citizen of a certain state other than that in which suit is brought is not a sufficient allegation of diverse citizenship. The pleading must show that it was created by the laws of a foreign state. Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. Ed. 451. The citizenship of a corporation, for the purposes of jurisdiction of a suit by or against it in the federal courts, is to be determined as of the time when the suit was commenced, and not as of the time when the cause of action accrued. Stout v. Sioux City & Pac. R. Co. (C. C.) 8 Fed. 794.

[92] Louisville C. & C. R. Co. v. Letson, 2 How. (U. S.) 497, 11 L. Ed. 353; Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606.

[93] Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207.

entitled to all privileges and immunities of citizens in the several states." [94]

Charters from Several States

It has been said that it is competent for several states to unite in creating the same corporation, or in consolidating several pre-existing corporations into a single one; but this is very inaccurate language. Several states may, by corresponding legislation, create several corporations, one in each state, having the same name, and the same object and powers, and being under the same management; but in the nature of things they cannot unite in creating the same corporation, for the laws of a state can have no extraterritorial effect. Suppose, for instance, it is desired to incorporate a railroad company to construct and operate, under one management, a railroad through several states. In the absence of constitutional limitations, it is competent for the Legislatures of these states to pass similar laws, chartering corporations to construct and operate the road, and to have the same name and the same powers in each state, and to be under one management, with principal offices in one state. So, where different corporations have been created by different states, it is competent for the Legislatures of the different states to pass corresponding laws for the purpose of giving them the same name and putting them under one management, or, in popular understanding, of consolidating them. And where a corporation has been created by one state, it is competent for another state, by appropriate legislation, to make that corporation, as chartered and conducted in the first-named state, a corporation of its own.[95]

[94] Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332.

[95] "It is entirely competent for the state, by its legislation, to determine the mode of creating corporations within its limits; and if it sees fit to declare that a foreign corporation may become a corporation of the state by building a railroad therein, and filing a copy of its articles of incorporation with the secretary of state, I have no doubt that compliance with these terms constitutes the foreign corporation a domestic corporation with respect to all its transactions within such state." Stout v. City & Pac. R. Co. (C. C.) 8 Fed. 794. And see Baltimore & O. R. Co. v. Gallahue's Adm'rs, 12 Grat. (Va.) 655, 65 Am. Dec. 254; Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 75 Fed. 433, 22 C. C. A. 378; Winn v. Wabash R. Co. (C. C.) 118 Fed. 55; Alabama & G. Mfg. Co. v. Riverdale Cotton Mills, 127 Fed. 497, 62 C. C. A. 295; Bernhardt v. Brown, 119 N. C. 506, 26 S. E. 162, 36 L. R. A. 402. Yet, in the case of a corporation created by one state and afterwards rechartered in another, it is anomalously held that it does not thereby become a citizen of the state in which it is rechartered, so far as to affect the jurisdiction of the federal courts upon a question of diverse citizenship. St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; St.

In none of these cases, however, do the different states unite in creating the same corporation, or in consolidating the several corporations into a single one. The result of such legislation is to create a separate and distinct corporation in each state. The corporations may have the same name in each state, it is true, and they may have the same powers, and be under one management, so that for all practical purposes they are conducted as a single corporation; but in law they are separate and distinct corporate bodies. The reason is that it is not possible for a state to pass a law which will have effect in another state, and a law of one state, therefore, cannot create, nor aid in creating, a corporation in another state.[96] In the leading case of Ohio & M. R. Co. v. Wheeler,[97]

Joseph & G. I. R. Co. v. Steele, 167 U. S. 659, 17 Sup. Ct. 925, 42 L. Ed. 315; Louisville, N. A. & C. R. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; Southern R. Co. v. Allison, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078 (overruling Allison v. Southern Ry. Co., 129 N. C. 336, 40 S. E. 91); Hollingsworth v. Southern R. Co. (C. C.) 86 Fed. 353; Wilson v. Southern R. Co., 64 S. C. 162, 36 S. E. 701, 41 S. E. 971. Cf. Patch v. Wabash R. Co., 207 U. S. 277, 28 Sup. Ct. 80, 52 L. Ed. 204, 12 Ann. Cas. 518.

[96] Ohio & M. R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. Ed. 130; Missouri Pac. Ry. Co. v. Meeh, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250; Chicago & N. W. Ry. Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. Ed. 571; Newport & C. Bridge Co. v. Woolley, 78 Ky. 523; Fitzgerald v. Missouri Pac. R. Co. (C. C.) 45 Fed. 812; Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207; Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363; Chicago & N. W. Ry. Co. v. Auditor General, 53 Mich. 91, 18 N. W. 586; Racine & M. R. Co. v. Farmers' Loan & Trust Co., 49 Ill. 331, 95 Am. Dec. 595; Rece v. Newport News & M. V. Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572; Bishop v. Brainerd, 28 Conn. 289; Duncan v. St. Louis, I. M. & S. Ry. Co., 49 La. Ann. 1700, 22 South. 924; Georgia & A. Ry. Co. v. Stollenwerck, 122 Ala. 539, 25 South. 258; Railroad v. Barnhill, 91 Tenn. 395, 19 S. W. 21, 30 Am. St. Rep. 889. In Missouri Pac. Ry. Co. v. Meeh, supra, it was said: "At this day it must be regarded as settled beyond doubt or controversy that two states of this Union cannot by their joint action create a corporation which will be regarded as a single corporate entity, and, for jurisdictional purposes, a citizen of each state which joined in creating it. One state may create a corporation of a given name, and the Legislature of an adjoining state may declare that the same legal entity shall be or become a corporation of that state as well, and be entitled to exercise within its borders, by the same board of directors and officers, all of its corporate functions. Nevertheless, the result of such legislation is not to create a single corporation, but two corporations of the same name, having a different paternity." In Chicago & N. W. Ry. Co. v. Auditor General, supra, Judge Cooley said: "It is impossible to conceive of one joint act performed simultaneously by two sovereign states, which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent

[97] 1 Black (U. S.) 286, 17 L. Ed. 130. And see Goodwin v. New York, N. H. & H. R. Co. (C. C.) 124 Fed. 358, able opinion per Lowell, J.; also article, "Corporations of Two States," by J. H. Beale, Jr., 4 Col. Law Rev. 391.

the plaintiff described itself as a corporation created and existing under the laws of the states of Indiana and Ohio, having its principal office in Cincinnati, Ohio. It sued Wheeler in the Circuit Court of the United States for the District of Indiana, describing him as a citizen of Indiana. The Supreme Court of the United States held that there was no jurisdiction, on the ground of diverse citizenship. "It is true," it was said, "that a corporation by the name and style of the plaintiff appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects; and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state; and neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons; but the legal entity or person, which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life, and indues it with its faculties and powers. The President and Directors of the Ohio & Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United States." As was said by the Illinois court, "the only possible status of a company acting under charters from two states is that it is an association incorporated in and by each of the states; and, when acting as a corporation in either of the states, it acts under the authority of the charter of the state in which it is then acting, and that only, the legislation of the other state having no operation beyond its territorial limits." [98]

given for the consolidation of corporations separately created; but, when the two unite, they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges." In Quincy Railroad Bridge Co. v. Adams County, 88 Ill. 615, 619, it is said: Two states "have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot so fuse themselves into a single sovereignty, and, as such, create a body politic which shall be a corporation of the two states, without being a corporation of each state or of either state." Cf. People v. New York, C. & St. L. R. Co., 129 N. Y. 474, 29 N. E. 959, 15 L. R. A. 82.

[98] Quincy Railroad Bridge Co. v. Adams Co., 88 Ill. 615, 619. See, also,

Charter Distinguished from License

Acts of the Legislature creating corporations must be distinguished from acts which merely recognize a corporation chartered by another state, and allow it to do business within the state on compliance with certain conditions. [99] This distinction is illustrated by the case of Baltimore & O. R. Co. v. Harris.[1] The Baltimore & Ohio Railroad Company had been incorporated by an act of the Legislature of Maryland. Laws 1827, c. 123. Afterwards the Legislature of Virginia passed an act whereby, after reciting the Maryland act, it was declared "that the same rights and privileges shall be, and are hereby, granted to the aforesaid company within the territory of Virginia, and the said company shall be subject to the same pains, penalties, and obligations as are imposed by said act; and the same rights, privileges, and immunities which are reserved to the state of Maryland or to the citizens thereof are hereby reserved to the state of Virginia and her citizens." Laws 1827, c. 74. It was held in this case that the Virginia act was a mere license, and nothing more, and that the license was given to the Maryland corporation as such, and in no degree changed the character or status of that body; that it remained a Maryland corporation only, and therefore a Maryland citizen only for the purposes of federal jurisdiction.[2]

On the other hand, the effect of an act adopting a foreign corporation may be to create it a domestic corporation.[3] Thus, where

Patch v. Wabash R. Co., 207 U. S. 277, 28 Sup. Ct. 80, 52 L. Ed. 204, 12 Ann. Cas. 518; Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363; CLARK v. BEVER, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88, Wormser Cas. Corporations, 300; Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Van Cott v. Van Brunt, 82 N. Y. 535; Stein v. Howard, 65 Cal. 616, 4 Pac. 662.

[99] Quesenberry v. People's Building, Loan & Savings Ass'n, 44 W. Va. 512, 30 S. E. 73; Savage v. People's Building, Loan & Savings Ass'n, 45 W. Va. 275, 31 S. E. 991; Daniel v. Gold Hill Min. Co., 28 Wash. 411, 68 Pac. 884.

[1] 12 Wall. (U. S.) 65, 20 L. Ed. 354.

[2] And see Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; Morgan v. East Tennessee & V. R. Co. (C. C.) 48 Fed. 705; note to St. Louis, I. M. & S. R. Co. v. Newcom, 56 Fed. 951, 6 C. C. A. 174, 175. See, also, Martin v. Baltimore & O. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; Goodloe v. Tennessee Coal, Iron & R. Co. (C. C.) 117 Fed. 348; Illinois Cent. R. Co. v. Sanford, 75 Miss. 862, 23 South. 355, 942; article by J. H. Beale, Jr., 4 Col. Law Rev. 391.

[3] Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518; Missouri Pac. R. Co. v. Meeh, 69 Fed. 753, 759, 16 C. C. A. 510, 30 L. R. A. 250; Uphoff v. Chicago, St. L. & N. O. R. Co. (C. C.) 5 Fed. 545; Gran-

a Connecticut corporation, pursuant to its charter, purchased the franchises and railroad of a Rhode Island corporation, and the Rhode Island Legislature ratified the purchase by an act which declared that the purchasing company should have all the rights, privileges, and powers, and be subject to all the duties and liabilities, imposed upon the selling company by its charter, it was held that the purchasing company became a corporation of that state.[4] And where a general act provides that a foreign corporation desiring to do business in the state shall become a domestic corporation by filing there a copy of its charter, upon complying with the requirement it becomes a domestic corporation, and not a mere licensee.[5]

EXTENSION OF CHARTER—CREATION OF NEW CORPORATION

39. It is competent for the Legislature to extend a charter before it has expired, or to revive a charter after its expiration, in the absence of constitutional prohibition. An act extending the period of existence of a corporation beyond the time for which it was originally created, even under a new name, does not create a new corporation. If, however, a new corporation is intended to be created, though with the same name and the same members, the old and the new body are distinct corporations.

The Legislature, subject to constitutional limitations,[6] may not only pass an act before the charter of a corporation expires, ex-

gers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325. "To make such a company a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state, or by the Legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers." Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83.

[4] Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780. And see Graham v. Boston, H. & E. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196.

[5] Layden v. Endowment Rank K. P. of the World, 128 N. C. 546, 39 S. E. 47. Cf. St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802. Goodwin v. New York, N. H. & H. R. Co. (C. C.) 124 Fed. 358; Southern R. Co. v. Allison, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078.

[6] Where a charter is granted under one Constitution, and is extended by act of the Legislature under another, and when the time arrives for such extension to take effect there is a third Constitution in force, the act can con-

tending the same,[7] but it may pass an act reviving a charter which has already expired, so as to revive the former corporation in all its original force, and not create a new one.[8] It is sometimes difficult to distinguish between an act creating a new corporation, with the same name and the same members as those of a former or an existing corporation, and an act which merely continues the existence of a corporation previously created. The distinction is important. For instance, if a statute grants special privileges to corporations thereafter incorporated, they cannot be claimed by a corporation previously created, though its charter may be afterwards extended.[9] Again, if a new corporation is created, though with the same name and the same members as those of an existing corporation, whose charter is about to expire, the new corporation is not liable for the debts of the old, while it is otherwise if the existence of the old corporation is merely extended.[10]

A mere change of name, as we have seen, does not create a new corporate body.[11] "To ascertain whether a charter creates a new corporation or merely continues the existence of the old one, we

fer no privileges not authorized by the Constitution in force at the time of its adoption, and is regulated, with respect to those granted by it, by the Constitution in force when it takes effect. State v. Citizens' Bank of Louisiana, 52 La. Ann. 1086, 27 South. 709. A constitutional provision that the Legislature shall not extend any charter of any corporation declares against legislation extending the charter of any corporation in any way. Boca Mill Co. v. Curry, 154 Cal. 326, 97 Pac. 1117.

[7] Foster v. President, etc., of Essex Bank, 16 Mass. 245, 8 Am. Dec. 135; Augusta & S. R. Co. v. City Council of Augusta, 100 Ga. 701, 28 S. E. 126. General laws authorizing the organization of corporations for limited terms commonly contain provisions for extending the corporate existence by act of the members for additional terms. See Attorney General v. Perkins, 73 Mich. 303, 41 N. W. 426; Ovid Elevator Co. v. Secretary of State, 90 Mich. 466, 51 N. W. 536; People ex rel. Ward v. Green, 116 Mich. 505, 74 N. W. 714; People ex rel. Haberman v. James, 5 App. Div. 412, 39 N. Y. Supp. 313; Smith v. Eastwood Wire Mfg. Co., 58 N. J. Eq. 331, 43 Atl. 567; Erb v. Grimes, 94 Md. 92, 50 Atl. 397; Coal Creek Min. & Mfg. Co. v. Tennessee Coal, Iron & R. Co., 106 Tenn. 651, 62 S. W. 162.

[8] President, etc., of Lincoln & Kennebec Bank v. Richardson, 1 Greenl. (Me.) 79, 10 Am. Dec. 34; President, etc., of Port Gibson v. Moore, 13 Smedes & M. (Miss.) 157; Diamond State Iron Co. v. Husbands, 8 Del. Ch. 205, 68 Atl. 240 (though retrospective, the curative statute was upheld). But see Attorney General ex rel. Linnell v. Gay, 162 Mich. 612, 127 N. W. 814.

[9] Frostburg Min. Co. v. Cumberland & P. R. Co., 81 Md. 28, 31 Atl. 698. Cf. Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560.

[10] Bellows v. Hallowell & A. Bank, 2 Mason, 31, Fed. Cas. No. 1,279. See, also, Supreme Lodge of Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. 891; United Mines Co. v. Hatcher, 79 Fed. 517, 25 C. C. A. 46.

[11] Erb v. Grimes, 94 Md. 92, 50 Atl. 397. Ante, p. 81.

must look to its terms, and give them a construction consistent with the legislative intent and the intent of the corporators." [12] In a Maryland case the act under consideration was entitled "An act to extend an act entitled 'An act to incorporate the Withers Mining Company,' passed at the December session, 1847, chapt. 306" (Laws 1878, c. 409); and it provided that said act, and a subsequent act amending it, "be and the same are hereby continued in full force and effect" for 30 years, and declared, after giving the company a new name, "that the company by such name shall succeed to all the rights, powers, liabilities, and obligations" of the company as previously named. It was held that this did not create a new corporation, but merely continued the existence of the old one.[13] On the other hand, where a bank was created as a corporation, with the same name as that of an old bank, whose charter was about to expire, and the statutes and circumstances together showed that the Legislature did not intend merely to continue the existing corporation, it was held that there was a new and distinct corporation, though most of the stockholders were the same, and that the new bank, therefore, was not liable for the debts of the old bank.[14]

A corporation seeking to avail itself of the privilege of extending the term of its corporate existence, as granted by statute, is required to take all of the necessary statutory steps during its life.[15] Thus a corporation was recently not permitted to amend its articles after the term of its incorporation had expired, so as to extend its corporate life.[16]

[12] Per Mr. Justice Story, in Bellows v. Hallowell & A. Bank, supra. See, also, Com. v. Licking Valley Bldg. Ass'n No. 3, 118 Ky. 791, 82 S. W. 435, 26 Ky. Law Rep. 730; Allen v. North Des Moines M. E. Church, 127 Iowa, 96, 102 N. W. 808, 69 L. R. A. 255, 109 Am. St. Rep. 366, 4 Ann. Cas. 257.

[13] Frostburg Min. Co. v. Cumberland & P. R. Co., supra. See, also, National Exchange Bank v. Gay, 57 Conn. 224, 17 Atl. 555, 4 L. R. A. 343; Higgins v. California Petroleum & Asphalt Co., 122 Cal. 373, 55 Pac. 155.

[14] Bellows v. Hallowell & A. Bank, supra. And see President, etc., of Port Gibson v. Moore, 13 Smedes & M. (Miss.) 157; Clough v. Rocky Mountain Oil Co., 25 Colo. 520, 55 Pac. 809.

[15] Merges v. Altenbrand, 45 Mont. 355, 123 Pac. 21; Home Bldg. Ass'n v. Bruner, 134 Ky. 361, 120 S. W. 306.

[16] Home Bldg. Ass'n v. Bruner, supra.

40. PROOF OF CORPORATE EXISTENCE

The sufficiency of the proof of corporate existence will depend to a great extent upon the nature of the proceeding in which the question is raised, and the circumstances of the particular case. In quo warranto proceedings by the state to test the right of an alleged corporation to exercise corporate powers, corporate existence de jure must be shown; and to show this it must be made to appear that there is a valid law creating or authorizing such a corporation, that there was a valid organization under it, and a substantial compliance with all conditions precedent.[17]

On the other hand, as has been stated, if the question of corporate existence is raised collaterally, it is sufficient if a de facto existence be shown.[18] Such proof is admissible, whenever the question comes up collaterally, as in a criminal prosecution for larceny, forgery, or any other crime against an alleged corporation;[19] or in any civil proceeding, other than proceedings by the state to test the existence of the alleged corporation,[20] except, in some states, proceedings by the corporation to condemn land under the power of eminent domain.[21] As will be seen, by the weight of authority, it is only necessary, in order to prove de facto corporate existence, to show a law under which the alleged corporation might have been formed, a colorable bona fide compliance with that law, and an assumption of corporate powers, or user.[22] It follows that it is not necessary under a plea of nul tiel corporation for plaintiff to show that it is a corporation de jure. It is sufficient for plaintiff to prove that it has a de facto existence.[23] And it has been held that parol evidence that the plaintiff was known and transacted business as a corporation is proper and sufficient to meet the plea.[24]

Again, as we shall see, there are many cases in which a party may, by his conduct, as by dealing with or holding out a body as a corporation, be estopped to deny its existence as a corporate

[17] Ante, p. 57; post, p. 97. And see Capps v. Hastings Prospecting Co., 40 Neb. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. Rep. 677.

[18] Post, p. 97.

[19] Calkins v. State, 18 Ohio St. 370, 98 Am. Dec. 121; State v. Habib, 18 R. I. 568, 30 Atl. 462; People v. Carter, 122 Mich. 668, 81 N. W. 924.

[20] 1 Mor. Corp. § 37.

[21] Post, p. 100.

[22] Post, p. 97; Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764, 12 S. E. 771.

[23] Dean & Son, Ltd. v. W. B. Conkey Co., 180 Ill. App. 162.

[24] Patton & Gibson Co. v. Shreve & Kelso, 134 Ill. App. 271.

body.[25] Here, according to many decisions, it is not necessary to prove even a de facto corporate existence. All that is necessary is to show the facts that will operate as an estoppel.[26] Where a person has contracted or dealt with an association as a corporation, proof of that fact alone is prima facie evidence of the corporate existence of the body as against him, as in an action by the alleged corporation on a subscription to its stock.[27] An indorsee of a note payable to a corporation need not prove the corporate capacity of the payee since the maker engages to pay it according to its tenor.[28] In another case, the record showed that defendant represented in a letter to plaintiff's assignors that it was a corporation. This was held to be ample to support the finding of the corporate character of defendant.[29]

The mode of proving acts of the Legislature is a question of the general law of evidence. There is no difference between the mode of proving the charter of a corporation and the mode of proving other legislative acts. A charter granted by a public statute need not be proved at all, for the courts must take judicial notice of all public acts.[30] Private acts, however, must be proved, for the courts do not take judicial notice of them.[31] For the mode of proving statutes, the reader must refer to works on evidence. Foreign laws, including charters granted by another state, must be proved.[32]

We have seen that acceptance of a charter by the corporators may, unless a particular mode of acceptance is prescribed by the Legislature, be shown by proof of any act on the part of the corporators which shows an unequivocal intention to accept, as by showing that they organized and exercised corporate powers. If such acts are shown, acceptance will be presumed.[33] Unless there is statutory requirement of other evidence, the organization of a corporation and user, for the purpose of showing a de facto exist-

[25] Post, p. 112. [26] Post, p. 119.

[27] United States Vinegar Co. v. Schlegel, 143 N. Y. 537, 38 N. E. 729.

[28] Grover v. Muralt, 23 N. D. 576, 137 N. W. 830.

[29] Marx v. Raley & Co., 6 Cal. App. 479, 92 Pac. 519.

[30] Hays v. Northwestern Bank of Virginia, 9 Grat. (Va.) 127; Bank of Utica v. Magher, 18 Johns. (N. Y.) 341; Williams v. Union Bank, 2 Humph. (Tenn.) 339; Stribbling v. Bank of Valley, 5 Rand. (Va.) 132; White Water Valley Canal Co. v. Boden, 8 Blackf. (Ind.) 130.

[31] 1 Mor. Corp. § 38; Ohio & I. R. Co. v. Ridge, 5 Blackf. (Ind.) 78; State v. Trustees of Vincennes University, 5 Ind. 77, Id., 5 Ind. 87, 91; Bailey v. Trustees of Lincoln Academy, 12 Mo. 174.

[32] 1 Mor. Corp. § 39; United States Bank v. Stearns, 15 Wend. (N. Y.) 314.

[33] Ante, p. 53 et seq.; President, etc., of Bank of Manchester v. Allen, 11 Vt. 302.

ence, may be shown by parol evidence.[84] In Washington, it was recently decided that a statute providing for prima facie proof of corporate existence and payment of license fees by certificate of the secretary of state, did not make such mode of proof exclusive, and that testimony of N. that he was president of the company, that it was a Washington corporation, and that the license fee had been duly paid, was not only competent but sufficient proof of corporate existence.[85] It has been said that general reputation of corporate existence is sufficient,[86] but this dictum cannot be supported by authority. There must be evidence, not only of an act authorizing incorporation and user of corporate powers, but also of organization in at least colorable compliance with the act.[87] The records, books, and minutes of a corporation, embracing the proceedings in its organization under its charter, or under the general law, when regular and identified by the person authorized to make them, are prima facie evidence of the organization of the corporation.[88] When it is shown that there was an act authorizing the formation of an alleged corporation, that it was formed under the act, and has since acted as a corporation, compliance with particular provisions of the act will be presumed, in the absence of evidence to the contrary.[89]

In many states it is provided by statute that a certified copy of the certificate or letters of incorporation or articles of association,

[84] Calkins v. State, 18 Ohio St. 370, 98 Am. Dec. 121; State v. Habib, 18 R. I. 558, 30 Atl. 462; Yakima Nat. Bank v. Knipe, 6 Wash. 348, 33 Pac. 834.

[85] Pacific Drug Co. v. Hamilton, 71 Wash. 469, 128 Pac. 1069. The existence of a corporation is sufficiently established by the introduction of a properly certified copy of its charter and a showing of a compliance with the statutory requirements. Calor Oil & Gas Co. v. Franzell, 138 Ky. 715, 109 S. W. 328, 33 Ky. Law Rep. 98, 36 L. R. A. (N. S.) 456.

[86] Fleener v. State, 58 Ark. 98, 23 S. W. 1.

[87] State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550; Porter v. State ex rel. Dunkleberg, 141 Ind. 488, 40 N. E. 1061; Owen v. Shepard, 8 C. C. A. 244, 59 Fed. 746.

[88] Buncombe Turnpike Co. v. McCarson, 18 N. C. 306; Coffin v. Collins, 17 Me. 440; Glenn v. Orr, 96 N. C. 413, 2 S. E. 538; Semple v. Glenn, 91 Ala. 245, 6 South. 46, 9 South. 265, 24 Am. St. Rep. 894; Peake v. Wabasha Co., 18 Ill. 88. If the acceptance of a charter is recorded on the books, they are the best evidence; and parol evidence is admissible only under the rules allowing secondary evidence. Coffin v. Collins, supra; Hudson v. Carman, 41 Me. 84. It must be made to appear that the books offered in evidence are the corporation books; that they have been kept as such; and that the entries have been made by an authorized person. President, etc., of Highland Turnpike Co. v. McKean, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324.

[89] Bank of the United States v. Lyman, 1 Blatchf. 297, Fed. Cas. No. 924; Packard v. Old Colony R. Co., 168 Mass. 92, 46 N. E. 433.

filed with the secretary of state or other officer (the statutes necessarily varying in the different states), shall be prima facie evidence of corporate existence.[40] This, however, does not exclude other competent evidence of incorporation, unless it is expressly so provided.[41] In some states it is provided that, whenever it is necessary to prove the incorporation of a company, evidence that it is doing business under a certain name shall be prima facie evidence of its due incorporation.[42]

If the certificate of incorporation and record thereof have been lost or destroyed, parol evidence is admissible to show compliance with the law in the organization of the company, and to prove the contents of the certificate; and it is not necessary that such evidence should be so minute as to permit of the reproduction of the certificate in all its details. It is sufficient if it is so full as to show that the law was complied with.[43] Long acquiescence by the public in the exercise of the franchise in such a case raises a presumption of organization in conformity to law, in aid of the parol evidence.[44]

Pleading

Wherever defendant intends to insist upon the want of capacity in plaintiffs to sue as a corporation, the point should be raised by a special plea in abatement or in bar. The general issue admits the competency of plaintiffs to sue in the corporate capacity in which they have sued.[45] The rule under code procedure is identical. The New York Code provides: "In an action, brought by or against a corporation, the plaintiff need not prove upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation."[46]

[40] Marshall v. Macon County Sav. Bank, 108 N. C. 639, 13 S. E. 182; Spokane & I. Lumber Co. v. Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

[41] Edelhoff v. State, 5 Wyo. 19, 36 Pac. 627; State v. Pittam, 32 Wash. 137, 72 Pac. 1042; Pacific Drug Co. v. Hamilton, 71 Wash. 469, 128 Pac. 1069.

[42] Canal Street Gravel Road Co. v. Paas, 95 Mich. 372, 54 N. W. 907.

[43] Rose Hill & E. R. Co. v. People, 115 Ill. 133, 3 N. E. 725.

[44] Rose Hill & E. R. Co. v. People, supra.

[45] Society for Propagation of Gospel v. Pawlet, 4 Pet. (U. S.) 480, 7 L. Ed. 927; Ang. & A. Corp., §§ 632, 633.

[46] Code Civ. Proc. N. Y. § 1776.

CHAPTER III

EFFECT OF IRREGULAR INCORPORATION

41–42. Corporations De Facto.
43–44. Estoppel to Deny Corporate Existence.
45. Liability of Associates as Partners.

CORPORATIONS DE FACTO

41. Where persons attempt, in good faith, to organize a corporation under a statute that is valid, and that authorizes such a corporation, and afterwards assume to exercise corporate powers, there is a corporation de facto, though, by reason of failure in some respect to comply with the statute, there may not be a corporation de jure; and the corporate character of the association can be questioned only by the state in a direct proceeding brought for that purpose. By the weight of authority, to constitute a corporation de facto within this rule, there must be

(a) A valid law which authorizes such a corporation.

(b) A colorable attempt in good faith to organize under and comply with the statute.

(c) An assumption of corporate powers; i. e., user.

42. The doctrine concerning de facto corporations is based on grounds of public policy, and does not depend on any element of estoppel.

A corporation may exist in fact without being legally constituted. Such a corporation is called a corporation de facto, as distinguished from a corporation de jure. "This phrase [de facto] is used to characterize an officer, a government, a past action, or a state of affairs which exists actually and must be accepted for all practical purposes, but which is illegal or illegitimate. In this sense it is the contrary of 'de jure.'" [1] The term "de facto," as applied to a corporation, means a body which actually exists, for all practical purposes, as a corporate body, but which, because of failure to comply with some provision of the law, has no legal right to corporate existence as against the state. A corporation de jure, on the other hand, is a corporation in law as well as in fact. Not even the state

[1] Black, Law Dict. tit. "De Facto."

can deprive it of its corporate existence in violation of the terms of its charter.

When corporations were created by special act of the Legislature, as was formerly the case, the situation giving rise to the need for the "de facto" doctrine was infrequent. However, since the inauguration of the era of incorporation under general laws, the need for the doctrine has become apparent. Suppose there is merely some slight slip-up by the associates in their endeavor to comply with the statute. It is clear that sound reason as well as sound policy warrant courts in treating the association as a de facto corporation. If it is judicial legislation, it is of a necessary sort.

The distinction between a corporation de jure and a corporation de facto is very important. A corporation de jure has a right to corporate existence even as against the state. The state cannot, even by a direct proceeding, deprive it of this right, contrary to the terms of its charter. A corporation de facto, on the other hand, may be deprived of its charter if the state brings a direct proceeding against it for that purpose. A corporation de facto has a corporate existence, even as against the state, where the state attacks its right collaterally; and it has such right as against private individuals, save in certain exceptional cases, whether they attack its corporate existence collaterally or directly. The state, which alone has the power to incorporate, may waive irregularities in the organization of corporations; and, so long as the state remains inactive in the premises, individuals must acquiesce.[2] "Where the law authorizes a corporation, and there is an effort, in good faith, to organize a corporation under the law, and thereupon, as a result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation de facto, and, as a general rule, the legal existence of such a corporation cannot be inquired into collaterally, although some of the required legal formalities may not have been complied with. Ordinarily, such an inquiry can only be made in a direct proceeding brought in the name of the state." [3]

A corporation de facto, that by regularity of organization might be one de jure, can make contracts, purchase, hold, and convey property, and sue and be sued, in the same manner as if it were a corporation de jure, for no one can object but the state. "A corporation de facto may legally do and perform every act and thing which the same entity could do and perform were it a de jure cor-

[2] North v. State, 107 Ind. 356, 8 N. E. 159, and cases cited in the following notes.

[3] Hasselman v. U. S. Mortg. Co., 97 Ind. 365.

poration. As to all the world except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid; and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted, its acts are to be treated as efficacious." [4] "Mere irregularities in organization cannot be shown collaterally, where there is no defect of power." [5] The doctrine is not limited in its application to domestic corporations, but extends to foreign corporations as well.[6]

[4] People v. La Rue, 67 Cal. 530, 8 Pac. 84. And see Heaston v. Cincinnati & Ft. W. R. Co., 16 Ind. 275, 79 Am. Dec. 430; Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552; Eaton v. Aspinwall, 19 N. Y. 119; Buffalo & A. R. Co. v. Cary, 26 N. Y. 75; Lamming v. Galusha, 81 Hun, 247, 30 N. Y. Supp. 767; Thompson v. Candor, 60 Ill. 244; People ex rel. Brewster v. Board of Trustees of Schools, 111 Ill. 171; Hudson v. Green Hill Seminary Corp., 113 Ill. 618; Bushnell v. Consolidated Ice Mach. Co., 138 Ill. 67, 27 N. E. 596; Appleton Mut. Fire Ins. Co. v. Jesser, 5 Allen (Mass.) 446; Butchers' & Drovers' Bank of St. Louis v. McDonald, 130 Mass. 264; Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315; East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. 260; Stout v. Zulick, 48 N. J. Law, 599, 7 Atl. 362; McTighe v. Macon Const. Co., 94 Ga. 306, 21 S. E. 701, 32 L. R. A. 208, 47 Am. St. Rep. 153; Whitney v. Robinson, 53 Wis. 309, 10 N. W. 512; Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; Pape v. Capitol Bank of Topeka, 20 Kan. 440, 27 Am. Rep. 183; Chicago K. & W. R. Co. v. Stafford Co. Com'rs, 36 Kan. 121, 12 Pac. 593; Upton v. Hansbrough, 3 Biss. 417, Fed. Cas. No. 16,801; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155; Doty v. Patterson, 155 Ind. 60, 56 N. E. 668; Marion Bond Co. v. Mexican Coffee & Rubber Co., 160 Ind. 558, 65 N. E. 748; Mayor, etc., of Wilmington v. Addicks, 7 Del. Ch. 56, 43 Atl. 297; Hooven Mercantile Co. v. Evans Min. Co., 193 Pa. 28, 44 Atl. 277; Pinkerton v. Pennsylvania Traction Co., 193 Pa. 229, 44 Atl. 284; Supreme Court Independent Order of Foresters of Canada v. Supreme Court of United Order of Foresters, 94 Wis. 234, 68 N. W. 1011; Los Angeles Holiness Band v. Spires, 126 Cal. 541, 58 Pac. 1049; Marsh v. Mathias, 19 Utah, 350, 56 Pac. 1074; Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch. App.) 56 S. W. 35; Bridge Street & Allendale Gravel Road Co. v. Hogadone, 150 Mich. 638, 114 N. W. 917; Foster v. Hip Lung Ying Kee & Co., 243 Ill. 163, 90 N. E. 375; Brown v. Webb, 60 Or. 526, 120 Pac. 387, Ann. Cas. 1914A, 148; Swofford Bros. Dry Goods Co. v. Owen, 37 Okl. 616, 133 Pac. 193; Roaring Springs Townsite Co. v. Paducah Tel. Co. (Tex. Civ. App.) 164 S. W. 50; Jaques v. Board of Sup'rs of Yuba County, 24 Cal. App. 381, 141 Pac. 404. "The reason is that, if rights and franchises have been usurped, they are the rights and franchises of the sovereign, and he alone can interpose. Until such interposition, the public may treat those possessing and exercising corporate powers under color of law as doing so rightfully. The rule is in the interest of the public, and is essential to the safety of business transactions with corporations." Duggan v. Colorado Mortgage & Investment Co., 11 Colo. 113, 17 Pac. 105.

[5] Heaston v. Cincinnati & Ft. W. R. Co., supra.

[6] Bank of Toledo v. International Bank, 21 N. Y. 542; Lancaster v. Amster-

Some of the courts have held that the doctrine of de facto corporations does not apply to a case in which an alleged corporation attempts to exercise the power of eminent domain by the appropriation of private property to public use; that in such a proceeding, if the question is raised, it must show that it is a corporation de jure.[7] Other courts make no such distinction, but apply the doctrine in condemnation proceedings, as well as in other cases.[8]

If a pretended corporation is neither a corporation de jure nor one de facto, it has no standing whatever, and its corporate existence may be questioned collaterally, and by a private individual as well as by the state,[9] provided there is no element of estoppel.[10]

By the better opinion, though there are decisions to the contrary, after the period of existence of a corporation has expired by force of express provision in its charter or in a general law, it is not even a corporation de facto. By the expiration of its charter it becomes ipso facto dissolved, and no longer has any existence at all.[11] It follows that its existence after that time can be questioned

dam Improvement Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; Wright v. Lee, 4 S. D. 237, 55 N. W. 931; post, p. 786.

[7] Atlantic & O. R. Co. v. Sullivant, 5 Ohio St. 276; Atkinson v. Marietta & C. R. Co., 15 Ohio St. 21; In re Brooklyn, W. & N. R. Co., 72 N. Y. 245; New York Cable Co. v. Mayor, etc., of New York, 104 N. Y. 1, 43, 10 N. E. 332; In re Broadway & S. A. R. Co., 73 Hun, 7, 25 N. Y. Supp. 1080; Orrick School Dist. v. Dorton, 125 Mo. 439, 28 S. W. 765. See, also, Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773.

[8] Reisner v. Strong, 24 Kan. 410; McAuley v. Columbus, C. & Q. C. Ry. Co., 83 Ill. 348; Ward v. Minnesota & N. W. R. Co., 119 Ill. 287, 10 N. E. 365; Wellington & P. R. Co. v. Cashie & C. Railroad & Lumber Co., 114 N. C. 690, 19 S. E. 646 (but see Kinston & C. R. Co. v. Strond, 132 N. C. 413, 43 S. E. 913); Oregon Short Line R. Co. v. Postal Tel. Cable Co., of Idaho, 111 Fed. 842, 49 C. C. A. 663; Postal Telegraph Cable Co. v. Oregon Short Line R. Co. (C. C.) 114 Fed. 787; Morrison v. Forman, 177 Ill. 427, 53 N. E. 73; Postal Tel. Cable Co. of Utah v. Oregon S. L. R. Co., 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; Union Pac. R. Co. v. Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; Smith v. Cleveland, C., C. & St. L. R. Co., 170 Ind. 382, 81 N. E. 501; Terre Haute & P. R. Co. v. Robbins, 247 Ill. 376, 93 N. E. 398 (semble); Chicago & W. I. R. Co. v. Heidenreich, 254 Ill. 231, 98 N. E. 567, Ann. Cas. 1913C, 266; Sisters of Charity of St. Elizabeth v. Morris R. Co., 84 N. J. Law, 310, 86 Atl. 954, 50 L. R. A. (N. S.) 236 (semble); Roaring Springs Townsite Co. v. Paducah Tel. Co. (Tex. Civ. App.) 164 S. W. 50.

[9] Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362; Chicago Open Board of Trade v. Imperial Building Co., 136 Ill. App. 606, affirmed 238 Ill. 100, 87 N. E. 855; Sisters of Charity of St. Elizabeth v. Morris R. Co., 84 N. J. Law, 310, 86 Atl. 954, 50 L. R. A. (N. S.) 236.

[10] Post, p. 112.

[11] Bradley v. Reppell, 133 Mo. 545, 32 S. W. 645, 34 S. W. 841, 54 Am. St. Rep. 685; Venable Bros. v. Southern Granite Co., 135 Ga. 508, 69 S. E. 822,

by any person who has not estopped himself, and collaterally as well as directly. Thus, if a pretended corporation, after expiration of its charter, assumes to execute a conveyance, and the grantee, or one claiming under him, sues a third person, who holds adversely, to recover possession, the latter may question the validity of the conveyance, and dispute the existence of the corporation.[12]

What is Necessary to Constitute a Corporation De Facto

Having once determined that a particular association is a corporation de facto, there is little difficulty in applying the principles of law as stated above. But there is much confusion and direct conflict in the decisions as to what constitutes a corporation de facto, as distinguished from an association which pretends to be a corporation, but which has no existence at all as such, either de jure or de facto.[13] And the books do not throw as much light on the question as might be expected.[14]

Most of the courts hold that there is a corporation de facto whenever there is a valid law under which a particular kind of corporation may lawfully be organized, and persons having the required qualifications undertake, in good faith, to organize such a corpora-

32 L. R. A. (N. S.) 446. And see Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 24 Am. Rep. 585; Sturges v. Vanderbilt, 73 N. Y. 384; Dobson v. Simonton, 86 N. C. 492; Krutz v. Paola Town Co., 20 Kan. 397. Contra, Bushnell v. Consolidated Ice Mach. Co., 138 Ill. 67, 27 N. E. 596; Miller v. Newburg Orrel Coal Co., 31 W. Va. 836, 8 S. E. 600, 13 Am. St. Rep. 903; Campbell v. Perth Amboy Mut. Loan, Homestead & Building Ass'n, 76 N. J. Eq. 347, 74 Atl. 144 (semble). See post, p. 292.

[12] Bradley v. Reppell, supra. And in Venable Bros. v. Southern Granite Co., supra, held, that a suit against a corporation terminated on the expiration of the time limit of its charter, and that no de facto corporation existed even though the two sole stockholders continued to act for the corporation and to defend the suit.

[13] See articles 25 Harv. Law Rev. 623; 13 Mich. Law Rev. 271.

[14] The state of the authorities on this subject is thus described by Judge Thompson in his work on Corporations: "It is impossible to formulate a rule on the subject of de facto corporations, which will be applicable in all American jurisdictions, or which will receive uniform support from the decisions in any one such jurisdiction. Those decisions oscillate between two extreme views; (1) That where a body of men act as a corporation, and in the ostensible possession of corporate powers, it will be conclusively presumed, in all cases except in a direct proceeding against them by the state to vacate their franchises, that they are a corporation. (2) That the conditions named in statutes authorizing the organization of corporations are conditions precedent, and must be strictly complied with, or the corporation does not exist; and that the want of compliance with any one condition precedent may be shown by any one, in a private litigation with the pretended corporation, unless he has estopped himself by his conduct from challenging its corporate existence, and frequently without reference to the question of estoppel." 1 Thomp. Corp. § 495.

tion thereunder, comply at least colorably with the law, and afterwards assume to act as a corporation, though particular provisions of the law are not complied with, whether compliance with the particular provisions was intended by the Legislature as a condition precedent to the formation of the corporation or not. Thus, an association has been held a corporation de facto, though there was not sufficient notice of the meetings held for the purpose of organizing, and though the certificates of incorporation were not properly executed, acknowledged, or recorded, as required by the statute.[15] And there are many other cases to the same effect.[16] All that is necessary, according to this doctrine, is that there shall be a law under which such a corporation as the one in question might have been formed, that there shall have been a bona fide attempt to organize, and a colorable compliance with the provisions of the law, and that there shall have been an assumption of corporate powers, or "user," as it is termed. "Where it is shown that there is a charter or law under which a corporation, with the powers assumed, might lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, and a user of the rights claimed under the charter or law, the existence

[15] East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. 260.

[16] See Attorney General ex rel. Pattee v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; Stout v. Zulick, 48 N. J. Law, 599, 7 Atl. 362; Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482; Society Perun v. Cleveland, 43 Ohio St. 481, 3 N. E. 357; Williamson v. Kokomo Building & Loan Fund Ass'n, 89 Ind. 389; North v. State, 107 Ind. 356, 8 N. E. 159; Cochran v. Arnold, 58 Pa. 399; Thompson v. Candor, 60 Ill. 244; Hudson v. Green Hill Seminary Corp., 113 Ill. 618; Bushnell v. Consolidated Ice Mach. Co., 138 Ill. 67, 27 N. E. 596; Merriman v. Magiveny, 12 Heisk. (Tenn.) 494; Pape v. Capitol Bank of Topeka, 20 Kan. 440, 27 Am. Rep. 183; Haas v. Bank of Commerce, 41 Neb. 754, 60 N. W. 85; Humphreys v. Mooney, 5 Colo. 282; Jones v. Aspen Hardware Co., 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220; Doty v. Patterson, 155 Ind. 60, 56 N. E. 668; Jones v. Hale, 32 Or. 465, 52 Pac. 311; Marsh v. Mathias, 19 Utah, 350, 56 Pac. 1074; Keys v. Smith, 67 N. J. Law, 190, 51 Atl. 122; Lusk v. Riggs, 70 Neb. 718, 102 N. W. 88 (modifying judgment 70 Neb. 713, 97 N. W. 1033, on rehearing); Marshall v. Keach, 227 Ill. 35, 81 N. E. 29, 118 Am. St. Rep. 247, 10 Ann. Cas. 164; Lyell Ave. Lumber Co. v. Lighthouse, 137 App. Div. 422, 121 N. Y. Supp. 802; Healey v. Steele Center Creamery Ass'n, 115 Minn. 451, 133 N. W. 69; Newcomb-Endicott Co. v. Fee, 167 Mich. 574, 133 N. W. 540. In the latter case a copy of the certificate was not filed with the county clerk, but the association was held to be a de facto corporation. Brown v. Webb, 59 Or. 526, 120 Pac. 387, Ann. Cas. 1914A, 148; Swofford Bros. Dry Goods Co. v. Owen, 37 Okl. 616, 133 Pac. 193; Rialto Co. v. Miner, 183 Mo. App. 119, 166 S. W. 629; Roaring Springs Townsite Co. v. Paducah Tel. Co. (Tex. Civ. App.) 164 S. W. 50; Jaques v. Board of Sup'rs of Yuba County, 24 Cal. App. 381, 141 Pac. 404.

of a corporation de facto is established." [17] "Two things are necessary to be shown to establish a corporation de facto, viz.: (1) The existence of a charter or some law under which a corporation, with the powers assumed, might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law. If the law exists, and the record exhibits a bona fide attempt to organize under it, very slight evidence of user beyond this is all that can be required." [18]

Same—Necessity for Valid Law Authorizing Incorporation

In the first place, by the weight of authority, it is always essential to the existence of a corporation de facto that there shall be some law under which such a corporation might have been legally created or organized. If there is no law at all authorizing the formation of such a corporation, there can be no corporation de facto, even though there may have been an assumption of corporate powers. In a Wisconsin case there had been an attempt to organize two churches into one corporate body, whereas the statute only authorized a corporation composed of one church. It was held that the association was not even a corporation de facto. "To be a corporation de facto," it was said, "it must be possible to be a corporation de jure; and acts done in the former case must be legally authorized to be done in the latter, or they are not protected or sanctioned by the law. Such acts must have an apparent right." [19] Within this rule, an unconstitutional law must be re-

[17] Stout v. Zulick, supra.

[18] Eaton v. Walker, supra. It will be noticed that, while the court here says that two things only are necessary to constitute a de facto corporation, namely, the law authorizing incorporation, and user under that law, it proceeds at once to specify a third essential; that is, "a bona fide attempt to organize" under the law. And it is clear that all three of these things are necessary. See Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552; Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. 147; Duggan v. Colorado Mortgage & Investment Co., 11 Colo. 113, 17 Pac. 105; Stanwood v. Sterling Metal Co., 107 Ill. App. 569; Jennings v. Dark, 175 Ind. 332, 92 N. E. 778; Newcomb-Endicott Co. v. Fee, supra. "The requisites to constitute a corporation de facto are three: (1) A charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise." Per Peckham, J., in Tulare Irr. District v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773. See, also, Stevens v. Episcopal Church History Co., 140 App. Div. 570, 125 N. Y. Supp. 573.

[19] Evenson v. Ellingson, 67 Wis. 634, 31 N. W. 342. And see Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416; State v. Critchett, 37 Minn. 13, 32 N. W. 787; Duke v. Taylor, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; American Loan & Trust Co. v. Minnesota & N. W. R. Co., 157 Ill. 641, 42 N. E. 153; Davis v. Stevens (D. C.) 104 Fed. 235; In-

garded as the same as no law at all.[20] There are some cases which declare that a de facto corporation may exist under an unconstitutional act,[21] but "an unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as if it had never been passed." [22] As we have seen, after the period of existence of a corporation has expired by express limitation in its charter or in a general law, it is not a corporation de facto. There is no law under which it can exist.[23]

Same—Necessity for Bona Fide Attempt to Organize

It is also essential to de facto corporate existence that there shall have been a bona fide attempt to organize under the law, and at

diana Bond Co. v. Ogle, 22 Ind. App. 593, 54 N. E. 407, 72 Am. St. Rep. 326; Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. 167; State v. Rutland Ry., Light & Power Co., 85 Vt. 91, 81 Atl. 252, Ann. Cas. 1914A, 1305. In Chicago & W. I. R. Co. v. Heidenreich, 254 Ill. 231, 98 N. E. 567, Ann. Cas. 1913C, 266, it was held there must be a valid law under which a corporation of the character of the one in question could be created. In CLARK v. AMERICAN CANNEL COAL CO., 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217, Wormser Cas. Corporations, 63, it was held "that there cannot be a corporation de facto when there cannot be one de jure," citing many authorities. But where the statutes of a state authorized the consolidation of railroad companies of the state with those of other states under certain conditions or circumstances, it was held that a consolidation of such companies created a de facto corporation, even though the constituent companies did not possess the qualifications required by the statutes to render the consolidated company a corporation de jure, and its corporate existence could be questioned on that ground only by the state. Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155. See, also, Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C.) 82 Fed. 642, 650; Cf. Whaley v. Bankers' Union of the World, 39 Tex. Civ. App. 385, 88 S. W. 259.

[20] Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; Burton v. Schildbach, 45 Mich. 504, 8 N. W. 497; Green v. Graves, 1 Doug. (Mich.) 351; Brandenstein v. Hoke, 101 Cal. 131, 35 Pac. 562; CLARK v. AMERICAN CANNEL COAL CO., 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217, Wormser Cas. Corporations, 63. In McTighe v. Macon Const. Co., 94 Ga. 306, 21 S. E. 701, 32 L. R. A. 208, 47 Am. St. Rep. 153, it was held that a corporation attempted to be created by a special act, which is unconstitutional, may, nevertheless, exist as a de facto corporation, if there is a general law under which it might have been incorporated.

[21] Coxe v. State, 144 N. Y. 396, 39 N. E. 400; Commonwealth v. Philadelphia County, 193 Pa. 236, 44 Atl. 336; Richards v. Minnesota Sav. Bank, 75 Minn. 196, 77 N. W. 822. And see the dictum in Winget v. Quincy Building & Homestead Ass'n, 128 Ill. 67, 21 N. E. 12. Compare Sturges v. Vanderbilt, 73 N. Y. 384, where the Court of Appeals said there could be no de facto corporation under an expired law.

[22] Norton v. Shelby County, 118 U. S. 442, 6 Sup. Ct. 1121, 30 L. Ed. 178. But see article, 13 Mich. Law Rev. 271, 289-292.

[23] Ante, p. 100.

least a colorable compliance with the law in such attempt.[24] "To give to a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the status of a de facto corporation, might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the status of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. * * * 'Color of apparent organization under some charter or enabling act'[25] does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation de jure. But there must be an attempt to perfect an organization under the law. There being such colorable attempt to perfect an organization, the failure as to some substantial requirement will prevent the corporation from being a corporation de jure; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation de facto." [26]

[24] Where partners agreed to do business as a corporation, fulfilling part of the statutory requirements of incorporation, but omitting certain essentials, with the intention of stopping short of the creation of a corporation, such action did not create a corporation de facto as between themselves. Card v. Moore, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed 173 N. Y. 598, 66 N. E. 1105. Where an attempt was made to organize a banking corporation at a time when no statute authorized it, and the bank was conducted and held itself out as a corporation, and afterwards a statute was enacted under which a corporation with the powers assumed might have been organized, and the bank continued to hold itself out as incorporated, but did not attempt to comply with the statute, it was held that the bank was a de facto corporation. State v. Stevens, 16 S. D. 309, 92 N. W. 420. See, also, to the same effect, Mason v. Stevens, 16 S. D. 320, 92 N. W. 424. And see Hancock v. Board of Education of City of Santa Barbara, 140 Cal. 554, 74 Pac. 44. These decisions seem questionable, since, while there was an attempt to organize, there was none to organize under the law. See 16 Harv. Law Rev. 362.

[25] The court had previously quoted from Taylor on Corporations: "When a body of men are acting as a corporation under color of apparent organization, in pursuance of some charter or enabling act, their authority to act as a corporation cannot be questioned collaterally." Tayl. Corp. 145.

[26] Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552. And see Bash v. Culver Gold Min. Co., 7 Wash. 122, 34 Pac. 464; Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; In re Gibbs Estate, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276; Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. 147; Washington Nat. Building, Loan & Investment Ass'n v. Stanley, 38 Or. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793; Healey v. Steele Center Creamery Ass'n, 115 Minn. 451, 133 N. W. 69; Stevens v. Episcopal Church History Co., 140 App. Div. 570, 125 N. Y. Supp. 573.

Same—Sufficiency of Compliance with Law

There are some cases that hold, and some that seem to hold, that there cannot be even a de facto corporation unless the corporators have substantially complied with all the conditions precedent prescribed by the statute; that, without such compliance, the pretended corporation does not come into existence for any purpose; and that, in the absence of elements of estoppel, the objection may be raised by a private individual as well as by the state, and collaterally as well as directly.[27] This really amounts to a negation of the entire de facto doctrine, for if there has been substantial compliance a corporation de jure exists. These cases, however, are contrary to the weight of authority, and some of them are not easily reconciled with other decisions of the same court. To constitute a corporation de facto there must, it is true, be a colorable compliance with the statute, but there need not be more. There need not be a substantial compliance. A substantial compliance makes the body a corporation de jure.[28] As was said by the Minnesota court, if there be an "apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the corporation from being a corporation de jure; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation de facto." [29] That a colorable or apparent compliance, in good faith, with the provisions of the law, is sufficient,

[27] Thus, in Utley v. Union Tool Co., 11 Gray (Mass.) 139, a case in which it was sought to charge the defendants as stockholders of an alleged corporation with personal liability for its debts, the defense was that there were no written articles of agreement in the organization of the alleged corporation, as required by the statute under which the organization was attempted, and the defense was allowed. So, in Bigelow v. Gregory, 73 Ill. 197, certain persons undertook to organize a corporation under a general law which required the articles of association to be published in a certain way, and a certificate of the purposes of the incorporation to be filed in certain public offices; but they failed to comply with these provisions. It was held that there was no corporation de facto, though articles of association were executed, a common name adopted, and business conducted under it; and the associates were held liable as partners for goods sold to them. See, also, Garnett v. Richardson, 35 Ark. 144; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Williams v. Hewitt, 47 La. Ann. 1076, 17 South. 496, 49 Am. St. Rep. 394; Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 8 N. W. 772, 41 Am. Rep. 85; Hurt v. Salisbury, 55 Mo. 310; McLennan v. Hopkins, 2 Kan. App. 260, 41 Pac. 1061; Bergeron v. Hobbs, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85; and article by F. M. Burdick, 6 Col. Law Rev. 1–14.

[28] Ante, p. 61.

[29] Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552. And see Mackay v. New York, N. H. & H. R. Co., 82 Conn. 73, 72 Atl. 583, 24 L. R. A. (N. S.) 768.

is shown by cases in almost all of the states.[30] Some of the cases in which the courts have allowed a collateral attack on the authority of an association to exercise corporate powers, where there was a valid law under which it might be incorporated, a bona fide attempt at incorporation under it, and user of corporate powers, may perhaps be explained on the ground that the court did not consider that there had been even a colorable or apparent compliance with the law.[31] Courts, for instance, will not ordinarily consider that there has been a colorable or apparent compliance with the law, where by express statutory enactment payment of the incorporation fee or tax is made a condition precedent to the exercise of any corporate powers. This apparently rests on grounds of public policy in order to prevent "wildcat" companies.[32] And courts take a similar position where no papers whatever have been filed by the associates.[33]

[30] See Thompson v. Candor, 60 Ill. 244; Bushnell v. Consolidated Ice Mach. Co., 138 Ill. 67, 27 N. E. 596; Miami Powder Co. v. Hotchkiss, 17 Ill. App. 622; Hudson v. Green Hill Seminary Corp., 113 Ill. 618; Duggan v. Colorado Mortgage & Investment Co., 11 Colo. 113, 17 Pac. 105; Franke v. Mann, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856; Gilman v. Druse, 111 Wis. 400, 87 N. W. 557; Owensboro Wagon Co. v. Bliss, 132 Ala. 253, 31 South. 81, 90 Am. St. Rep. 907; Huntington Mfg. Co. v. Schofield, 28 Ind. App. 95, 62 N. E. 106; Lusk v. Riggs, 70 Neb. 718, 102 N. W. 88 (modifying judgment 70 Neb. 713, 97 N. W. 1033, on rehearing); Kwapil v. Bell Tower Co., 55 Wash. 583, 104 Pac. 824. In Duggan v. Colorado Mortgage & Investment Co., supra, it was sought to avoid a mortgage given by a corporation on the ground that its certificate of incorporation was defective because it was not acknowledged as required by the statute. The court said: "We are aware of the distinction between mere omissions or irregularities, and what are called 'prerequisites' of the statutes. The distinction may well be taken in a direct proceeding or other exceptional cases where strict proof is required, but we do not regard it as having any controlling place in the case at bar. What is or what is not a prerequisite is often a difficult question for a professional man, and much more for a layman, to determine. To cast such a burden upon the public as between its individual members is to lose sight of the reason for, and largely abrogate, the salutary rule respecting de facto corporations."

[31] Compare Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552, with Johnson v. Corser, 34 Minn. 355, 25 N. W. 799. And see HARRILL v. DAVIS, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153, Wormser Cas. Corporations, 71.

[32] Stevens v. Episcopal Church History Co., 140 App. Div. 570, 125 N. Y. Supp. 573; National Shutter Bar Co. v. G. F. S. Zimmerman & Co., 110 Md. 313, 73 Atl. 19; Jones v. Aspen Hardware Co., 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220. But compare Slocum v. Providence Steam & Gas Pipe Co., 10 R. I. 112; and see Hughesdale Mfg. Co. v. Vanner, 12 R. I. 491; Christian, etc., Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340, 25 South. 506.

[33] Perrine v. Levin, 68 Misc. Rep. 327, 123 N. Y. Supp. 1007; Stevens v. Episcopal Church History Co., 140 App. Div. 570, 125 N. Y. Supp. 573.

Same—Necessity for User of Corporate Powers

To constitute a de facto corporation it is also essential that the parties shall have assumed in some way the appearance of a corporation, and shall have pretended to act as a corporate body. If, after an attempt at incorporation, in which conditions precedent are not complied with, the directors named in the articles never meet, and no stock is issued nor corporate act done, the association is not a corporation de facto.[84] The mere fact that the owners of a mine use a corporate name does not make a corporation de facto, where no corporate act is performed, and no steps have been taken to incorporate.[85] As was said in a Michigan case, however, "if the law exists, and the record exhibits a bona fide attempt to organize under it, very slight evidence of user beyond this is all that can be required." [86] But some proof of user is essential. In a recent New York case, a certificate of incorporation, which recited that the object of the corporation was "to do a general publishing and printing business," was filed in the secretary of state's office December 21, 1899, but the incorporation was defective because no certificate was filed in the office of the clerk of the county of New York, which was the place at which the corporate business was to be conducted. On December 22, 1899, the board of directors held a meeting at which the sole business transacted was the election of officers and the passage of a resolution authorizing the purchase from one Donnell of his publication, the "Railway News." No action was taken pursuant to the resolution prior to Jan. 1, 1900, nor did the corporation transact any other business prior to that time. The court held that there existed no de facto corporation prior to Jan. 1, 1900. The court conceded that only slight evidence of user is necessary, but added that "none of the cases to which our attention has been called holds that the mere organization of the corporation by the election of officers and the passage of resolutions by directors relating to contracts purely executory in their nature, constitute acts of user of the franchise." [87]

[84] Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151. See, also, Wall v. Mines, 130 Cal. 27, 62 Pac. 386; Card v. Moore, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed 173 N. Y. 598, 66 N. E. 1105; Elgin Nat. Watch Co. v. Loveland (C. C.) 132 Fed. 41. It is necessary to show, not only a valid law and an attempt to organize a corporation, but also that corporate powers have been thereafter exercised. Von Lengerse v. City of New York, 150 App. Div. 98, 134 N. Y. Supp. 832.

[85] Bash v. Culver Gold Min. Co., 7 Wash. 122, 34 Pac. 462.

[86] Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102. See also, Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482; EMERY v. DE PEYSTER, 77 App. Div. 65, 78 N. Y. Supp. 1056, Wormser Cas. Corporations, 61.

[87] EMERY v. DE PEYSTER, supra.

Same—Where Attempted Organization is a Fraud upon the Act

If the attempted organization of a corporation was a fraud upon the act under which corporate existence is claimed, the better opinion is that there is no corporation, even de facto. Thus, where citizens of New Jersey went over into New York, and there attempted to form a corporation under the laws of that state for the purpose of doing business in New Jersey, it was held that there was no corporation de facto, since, under the circumstances of that particular case, the attempted organization was a fraud upon the laws of New York.[38] So, where persons not named in a charter creating a corporation to be located at a certain place, got control of the charter, and attempted to establish a corporation under it, to be located at a different place, it was held that the pretended corporation was not even a de facto corporation.[39]

The Doctrine of De Facto Corporations Distinct from the Doctrine of Estoppel

Much of the confusion in the cases as to corporations de facto results from a failure to distinguish between the doctrine of corporations de facto and the doctrine of equitable estoppel.[40] They are not the same thing, but entirely different doctrines. No elements of estoppel are necessary to prevent a private individual from objecting to the existence of a corporation de facto; and, as we shall see, a man may, in some jurisdictions, on equitable grounds, be estopped to question the corporate character of an association that is not even a corporation de facto. The rule relating to de facto corporations, said the Minnesota court, "is not founded upon any principle of estoppel, as is sometimes assumed, but upon the broad-

[38] Hill v. Beach, 12 N. J. Eq. 31. See Empire Mills v. Alston Grocery Co. (Tex. App.) 15 S. W. 200, 505. Where a corporation is organized without capital to cover a real partnership, and to permit the carrying on of a partnership business without personal liability, the existence of the pretended corporation is open to collateral attack as a fraudulent device, except as to persons who have contracted with it as a corporation in such way as to estop themselves to show the fraud. Christian & Craft Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340, 25 South. 566. And see Card v. Moore, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed 173 N. Y. 598, 66 N. E. 1105.

[39] Wonderly v. Booth, 36 N. J. Law, 250. See, also, Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342. Cf. Elizabethtown Gaslight Co. v. Green, 46 N. J. Eq. 118, 18 Atl. 844; Id., 49 N. J. Eq. 329, 24 Atl. 560. The decisions in New York are difficult to harmonize with the preceding. See Demarest v. Flack, 128 N. Y. 205, 28 N. E. 643, 13 L. R. A. 854; Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322.

[40] For examples, see Hamilton v. Clarion, M. & P. R. Co., 144 Pa. 34, 23 Atl. 53, 13 L. R. A. 779; Bates v. Wilson, 14 Colo. 140, 24 Pac. 99, 104; Foster v. Moulton, 35 Minn. 458, 29 N. W. 155; Butchers' & Drovers' Bank of St. Louis v. McDonald, 130 Mass. 264.

er principles of common justice and public policy. It would be unjust and intolerable if, under such circumstances, every interloper and intruder were allowed thus to take advantage of every informality or irregularity of organization." [41] The law forbids a private individual ordinarily to question the right of a corporation de facto to existence as a corporation, not because of any conduct on his part which renders it inequitable to allow him to do so, for the doctrine extends to persons who have had no dealings whatever with the corporation, but because, irrespective of any question as his position or conduct, it is contrary to public policy to allow any private individual to do so. The Alabama court has said that, before a suit can be maintained by an alleged corporation, its actual or de facto existence must be proved, "or else a state of facts shown which will operate to estop the defendant from denying such de facto existence." [42] In a great many cases it is said that "a person who has entered into a contract" with a "de facto" corporation in its corporate name and capacity cannot, in the absence of fraud, afterwards disregard the existence of the corporation, and sue the stockholders individually as partners on the contract, or defeat an action by the corporation on the contract.[43] This is a confusion of principles. If the corporation is a de facto one, then it is not necessary that a private individual shall have dealt with it in order that he may be prevented from questioning its corporate existence, since the de facto doctrine does not rest upon any basis of estoppel.

In an Ohio case, the plaintiff admitted that persons who have recognized the existence of a pretended corporation by their transactions with it as a corporation are estopped to deny its corporate existence; but it was contended that, as the plaintiff had engaged in no transactions with the alleged corporation in this case, he was free to challenge its existence as a corporation de facto as

[41] East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. 260. And see Society Perun v. Cleveland, 43 Ohio St. 481, 3 N. E. 357 (collecting cases); Williamson v. Kokomo Building & Loan Fund Ass'n, 89 Ind. 389; Pape v. Capitol Bank of Topeka, 20 Kan. 440, 27 Am. Rep. 183; Doty v. Patterson, 155 Ind. 60, 56 N. E. 668; Newcomb-Endicott Co. v. Fee, 167 Mich. 574, 133 N. W. 540.

[42] Schloss v. Montgomery Trade Co., 87 Ala. 411, 6 South. 360, 13 Am. St. Rep. 51.

[43] See SNIDER'S SONS CO. v. TROY, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887, Wormser Cas. Corporations, 66; Swartwout v. Michigan Air Line R. Co., 24 Mich. 390; Butchers' & Drovers' Bank of St. Louis v. McDonald, 130 Mass. 264; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 95 Fed. 497, 507, 36 C. C. A. 155; Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324; Owensboro Wagon Co. v. Bliss, 132 Ala. 253, 31 South. 81, 90 Am. St. Rep. 907.

well as de jure—the argument being that "no case can be found where it is held that there is a corporation de facto against persons who have in no way recognized its existence as a corporation"; and that "the notion of a de facto corporation is based on the doctrine of estoppel. When estoppel cannot be invoked, there can be no de facto corporation." The court, however, declined to take this view, and held that it is a rule, entirely irrespective of any question of estoppel, that no private individual can attack the corporate character of a de facto corporation. In its opinion the court said: "The theory that a de facto corporation has no real existence—that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence—has no foundation, either in reason or authority. A de facto corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a corporation. * * * It is bound by all such acts as it might rightfully perform as a corporation de jure. Where it has attempted, in good faith, to assume corporate powers; where its proceedings in that behalf are colorable, and are approved by those officers of the state who are authorized to act in that regard; where it has honestly proceeded for a number of years, without interference from the state, to transact business as a corporation; has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it—no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon, in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation." [44] In the case of Newcomb-Endicott Co. v. Fee,[45] an action for goods sold and delivered was brought and plaintiff sought to hold the defendants individually liable as partners. A witness for the plaintiff testified that "he was the bookkeeper of the plaintiff, and that the goods sued for were installed in Pound & Co.'s Inn. He did not know who ordered them; witness was not the selling party; that he extended the credit to Pound & Co. in June and July, 1908; that he knew that the defendant Fee was connected with the company. He did not know whether it was a corporation or a partnership." The facts were undisputed that there was a valid law under which defendants could have organized; that they had attempted in good faith to comply with the requirements of the law and had filed their articles

[44] Society Perun v. Cleveland, 43 Ohio St. 481, 3 N. E. 357.
[45] 167 Mich. 574, 133 N. W. 540.

of association with the secretary of state at the time credit was extended by the plaintiff, but had not at that time filed a copy of the articles with the county clerk; and that they had conducted business as a corporation since the date of filing the articles with the secretary of state. The court, on these facts, held that all the elements of a de facto corporation were present, and that the defendants could not be held individually liable as partners. It is clear from the testimony of plaintiff's witness that there was no question of estoppel here; the plaintiff did not know whether the dealings were with a corporation or a partnership. The decision rests purely on the de facto doctrine, and it makes plain that to constitute a de facto corporation no element of estoppel is necessary.[46]

ESTOPPEL TO DENY CORPORATE EXISTENCE

43. Where persons pretend to form a corporation, and assume to exercise corporate powers, an estoppel to deny that they are a corporation operates as against

(a) The persons who so hold themselves out as a corporation.

(b) The pretended corporation itself.

(c) Third persons who deal with the association as a corporation except in the cases hereafter mentioned.

44. EXCEPTIONS—To the rule above stated there are exceptions. Though there are some conflicting decisions by the weight of authority the doctrine does not apply

(a) Where the dealings relied upon as an estoppel are not such as to show recognition of the association as a corporation.

(b) Where there are no equitable grounds for applying it, and, a fortiori, where to apply it would be inequitable.

(c) A few cases hold that the doctrine does not apply where the assumption of corporate powers was unlawful as being in violation of a prohibitory law.

(d) In some states the doctrine is held to apply to such associations only as are at least corporations de facto, but other states do not so limit it.

[46] Under a prosecution for embezzlement from an "incorporated company," it has been held sufficient to show that the money taken was the money of a de facto corporation. People v. Carter, 122 Mich. 668, 81 N. E. 924. And see, Brewer v. State, 7 Lea (Tenn.) 682. Here again there can be no estoppel. So held, also, in tort cases where there is no possibility of estoppel. Persse & Brooks Paper Works v. Willett, 1 Rob. (N. Y.) 131; Cincinnati, etc., R. Co. v. Danville, etc., R. Co., 75 Ill. 113.

It is a well-settled rule, subject to very few, if any, exceptions, that, where persons undertake to form a corporation, and afterwards assume to act as a corporate body, neither they nor the association can dispute its corporate existence and authority to act as such, when it is sued as a corporation on a contract into which it has entered in that character.[47] Nor under such circumstances can the associates deny the corporate character of the association, in order to escape statutory liability for its debts.[48] Nor can they do so in order to avoid liability on their subscriptions to stock in the pretended corporation, when sued thereon either by it, or by its creditors, or by a receiver or assignee.[49] The estoppel also operates

[47] Scheufler v. Grand Lodge A. O. U. W. of Minnesota, 45 Minn. 256, 47 N. W. 799; Perine v. Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. 1022; Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 287; Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. R. Co. (C. C.) 67 Fed. 49; Callender v. Painesville & H. R. Co., 11 Ohio St. 516; Stewart Paper Mfg. Co. v. Rau, 92 Ga. 511, 17 S. E. 748; Fitzpatrick v. Rutter, 160 Ill. 282, 43 N. E. 392; Hamilton v Clarion, M. & P. R. Co., 144 Pa. 34, 23 Atl. 53, 13 L. R. A. 779; Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764, 12 S. E. 771; Independent Order of Mutual Aid v. Paine, 122 Ill. 625, 14 N. E. 42. See, also, Dooley v. Cheshire Glass Co., 15 Gray (Mass.) 494.

[48] Slocum v. Providence Steam & Gas-Pipe Co., 10 R. I. 112; Slocum v. Warren, 10 R. I. 116; Building & Loan Ass'n of Dakota v. Chamberlain, 4 S. D. 271, 56 N. W. 897; Corey v. Morrill, 61 Vt. 598, 17 Atl. 841; Hamilton v. Clarion, M. & P. R. Co., 144 Pa. 34, 23 Atl. 53, 13 L. R. A. 779; Freeland v. Pennsylvania Cent. Ins. Co., 94 Pa. 504; Wheelock v. Kost, 77 Ill. 296; McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 83; McDonnell v. Alabama Gold Life Ins. Co., 85 Ala. 401, 5 South. 120; Eaton v. Aspinwall, 19 N. Y. 119; McClinch v. Sturgis, 72 Me. 288; Aultman v. Waddle, 40 Kan. 195, 19 Pac. 730.

[49] Wadesboro Cotton Mills Co. v. Burns, 114 N. C. 353, 19 S. E. 238; Hickling v. Wilson, 104 Ill. 54; Weinman v. Wilkinsburg & E. L. P. R. Co., 118 Pa. 192, 12 Atl. 288; Parker v. Northern Cent. M. R. Co., 33 Mich. 23; Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298; Anderson v. Newcastle & R. R. Co., 12 Ind. 376, 74 Am. Dec. 218; Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523; American Homestead Co. v. Linigan, 46 La. Ann. 1118, 15 South. 369; Upton v. Hansbrough, 3 Biss. 417, Fed. Cas. No. 16,801; Dutchess Cotton Manufactory v. Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459; Black River & U. R. Co. v. Clarke, 25 N. Y. 208; Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128; Home Stock Ins. Co. v. Sherwood, 72 Mo. 461; South. Bay Meadow Dam Co. v. Gray, 30 Me. 547; Montpelier & W. R. R. Co. v. Langdon, 46 Vt. 284; Torras v. Raeburn, 108 Ga. 345, 33 S. E. 989; United Growers Co. v. Elsner, 22 App. Div. 1, 47 N. Y. Supp. 906; Fish v. Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161; American Alkali Co. v. Campbell (C. C.) 113 Fed. 398. This rule has no application to one who subscribes for stock previous to and in anticipation of incorporation, and who has not by his subsequent acts acquiesced in the mode of incorporation. In such a case it is an implied condition of his subscription that the proposed corporation shall be legally and regularly organized; and, if it is not, he may set it up as a defense

in actions and controversies between the associates themselves.[50] Not only may the associates themselves, and the association or pretended corporation, be thus estopped, but third persons may be estopped by dealing with the association as a corporation.[51] Thus, it has frequently been held that entering into a contract with an association as a corporation will operate as an estoppel to dispute its existence as a corporation, in an action brought on the contract, unless there are special circumstances to take the case out of the general rule, whether it be brought by the pretended corporation,[52]

when sued on his subscription. Capps v. Hastings Prospecting Co., 40 Neb. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. Rep. 677; Schloss v. Montgomery Trade Co., 87 Ala. 411, 6 South. 360, 13 Am. St. Rep. 51; Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. 244; post, p. 117, note 59. If, however, a subscriber to stock in a corporation to be formed takes active part in its organization, or in its management after organization, he cannot be heard to say that it was not legally organized. Danbury & N. R. Co. v. Wilson, 22 Conn. 435, 456; Phœnix Warehousing Co. v. Badger, 67 N. Y. 294; Schenectady & S. Plank Road Co. v. Thatcher, 11 N. Y. 102; Ohio & M. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128; Canfield v. Gregory, 66 Conn. 9, 33 Atl. 536; Hause v. Mannheimer, 67 Minn. 194, 69 N. W. 810; Tanner v. Nichols, 80 S. W. 225, 25 Ky. Law Rep. 2191. And if a corporation has been incorporated and has been doing business for several years before a subscription is made, in an action on the subscription the subscriber cannot defend on the ground that the corporation was not legally incorporated. Farmers' Mut. Telephone Co. v. Howell, 132 Iowa, 22, 109 N. W. 294.

[50] See Bushnell v. Consolidated Ice Mach. Co., 138 Ill. 67, 27 N. E. 596; Curtis v. Tracey, 169 Ill. 233, 48 N. E. 399, 61 Am. St. Rep. 168; Anderson v. Thompson, 51 La. Ann. 727, 25 South. 399. In mandamus to compel delivery of corporate books and records, a stockholder and former officer is estopped from disputing that the corporation is a legal one. Coldwater Copper Min. Co. v. Gillis, 170 Mich. 126, 135 N. W. 901, Ann. Cas. 1915A, 410.

[51] Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C.) 82 Fed. 642; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155; Seven Star Grange, No. 73, Patrons of Husbandry v. Ferguson, 98 Me. 176, 56 Atl. 648. Where persons assuming to be a corporation as such executed an assignment for creditors, a creditor who filed his claim with the assignee thereby elected to treat the company as a corporation. Clausen v. Head, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933. In Swofford Bros. Dry Goods Co. v. Owen, 37 Okl. 616, 133 Pac. 193, it was held that the filing of a claim against a corporation in bankruptcy was inconsistent with a suit against the members as partners. See, also, First Nat. Bank of Decatur v. Henry, 159 Ala. 367, 49 South. 97.

[52] Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482; Commercial Bank of Keokuk v. Pfeiffer, 108 N. Y. 242, 15 N. E. 311; Minnesota Gaslight Economizer Co. v. Denslow, 46 Minn. 171, 48 N. W. 771; Jones v. Cincinnati Type Foundry Co., 14 Ind. 89; Fresno Canal & Irrigation Co. v. Warner, 72 Cal. 379, 14 Pac. 37; Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523; Swartwout v. Michigan Air Line R. Co., 24 Mich. 390; Cahall v. Citizens' Mut. Bldg. Ass'n, 61 Ala. 232; Douglas County Com'rs v. Bolles,

or by the other party, in disregard of the corporate existence of the association, to charge the members individually as partners.[53] As to the latter proposition, however, there is some doubt, and there are cases against it.[54]

94 U. S. 104, 24 L. Ed. 46; Tarbell v. Page, 24 Ill. 46; Winget v. Quincy Building & Homestead Ass'n, 128 Ill. 67, 21 N. E. 12; Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. 244; Building & Loan Ass'n of Dakota v. Chamberlain, 4 S. D. 271, 56 N. W. 897; Butchers' & Drovers' Bank of St. Louis v. McDonald, 130 Mass. 264; Worcester Medical Inst. v. Harding, 11 Cush. (Mass.) 285; Lehman, Durr & Co. v. Warner, 61 Ala. 455; Close v. Glenwood Cemetery, 107 U. S. 477, 2 Sup. Ct. 267, 27 L. Ed. 408; Oregonian R. Co. v. Oregon R. & Nav. Co. (C. C.) 23 Fed. 232; South Bay Meadow Dam Co. v. Gray, 30 Me. 547; Hassinger v. Ammon, 160 Pa. 245, 28 Atl. 679; Bank of Shasta v. Boyd, 99 Cal. 604, 34 Pac. 337; Manship v. New South Building & Loan Ass'n (C. C.) 110 Fed. 845; Deitch v. Staub, 115 Fed. 309, 53 C. C. A. 137; Nebraska Nat. Bank of York v. Ferguson, 49 Neb. 109, 68 N. W. 370, 59 Am. St. Rep. 522; Fayetteville Waterworks Co. v. Tillinghast, 119 N. C. 343, 25 S. E. 960; Kalamazoo, City of, v. Kalamazoo Heat, Light & Power Co., 124 Mich. 74, 82 N. W. 811; First Congregational Church of Cripple Creek v. Grand Rapids School Furniture Co., 15 Colo. App. 46, 60 Pac. 948; West Missouri Land Co. v. Kansas City Suburban Belt R. Co., 161 Mo. 595, 61 S. W. 847; Kansas City Southern R. Co. v. Mixon-McClintock Co., 107 Ark. 48, 154 S. W. 205, Ann. Cas. 1914C, 1247. Thus, the grantor in a deed in favor of a body professing to be a corporation and acting as such, and any person claiming under him, is estopped to deny the corporate existence of the grantee, for the purpose of defeating the deed. Broadwell v. Merritt (Mo.) 1 S. W. 855; Whitney v. Robinson, 53 Wis. 309, 10 N. W. 512; Lynch v. Perryman, 29 Okl. 615, 119 Pac. 229, Ann. Cas. 1913A, 1065. And the execution of a note or bond payable to a body as a corporation is an admission by the maker or obligor of its corporate existence, which will estop him from denying it. Stoutimore v. Clark, 70 Mo. 471; Vater v. Lewis, 36 Ind. 288, 10 Am. Rep. 29; Brickley v. Edwards, 131 Ind. 3, 30 N. E. 708; John v. Farmers' & Mechanics' Bank of Indiana, 2 Blackf. (Ind.) 367, 20 Am. Dec. 119; School Dist. No. 61 v. Alderson, 6 Dak. 145, 41 N. W. 466; Booske v. Gulf Ice Co., 24 Fla. 550, 5 South. 247; California Fruit Exch. v. Buck, 163 Cal. 223, 124 Pac. 824.

[53] See SNIDER'S SONS' CO. v. TROY, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887, Wormser Cas. Corporations, 66; Cochran v. Arnold, 58 Pa. 399. And see Shields v. Clifton Hill Land Co., 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. Rep. 700; Phinizy v. Augusta & K. R. Co. (C. C.) 62 Fed. 678; Bradford v. Frankfort, St. L. & T. R. Co., 142 Ind. 383, 40 N. E. 741, 41 N. E. 819; Black River Imp. Co. v. Holway, 85 Wis. 344, 55 N. W. 418; Jennings v. Dark, 175 Ind. 332, 92 N. E. 778; Clinton Co. v. Schwarz, 175 Ill. App. 577; Lockwood v. Wynkoop, 178 Mich. 388, 144 N. W. 846; Johnston v. Gumbel (Miss.) 19 South. 100. In the latter case it was held that creditors of a corporation, having dealt with it in its corporate capacity, cannot attack an assignment by it on the ground of irregularities in its organization. In the case of Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74, it was held that the purchaser of a note indorsed as by a corporation is estopped to deny the corporate existence of such indorser, and that the associates cannot be held liable as partners.

[54] Post, pp. 123–124, notes 82, 83, 84.

Where a party has recognized a corporation in a promissory note, mortgage, or other contract by inserting the corporate name, and suit is brought on the instrument and the instrument itself is the only evidential fact set forth in the complaint by the alleged corporation tending to prove its corporate existence, and the party demurs to the complaint (the instrument having been made a part of the pleadings), courts have frequently given judgment for the plaintiff on the ground that the defendant is estopped to deny the corporate existence of plaintiff, because of having dealt with plaintiff as a corporation. It is an interesting question whether the true basis of these decisions is that the defendant's recognition of the plaintiff's corporate character, by referring to the corporate name of plaintiff in the instrument, is prima facie evidence that plaintiff is a de facto corporation, placing the burden of going forward with evidence on the defendant; and not that defendant is estopped to deny the corporate existence of plaintiff.[55]

Necessity for Recognition of Corporate Existence

To warrant holding a person estopped from denying the existence of a corporation because he has dealt with it, his dealings must have been such as to show a recognition of the corporate character of the body.[56] A man cannot be so estopped by acts which are just as consistent with the existence of an unincorporated association as of one incorporated, for "estoppels never arise from ambiguous facts; they must be established by those that are unequivocal, and not susceptible of two constructions." [57] Thus, the mere fact that a man accepted the office of treasurer of an association will not estop him from denying that the association was a corporation; nor will the members of a religious association, for instance, be estopped to deny its existence as a corporation by the fact that they

[55] Toledo Computing Scale Co. v. Young, 16 Idaho, 187, 101 Pac. 257; Young v. Plattner Imp. Co., 41 Colo. 65, 91 Pac. 1109; Kellerher v. Denver Music Co., 48 Colo. 212, 109 Pac. 860; Gainesville & Alachua County Hospital Ass'n v. Atlantic Coast Line R. Co., 157 N. C. 460, 73 S. E. 242. And see New Bern Banking & Trust Co. v. Duffy, 156 N. C. 83, 72 S. E. 96.

[56] Where partners who had been carrying on business as a corporation entered into a written agreement reciting the existence of the supposed corporation merely for prudential reasons, and with no intention to create a corporation or belief that one had been created, the recital of incorporation did not estop one partner to deny corporate existence as against parties claiming under the other partner. Card v. Moore, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed 173 N. Y. 598, 66 N. E. 1105.

[57] Fredenburg v. Lyon Lake Methodist Episcopal Church, 87 Mich. 476. See Schloss v. Montgomery Trade Co., 87 Ala. 411, 6 South. 360, 13 Am. St. Rep. 51; De Witt v. Hastings, 69 N. Y. 518; Clark v. Jones, 87 Ala. 474, 6 South. 362; Florsheim & Co. v. Fry, 109 Mo. App. 487, 84 S. W. 1023.

held the ordinary meetings of a religious society, passed by-laws, elected officers, etc., for these acts are just as consistent with the existence of an unincorporated association as of a corporation.[58] On the same principle it has been held that, though a person who has co-operated in the organization and acts of a body as a corporation will be estopped from disputing its corporate character, a person who merely subscribes for stock in a corporation not yet formed, and makes a payment thereon preliminary to its organization, but who does nothing to recognize the body as duly incorporated, will not be estopped to deny its de facto existence.[59] And a person who contracts with an association in ignorance of its claim to corporate existence is not thereby estopped to sue the associates as partners.[60] The mere fact that in a contract with an association it is designated by a name which is appropriate to a corporate body does not show a recognition or admission of its existence as a corporation. It merely shows an admission of the existence of an association acting under that name.[61]

[58] Fredenburg v. Lyon Lake Methodist Episcopal Church, supra; Kirkpatrick v. United Presbyterian Church of Keota, 63 Iowa, 372, 19 N. W. 272; Trustees, etc., of M. E. Church of Newark v. Clark, 41 Mich. 730, 3 N. W. 207. And see Middle Branch Mut. Tel. Co. v. Jones, 137 Iowa, 396, 115 N. W. 3.

[59] Schloss v. Montgomery Trade Co., supra. And see Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. 244; Capps v. Hastings Prospecting Co., 40 Neb. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. Rep. 677; Indianapolis Furnace & Min. Co. v. Herkimer, 46 Ind. 142; Rikhoff v. Brown's Rotary Shuttle Sewing Mach. Co., 68 Ind. 388; Dorris v. Sweeney, 60 N. Y. 463; Richmond Factory Ass'n v. Clarke, 61 Me. 351; Byronville Creamery Ass'n v. Ivers, 96 Minn. 8, 100 N. W. 387.

[60] In Guckert v. Hacke, 159 Pa. 303, 28 Atl. 249, it was held that where a person contracts with an association of persons, and becomes their creditor, without any knowledge that they claim to be a corporation instead of partners, and there is nothing to put him on inquiry, he is not estopped to sue the members as partners, and show that they have failed to comply with the law under which they claim corporate existence; and, further, that he cannot be estopped by taking their corporate note for the debt after knowledge of their claim to corporate existence, for the relation of the parties has been fixed by their status when the original contract was made. And see Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; Duke v. Taylor, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; Christian & Craft Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340, 25 South. 566; Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324. Cf. Fitzpatrick v. Rutter, 160 Ill. 282, 43 N. E. 392; Newcomb-Endicott Co. v. Fee, 167 Mich. 574, 133 N. W. 540.

[61] Holloway v. Memphis, E. P. & P. R. Co., 23 Tex. 465, 76 Am. Dec. 68; Welland Canal Co. v. Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51; Rust Owen Lumber Co. v. Wellman, 10 S. Dak. 122, 72 N. W. 89. But see Jones v. Cincinnati Type Foundry Co., 14 Ind. 89; Johnston Harv. Co. v. Clark, 30

Doctrine of Estoppel is Based on Equitable Grounds

An examination of the cases in which the doctrine of estoppel to deny corporate existence has been applied will show that most of them rest on some basis of conduct, or of benefit obtained, or other cause rendering it inequitable to allow such denial. The doctrine is an equitable one, and should be applied only where there are equitable grounds for applying it.[62] It should never be applied where it would be inequitable to do so.[63] Nor should it be applied unless it would be inequitable not to do so. To say, therefore, without qualification, that a person who deals with an association as a corporation is estopped to deny its existence as a corporation, is too broad. It is perfectly right that a person who deals with an association as a corporation, knowing that it is not, should be left in the position that he has thus assumed, and be precluded from denying that the body is a corporation in actions growing out of the transaction.[64] When, however, a person deals with a body as a corporation, which the members hold out as a corporation, and which he believes to be a corporation, there should be something more than the mere fact of his dealings to estop him.[65] If, in such a case, he derives a benefit from the association, and assumes an obligation to pay therefor, as where a person borrows money or purchases goods from a pretended corporation, it is equitable that he should be estopped to deny its corporate existence in order to escape liability on his obligation.[66] On the other hand, if a person deals with a pretended corporation, believing it to be a corporation, and, instead of receiving a benefit himself, confers a benefit upon the associates, he ought not, from the mere fact that he dealt with them as a corporation, to be estopped to deny their corporate existence, and hold them individually liable. Though there are cases to the contrary,[67] there are many cases which hold that there is no estoppel under such circumstances,[68] but some of them seem to

Minn. 308, 15 N. W. 252; Richards v. Minnesota Sav. Bank, 75 Minn. 196, 77 N. W. 822.

[62] Kohlsaat v. Gay, 126 Ill. App. 4, affirmed Gay v. Kohlsaat, 223 Ill. 260, 79 N. E. 77.

[63] Doyle v. Mizner, 42 Mich. 332, 3 N. W. 968. And see Estey Mfg. Co. v. Runnels, 55 Mich. 130, 20 N. W. 823; Krutz v. Paola Town Co., 20 Kan. 397.

[64] See Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050.

[65] Williams v. Hewitt, 47 La. Ann. 1076, 17 South. 496, 49 Am. St. Rep. 394.

[66] Ante, p. 114, and cases cited.

[67] See SNIDER'S SONS' CO. v. TROY, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887, Wormser Cas. Corporations, 66; Cochran v. Arnold, 58 Pa. 399. See ante, p. 115, and post, p. 119.

[68] In Williams v. Hewitt, 47 La. Ann. 1076, 17 South. 496, 49 Am. St. Rep. 394, the defendants conducted a banking business as a corporation, when they were not a corporation because of noncompliance with the statute

ignore the operation and effect of the de facto doctrine as distinguished from that of estoppel.[69]

Unlawful Assumption of Corporate Powers

It has been said that the doctrine of estoppel does not apply, so as to prevent one who recognizes a pretended corporation by contracting with it from afterwards denying its corporate character, where the assumption of corporate powers by the body was unlawful, as being in violation of a prohibitory law, or as being for an illegal purpose. Any dealings with such a body would be illegal and void, and could not give rise to a cause of action.[70]

Doctrine of Estoppel not Limited to De Facto Corporations

This question has already been somewhat referred to.[71] In Swartwout v. Michigan Air Line R. Co.,[72] Judge Cooley said: "Where there is a corporation de facto, with no want of legislative power to its due and legal existence, when it is proceeding in the performance of corporate functions, and the persons are dealing with it on the supposition that it is what it professes to be, and the questions are only whether there has been exact regularity, and strict compliance with the provisions of the law relating to corporations, it is plainly a dictate alike of justice and public policy that, in controversies between the de facto corporation and those who have entered into contract relations with it, as corporators or otherwise, such questions should not be suffered to be raised." This dictum has been often quoted, and the doctrine of estoppel has been similarly stated by many other courts.[73] The dictum in

under which they pretended to organize. The plaintiff deposited money with them, believing that they were a corporation. Afterwards he brought suit against them individually as partners, to recover the amount of the deposit, and it was held that he was not estopped. And there are many cases in which a person who has sold goods to a pretended corporation has been permitted, on discovery that there was no corporation, to sue the associates as partners. Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342. And see Bigelow v. Gregory, 73 Ill. 197; Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416. Contra, SNIDER'S SONS' CO. v. TROY, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887, Wormser Cas. Corporations, 66; Cochran v. Arnold, 58 Pa. 399. See, also, articles, 25 Harv. Law Rev. 623; 13 Mich. Law Rev. 271.

[69] Thus see Bigelow v. Gregory, supra.

[70] See 1 Thomp. Corp. § 533; Wright v. Lee, 2 S. D. 596, 51 N. W. 706; Building & Loan Ass'n of Dakota v. Chamberlain, 4 S. D. 271, 56 N. W. 897; Oregonian R. Co. v. Oregon R. & Nav. Co. (C. C.) 23 Fed. 233; Empire Mills v. Alston Grocery Co. (Tex. App.) 15 S. W. 200; Id., 15 S. W. 505, 12 L. R. A. 366. But see Lincoln Building & Sav. Ass'n v. Graham, 7 Neb. 173.

[71] Ante, p. 109.

[72] 24 Mich. 390.

[73] See the dictum in SNIDER'S SONS' CO. v. TROY, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887, Wormser Cas. Corporations, 66;

these cases is broad enough to imply that the doctrine of estoppel applies to de facto corporations only; but many of the same courts have in later decisions made it evident that it was not intended so to hold.[74] There are some decisions, however, which do expressly hold that the doctrine only applies to associations that are at least corporations de facto; that it does not apply, for instance, to an association that has never had any corporate existence at all, either in law or in fact, as where persons have attempted to organize a corporation, and have not gone far enough to become a corporation de facto, or have assumed to act as such, without any legislative authority at all, or under an unconstitutional law.[75] These deci-

Butchers' & Drovers' Bank of St. Louis v. McDonald, 130 Mass. 264; Bushnell v. Consolidated Ice Mach. Co., 138 Ill. 67, 27 N. E. 596; Merchants' & Manufacturers' Bank v. Stone, 38 Mich. 779; Merriman v. Magiveny, 12 Heisk. (Tenn.) 494; Eaton v. Aspinwall, 19 N. Y. 119; Cochran v. Arnold, 58 Pa. 399; Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120; Harris v. Gateway Land Co., 128 Ala. 652, 29 South. 611; Lincoln Park Chapter No. 177 Arch Masons v. Swatek, 204 Ill. 228, 68 N. E. 429; Swofford Bros. Dry Goods Co. v. Owen, 37 Okl. 616, 133 Pac. 193. An interesting note approving the case last cited is found in 1 Virginia Law Rev. 236-238.

[74] Compare, with the above, Cahall v. Citizens' Mut. Bldg. Ass'n, 61 Ala. 232; Schloss v. Montgomery Trade Co., 87 Ala. 411, 6 South. 360, 13 Am. St. Rep. 51; Estey Manuf'g Co. v. Runnels, 55 Mich. 130, 20 N. W. 823; Stoffiet v. Strome, 101 Mich. 197, 59 N. W. 411. In Schloss v. Montgomery Trade Co., supra, it was said that, before a suit can be maintained by an alleged corporation, its actual or de facto existence must be proved, "or else" a state of facts shown which will estop the defendant from denying "such de facto existence." And further on it is again said that a subscriber to stock, like any other person, may be estopped from disputing "the de facto existence" of a corporation. This clearly implies that the doctrine of estoppel applies to associations which pretend to be a corporation, but which have not even a de facto existence as such. In Estey Mfg. Co. v. Runnels, supra, it was said: "Where a body assumes to be a corporation, and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence. Such is the general rule founded upon equitable principles, and, if any exceptions exist, it is only where there are no facts which make it legally unjust to forbid its denial." The rule here is not limited to de facto corporations.

[75] Heaston v. Cincinnati & Ft. W. R. Co., 16 Ind. 275, 279, 79 Am. Dec. 430; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415; Harriman v. Southam, 16 Ind. 190; Jones v. Aspen Hardware Co., 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220; Brandenstein v. Hoke, 101 Cal. 131, 35 Pac. 562. And see Empire Mills v. Alston Grocery Co. (Tex. App.) 15 S. W. 505, 12 L. R. A. 366; Boyce v. Trustees of the Towsonton Station of Methodist Episcopal Church, 46 Md. 359; Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. 167; National Shutter Bar Co. v. G. F. S. Zimmerman & Co., 110 Md. 313, 73 Atl. 19; HARRILL v. DAVIS, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153, Wormser Cas.

sions have two arguments to support them. In the first place, equity will not invoke an estoppel where it is against public policy to raise an estoppel, and it would seem contrary to public policy, as declared by express enactment of the Legislature in the laws relating to the formation of corporations, to create a corporation where no attempt has been made to comply with the laws, or an utter disregard of them has been shown. In the second place, it is often very doubtful whether the elements necessary to raise an equitable estoppel in pais are present. In the recent case of Harrill v. Davis,[76] Judge Sanborn said: "The fact that the plaintiff dealt with and treated the Cowetta Cotton & Milling Company as a corporation did not estop it from denying it was such before the defendants filed their articles of incorporation, because it was not a corporation de facto before that time and because the indispensable elements of an estoppel in pais, ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel, and action by the latter induced by the misrepresentations of the party against whom the estoppel is invoked, do not exist in the case at bar. The plaintiff did not and the defendants did, represent that the milling company was a corporation when it was not. The defendants had better means of knowledge of the fact than the plaintiff, and they knew it was not a corporation, and they were not induced to act on any representation of the plaintiff that it was such, or by its treatment of it as such."

There are many recent cases in which the rule of estoppel to deny corporate existence is stated without limiting it to de facto corporations, and there are many cases which expressly hold that it is not so limited; that it applies, for instance, where the law under which corporate existence is claimed is void, expired or unconstitutional.[77] The Supreme Court of the United States has said

Corporations, 71; Jennings v. Dark, 175 Ind. 332, 92 N. E. 778; Cottentin v. Meyer, 80 N. J. Law, 52, 76 Atl. 341 (semble).

[76] HARRILL v. DAVIS, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153, Wormser Cas. Corporations, 71.

[77] Minnesota Gaslight Economizer Co. v. Denslow, 46 Minn. 171, 48 N. W. 771; Snyder v. President, etc., of State Bank of Illinois, Breese (Ill.) 161; McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Dows v. Naper, 91 Ill. 44; Winget v. Quincy Building & Homestead Ass'n, 128 Ill. 67, 21 N. E. 12; Building & Loan Ass'n of Dakota v. Chamberlain, 4 S. D. 271, 56 N. W. 897 (collecting cases); Corey v. Morrill, 61 Vt. 598, 17 Atl. 841; Freeland v. Pennsylvania Cent. Ins. Co., 94 Pa. 504; Weinman v. Wilkinsburg & E. L. P. Ry. Co., 118 Pa. 192, 12 Atl. 288; Board of Com'rs for Filling Certain Slough Ponds in City of St. Louis v. Shields, 62 Mo. 247; Broadwell v. Merritt (Mo.) 1 S. W. 855; Fresno Canal & Irr. Co. v. Warner, 72 Cal. 379, 14 Pac. 37; American Homestead Co. v. Linigan, 46 La. Ann. 1118, 15 South. 369; Bates v. Wilson, 14 Colo. 140, 24 Pac. 99; Agua Fria Copper

"sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it." [78] If the doctrine is limited to de facto corporations, it is unnecessary. Grounds of estoppel are not necessary to prevent a private individual, whoever he may be, from attacking the existence of a de facto corporation.[79] It is of course, very largely a matter of public policy whether courts shall raise an estoppel where not even the elements of de facto incorporation are present, and naturally the courts differ.

LIABILITY OF ASSOCIATES AS PARTNERS

45. Where persons hold themselves out as a corporation, and contract as such, without having even a de facto corporate existence, most courts hold that persons dealing with them, if not estopped to deny their corporate existence, may hold them liable as partners. Other courts hold that they are not liable as partners, but that the remedy is against the agents who assume to represent the pretended corporation for breach of implied warranty of authority.

We have just seen that where persons in good faith undertake to organize themselves into a corporation under a valid law authorizing incorporation, and assume corporate powers in pursuance thereof, they constitute a corporation de facto, and, though they may not

Co. v. Bashford-Burmister Co., 4 Ariz. 203, 35 Pac. 983; Pape v. Capitol Bank of Topeka, 20 Kan. 440, 27 Am. Rep. 183; Gardner v. Minneapolis & St. L. Ry. Co., 73 Minn. 517, 76 N. W. 282; Crete Building & Loan Ass'n v. Patz, 1 Neb. (Unof.) 768, 95 N. W. 793; In re Western Bank & Trust Co. (D. C.) 163 Fed. 713; Tulane Imp. Co. v. S. A. Chapman & Co., 129 La. 562, 56 South. 509; Lynch v. Perryman, 29 Okl. 615, 119 Pac. 229, Ann. Cas. 1913A, 1065. But see Western Union Telegraph Co. v. Mexican Agr. Land Co., 31 Okl. 528, 122 Pac. 505, Ann. Cas. 1914C, 1244. And see article, 13 Mich. Law Rev. 271, 289–292. "It is too well settled now to be controverted that a party who contracts with a corporation, whether it be by subscription to its stock, or by promissory note, bond, mortgage, or other form of contract, is estopped from denying the existence of the corporation." Lehman, Durr & Co. v. Warner, 61 Ala. 455, 466. "One who deals with a corporation as existing in fact is estopped to deny, as against the corporation, that it has been legally organized." Close v. Glenwood Cemetery, 107 U. S. 477, 2 Sup. Ct. 267, 27 L. Ed. 408. "It is hardly possible that one will be suffered to obtain the goods of another, doing business as a corporation, and retaining the goods, defeat a recovery by alleging the illegality of the act under which the corporation was formed. We do not care to countenance such a result." Agua Fria Copper Co. v. Bashford-Burmister Co., supra.

[78] Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168, 307. [79] Ante, p. 109.

have complied with the provisions of the law in their organization, they nevertheless have the status of a corporation as against all persons except the state, and that even the state cannot attack their existence as a corporation, except in a direct proceeding for that purpose. In such a case, of course, persons who deal with the body cannot dispute its corporate existence, and hold the associates liable as partners.[80]

We have also seen that, according to some of the cases, where there is not even a de facto corporation, persons who deal with a pretended corporation as a corporation will, except under peculiar circumstances, be estopped to deny its existence as a corporation, for the purpose of holding the associates liable as partners, though on this proposition the authorities cannot be harmonized.[81]

The question now arises as to the remedy of those who deal with an association which is not even a de facto corporation, and under such circumstances that they are not estopped to deny its corporate existence, as where they deal with the parties in ignorance of their claim of corporate existence. On this question the courts do not agree. In some jurisdictions it is held that persons who contract as a corporation, without a right to do so, cannot be held liable as partners, since they have not contemplated or assented to such a liability. Fay v. Noble [82] is a leading case holding this view. In this case the agent of an association which pretended to be a corporation, but which had not been legally organized, borrowed money from the plaintiffs in the name of the association, and gave its note therefor. The plaintiffs sought to recover the money in an action against the associates as partners, but it was held that they could not recover.[83] There are many other cases to the same effect, though in most of them it will be found that the plaintiff contracted with the association as a corporation, so that he might have been

[80] Ante, p. 97; Stout v. Zulick, 48 N. J. Law, 599, 7 Atl. 362; SNIDER'S SONS' CO. v. TROY, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887, Wormser Cas. Corporations, 66; Doty v. Patterson, 155 Ind. 60, 56 N. E. 668; Swofford Bros. Dry Goods Co. v. Owen, 37 Okl. 616, 133 Pac. 193; Shawmut Commercial Paper Co. v. Auerbach, 214 Mass. 363, 101 N. E. 1000.

[81] Ante, p. 112; SNIDER'S SONS' CO. v. TROY, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887, Wormser Cas. Corporations, 66; Cochran v. Arnold, 58 Pa. 399. Contra, are the cases in note 68; but some of these seemingly present all the elements of de facto incorporation.

[82] 7 Cush. (Mass.) 188.

[83] But if a single person assumes, without right, to act and contract as a corporation, his pretended associates being associates in name only, and gives a note in the name of the pretended corporation, he can be sued individually on the note. Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342.

held estopped.[84] According to this doctrine, if there is not even a de facto corporation, and the party contracting with the pretended corporation is not estopped to deny its corporate existence, the remedy is against the agent or agents who entered into the contract on behalf of the pretended corporation for breach of implied warranty of authority. "By professing to act for a corporation which does not exist, they put themselves in the position of a person who professes to act as the agent of another person who is really nonexistent. Under a well-settled rule, they are therefore personally bound to make good any undertaking which they assume in that character." [85]

In most of the states, perhaps, this rule is not recognized; but it is held that where a pretended corporation is not a corporation de facto, and where persons dealing with it are not, under the rules heretofore explained,[86] estopped to deny its corporate existence—as, where they do not know of its claim to corporate existence, or even where they do know of it, if in the particular jurisdiction they are not held to be estopped—they may hold the associates liable as partners for debts contracted by them in the name of the association.[87] In some states this rule is, in effect, expressly declared by statute.[88]

[84] Rutherford v. Hill, 22 Or. 218, 29 Pac. 546, 17 L. R. A. 549, 29 Am. St. Rep. 596; Trowbridge v. Scudder, 11 Cush. (Mass.) 83; Salem First Nat. Bank v. Almy, 117 Mass. 476; Ward v. Brigham, 127 Mass. 24; Medill v. Collier, 16 Ohio St. 599; Humphreys v. Mooney, 5 Colo. 282; Planters' & Miners' Bank v. Padgett, 69 Ga. 159; Stafford Nat. Bank v. Palmer, 47 Conn. 443; Central City Sav. Bank v. Walker, 66 N. Y. 424; Jessup v. Carnegie, 80 N. Y. 441, 36 Am. Rep. 643; Blanchard v. Kaull, 44 Cal. 440; Gartside Coal Co. v. Maxwell (C. C.) 22 Fed. 197.

[85] 1 Thomp. Corp. § 418, citing Medill v. Collier, 16 Ohio St. 599; Fay v. Noble, 7 Cush. (Mass.) 188. Where the officers of a corporation executed a lease before it was authorized to transact business, although it was a corporation de jure, the directors and stockholders were not liable as partners; but the officers were liable on the implied warranty of their authority to act on behalf of the corporation, where they were aware of their want of authority, while the lessor was not. Seeberger v. McCormick, 178 Ill. 404, 53 N. E. 340.

[86] Ante, p. 112.

[87] Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; Guckert v. Hacke, 159 Pa. 303, 28 Atl. 249; Empire Mills v. Alston Grocery Co. (Tex. App.) 15 S. W. 200; Id., 15 S. W. 505, 12 L. R. A. 366; Kaiser v. Lawrence

[88] Post, p. 703. See Clegg v. Hamilton & Wright County Grange Co., 61 Iowa, 121, 15 N. W. 865; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99. In the last case cited, the corporation was apparently one de facto, yet under the Illinois statute the associates were held to individual liability on the corporate obligation. See, also, Butler Paper Co. v. Cleveland, 220 Ill. 128, 77 N. E. 99, 110 Am. St. Rep. 230.

Still other courts, with what appears to be the better reason, hold that the associates in such cases are liable, not upon the ground of partnership, but upon the ordinary principles of agency and contract,—in other words, that they are liable upon contracts which they have expressly or impliedly authorized or ratified.[89]

Modern Tendency

The entire topic is largely affected in all jurisdictions by the local conceptions as to what is sound public policy in these cases of defective organization. The modern tendency seems to be to forbid collateral attack so far as possible by a liberal application of the de facto doctrine, resort being had in some jurisdictions to the estoppel doctrine as well, where for any reason this seems necessary and equitable.

Sav. Bank, 56 Iowa, 104, 8 N. W. 772, 41 Am. Rep. 85; Pettis v. Atkins, 60 Ill. 454; Bigelow v. Gregory, 73 Ill. 197; Whipple v. Parker, 29 Mich. 380; Eliot v. Himrod, 108 Pa. 569; Garnett v. Richardson, 35 Ark. 144; Hill v. Beach, 12 N. J. Eq. 31; Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416; Wechselberg v. Flour City Nat. Bank, 12 C. C. A. 56, 64 Fed. 90, 26 L. R. A. 470; Coleman v. Coleman, 78 Ind. 346; Martin v. Fewell, 79 Mo. 401; Smith v. Warden, 86 Mo. 382; Williams v. Hewitt, 47 La. Ann. 1076, 17 South. 497, 49 Am. St. Rep. 394; Duke v. Taylor, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; New York Nat. Exch. Bank of City of New York v. Crowell, 177 Pa. 313, 35 Atl. 613; Bergeron v. Hobbs, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85; HARRILL v. DAVIS, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153, Wormser Cas. Corporations, 71; Central Nat. Bank of Junction City v. Sheldon, 86 Kan. 460, 121 Pac. 340. In Jones v. Aspen Hardware Co., 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220, it was held that the associates in a defectively incorporated association could sue as partners. See articles, 20 Harv. Law Rev. 456, 21 Harv. Law Rev. 305, by E. H. Warren.

[89] Johnson v. Corser, 34 Minn. 355, 25 N. W. 799; Roberts Mfg. Co. v. Schlick, 62 Minn. 332, 64 N. W. 826. In Johnson v. Corser, supra, where several persons had entered into articles of association, with the intention of becoming incorporated, but failed to perfect an incorporation, it was held that they were individually liable on a contract which they were found to have authorized or ratified, although it was in terms the contract of the assumed corporation, but that, the purposes of the association being to secure the grading and extension of a public street, and not for gain or profit, the prosecution of the contemplated work by the association did not constitute the association a partnership, nor the associates copartners, with authority (implied from their relations) in each member to bind all the associates by any act within the scope of the business undertaken.

CHAPTER IV

RELATION BETWEEN CORPORATION AND ITS PROMOTERS

46a. Who are Promoters—Their Functions.
46b. Liability of Corporation for Expenses and Services of Promoters.
47. Liability on Contracts by Promoters.
48. Liability of Promoters to Corporation and Stockholders.
48a. Underwriters and Underwriting.

WHO ARE PROMOTERS—THEIR FUNCTIONS

46a. A promoter is a person who brings about the organization of a corporation, who brings together the persons interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery leading to the formation of the corporation. He occupies a fiduciary relation toward it. Ordinarily it is his duty to prepare the prospectus.

The term "promoter" has been said to be a term not so much of law as of business, "usually summing up in a single word a number of business operations, familiar to the commercial world, by which a company is generally brought into existence." [1] The term involves the idea of exertion for the purpose of getting up and starting a company and also the idea of some fiduciary duty towards the company imposed by or arising from the position which the so-called promoter assumes toward it.[2] In a well-known recent New Jersey decision, Chancellor Pitney said: "A promoter is one who seeks opportunities for making advantageous purchases and profitable investments in industrial or other enterprises, who interests men of means in such a project when found, organizes them into a corporation for the purpose of 'taking over' the project, and attends upon the newly formed company until it is fully launched in business. He may be stockholder, director, officer or none of these. His services begin before the company is formed, and ordinarily are not concluded until some time after its formation." [3] Thus, a

[1] Bowen, J., in Whaley Bridge Calico Printing Co. v. Green, 28 Weekly Rep. (2 B. Div. 1880) 351; The Telegraph v. Loetscher, 127 Iowa, 383, 101 N. W. 773, 4 Ann. Cas. 667; Armstrong v. Sun Printing & Publishing Ass'n, 137 App. Div. 828, 122 N. Y. Supp. 531; Richlands Oil Co. v. Morriss, 108 Va. 288, 61 S. E. 762.

[2] Armstrong v. Sun Printing & Publishing Ass'n, supra.

[3] Bigelow v. Old Dominion Copper Min. & Smelting Co., 74 N. J. Eq. 457.

person is a promoter who holds in his own name and right, options on certain coal in place, and organizes a corporation for the purpose of developing the coal and marketing it.[4]

The Prospectus

Ordinarily one of the promoter's functions is the preparation of a document called a "prospectus," whose purpose is to acquaint people in general, and more especially prospective investors, with the merits and advantages of the new corporate undertaking. A prospectus has been defined as a "document published by a company or a corporation, or by persons acting as its agents or assignees, setting forth the nature and objects of an issue of shares, debentures, or other securities created by the company or corporation, and inviting the public to subscribe to the issue." [5] It has been held in the House of Lords that the purchaser of shares in the market upon the faith of a prospectus which he has not received from those who are answerable for it cannot by action upon it so connect himself with them as to render them liable to him for the misrepresentations contained in it, as if it had been addressed personally to him.[6] This case draws a distinction between those who receive their shares directly from the corporation and those who purchase their shares in the market from others to whom the shares have been issued. The distinction is unsound and is repudiated by the weight of authority.[7] On principle, the promoter of a company, whether he be a director or not, who knowingly issues or sanctions the circulation of a false prospectus naturally tending to mislead and to induce the public to purchase its stock or other securities, should be responsible to all those who are injured thereby and in reliance thereon.[8] Where there are a number of promoters, all are liable in damages for the fraud of an agent employed by them to effect the sale of the corporate securities.[9] Their own personal moral guilt or innocence is rightly declared to be immaterial

71 Atl. 153. See, also, Bosher v. Richmond & H. Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879; Cook, Corp. § 651.

[4] Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494.

[5] Black's Law Dict.

[6] Peek v. Gurney, L. R. 6 H. L. 377. But see Andrews v. Mockford, L. R. [1896] 1 Q. B. 372, 383.

[7] Morgan v. Skiddy, 62 N. Y. 319; Lehman-Charley v. Bartlett, 135 App. Div. 674, 120 N. Y. Supp. 501, affirmed 202 N. Y. 524, 95 N. E. 1125; Benedict v. Guardian Trust Co., 91 App. Div. 103, 86 N. Y. Supp. 370, affirmed 180 N. Y. 558, 73 N. E. 1120. And see Andrews v. Mockford, supra.

[8] Downey v. Finucane, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A. (N. S.) 307, affirming 146 App. Div. 209, 130 N. Y. Supp. 988; Morgan v. Skiddy, supra. Cf. Derry v. Peek, L. R. 14 A. C. 337.

[9] Downey v. Finucane, supra.

on the theory "that where an associate in such an enterprise abstains from knowing and leaves the details to his companions while the illicit gains go to the common account his ignorance ought not to avail him." [10]

The prospectus must be couched in clear phraseology and free from misleading or tricky phrases. Referring to an equivocal prospectus, Lord Halsbury called its language "ambidextrous" and said that the test is not so much whether any specific statement therein was false as "whether taking the whole thing together was there a false representation." [11] And speaking for the Supreme Court of the United States, Justice Brown recently said: "In estimating the probability of subscribers being misled by these prospectuses we may take into consideration, not only the facts stated, but the facts suppressed." [12] The rule of law as to liability is strict, but wisely so, as the overdrawn and extravagant prospectus is a source of the gravest danger, if unregulated.

LIABILITY OF CORPORATION FOR EXPENSES AND SERVICES OF PROMOTERS

46b. Some courts imply a promise by a corporation to pay for expenses necessarily incurred and services necessarily rendered by promoters, which inure to the benefit of the corporation; but by the better opinion, in the absence of express provision in the charter or some statute, there is no such liability unless the corporation, after organization, expressly promises to pay or otherwise clearly recognizes the obligation.

Corporations are sometimes made liable by the express provisions of their charter, or by statute, for necessary expenses incurred or services rendered in their promotion. As to the liability in the absence of such provision, there is some difference of opinion. A few courts have held that a corporation is liable at law, upon an implied contract, for expenses legitimately incurred and services legitimately rendered by promoters before its organiza-

[10] Downey v. Finucane, supra; Hornblower v. Crandall, 7 Mo. App. 220, affirmed 78 Mo. 581.

[11] Aaron's Reefs v. Twiss, L. R. [1896] App. Cas. 273, 285; Downey v. Finucane, supra; Greenwood v. Leather Shod Wheel Co., L. R. [1900] 1 Ch. Div. 421. The language should be interpreted by the effect it would produce on an ordinary mind, considering the facts suppressed by it as well as stated therein. Downey v. Finucane, supra.

[12] Wiser v. Lawler, 189 U. S. 260, 264, 23 Sup. Ct. 624, 47 L. Ed. 802.

tion, which were necessary to perfect organization, on the ground that, in accepting the benefit of such expenses and services, it becomes bound to pay therefor, and that no express promise to pay need be shown.[13] The generally accepted doctrine, however, is that the corporation is not liable, unless made so by statute or by its charter, in the absence of an express promise to pay.[14] Such a promise is regarded as supported by a sufficient consideration, and is binding. The reason usually assigned for the prevailing rule is that a corporation should be fully organized as a legal entity before it enters into any kind of a contract or transacts any business.

If money is paid by subscribers to promoters preliminary to organization, and the promoters or provisional directors fail to organize according to the prospectus, and abandon the enterprise, after applying the money in payment of expenses in view of organization, the subscribers cannot be made to bear such expenses, and they may recover the money paid by them in an action for money had and received.[15]

[13] Low v. Connecticut & Passumpsic Rivers R. R. Co., 45 N. H. 370; Id., 46 N. H. 284; Farmers' Bank of Vine Grove v. Smith, 105 Ky. 816, 49 S. W. 810, 88 Am. St. Rep. 341; Hall v. Vermont & M. R. Co., 28 Vt. 401. In these cases a corporation was held liable for services in procuring subscriptions to its capital stock, necessary in order to perfect organization. But in the case last cited charges by promoters for services in procuring an act of incorporation were disallowed, on the ground that the services must be regarded as voluntarily rendered, and there was no promise by the corporation.

[14] Rockford, R. I. & St. L. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587; New York & N. H. R. Co. v. Ketchum, 27 Conn. 170; Marchand v. Loan & Pledge Ass'n, 26 La. Ann. 389; Melhado v. Railway Co., L. R. 9 C. P. 503; Security Co. v. Bennington Monument Ass'n, 70 Vt. 201, 40 Atl. 43; In re English Produce Co., L. R. [1906] 2 Ch. Div. 435; CUSHION HEEL SHOE CO. v. HARTT, 181 Ind. 167, 103 N. E. 1063, 50 L. R. A. (N. S.) 979, Wormser Cas. Corporations, 80; Dickinson v. Matheson Motor Car Co., 171 Fed. 646, 97 C. C. A. 29, affirming (C. C.) 161 Fed. 874. See, also, Ritchie v. McMullen, 79 Fed. 522, 25 C. C. A. 50. Cf. Cuba Colony Co. v. Kirby, 149 Mich. 453, 112 N. W. 1133; Wintner v. Rosemont Realty Co., 101 App. Div. 30, 91 N. Y. Supp. 452.

[15] Nockels v. Crosby, 3 Barn. & C. 814; Walstab v. Spottiswoode, 15 Mees. & W. 501.

LIABILITY ON CONTRACTS BY PROMOTERS

47. With regard to the liabilities arising out of contracts entered into by promoters on behalf of a corporation to be formed, the following rules are established by the weight of authority:

(a) The promoters are personally liable unless exempt by the terms of the contract.

(b) The corporation is not liable unless it has expressly or impliedly adopted the contract after its organization.

(c) In England and Massachusetts it is held that the corporation cannot become a party to the contract even by adoption, and that to hold the corporation it must appear that a new contract was expressly made, after the incorporation of the company, on the terms of the former contract. But by the weight of American authority the contract may be adopted by the corporation, and thereby become binding upon it and in its favor.

(d) Adoption of the contract is not a ratification, but it is, in effect, the making of a new contract by the corporation, which is to be regarded as made at the date of the adoption.

(e) Adoption by the corporation will be implied if it knowingly accepts the benefits of the contract. Even where, as in England, the corporation cannot adopt the contract, it is liable in an action of quasi contract if it accepts and retains the benefits of such a contract.

A corporation is not liable on contracts made by its promoters, unless it has adopted them.[16] A promoter, though he may assume to act on behalf of the projected corporation, and not for himself, cannot be treated as an agent of the corporation, for it is not yet in existence; and therefore, when there is nothing more than a contract by a promoter, in which he undertakes to bind the future corporation, it is generally conceded that it cannot be enforced either

[16] Bradshaw v. Knoll, 132 La. 829, 61 South. 839, where there was no ratification or adoption by the corporation and it was held not bound; Horowitz v. Broads Mfg. Co., 54 Misc. Rep. 569, 104 N. Y. Supp. 988; Drucklieb v. Sam H. Harris, 209 N. Y. 211, 215, 102 N. E. 599. Promoters cannot contract for a corporation which comes into existence unfettered by any contract obligations, and it will be bound by their agreement only on proof of its ratifying, accepting or adopting it. Bond v. Atlantic Terra Cotta Co., 137 App. Div. 671, 122 N. Y. Supp. 425.

by or against the corporation.[17] This is so though the promoters become, at the creation of the corporation, its only stockholders, directors, and officers.[18] The promoters themselves are personally liable on such contracts, unless the other party agreed to look to some other fund or to the prospective corporation for payment;[19] and this is the party's only remedy if the corporation, after its organization, has done nothing to bind itself under the principles hereafter explained.

In Massachusetts it is held that, if a contract is made in the name and for the benefit of a projected corporation by its promoters, the corporation cannot become a party to the contract after organization, even by adoption of it.[20] And it has been so held in

[17] Weatherford, M. W. & N. W. Ry. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837; Franklin Fire Ins. Co. of Baltimore v. Hart, 31 Md. 59; Munson v. Syracuse, G. & C. R. Co., 103 N. Y. 58, 8 N. E. 355; Carmody v. Powers, 60 Mich. 26, 26 N. W. 801; Tift v. Quaker City Nat. Bank, 141 Pa. 550, 21 Atl. 660; Buffington v. Bardon, 80 Wis. 635, 50 N. W. 776; Penn Match Co. v. Hapgood, 141 Mass. 145, 7 N. E. 22; Abbott v. Hapgood, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193; KOPPEL v. MASSACHUSETTS BRICK CO., 192 Mass. 223, 78 N. E. 128, Wormser Cas. Corporations, 87; Tuttle v. George A. Tuttle Co., 101 Me. 287, 64 Atl. 496, 8 Ann. Cas. 260; Natal Land Co. v. Pauline, etc., Syndicate, L. R. [1904] App. Cas. 120; Western Screw & Mfg. Co. v. Cousley, 72 Ill. 531; Gent v. Manufacturers' & Merchants' Mut. Ins. Co., 107 Ill. 652; Carey v. Des Moines Co-op. Coal & Min. Co., 81 Iowa, 674, 47 N. W. 882; Morrison v. Gold Mountain Gold Min. Co., 52 Cal. 306; Hawkins v. Mansfield Gold Min. Co., 52 Cal. 513; Ireland v. Globe Milling & Reduction Co., 20 R. I. 190, 38 Atl. 116, 38 L. R. A. 299; Park v. Modern Woodmen of America, 181 Ill. 214, 54 N. E. 932; Church v. Church Cementico Co., 75 Minn. 85, 77 N. W. 548. And see Chicago Bldg. & Mfg. Co. v. Talbotton Creamery & Mfg. Co., 106 Ga. 84, 31 S. E. 809; Martin v. Remington-Martin Co., 95 App. Div. 18, 88 N. Y. Supp. 573.

[18] Battelle v. Northwestern Cement & C. P. Co., 37 Minn. 89, 33 N. W. 327.

[19] Carmody v. Powers, 60 Mich. 26, 26 N. W. 801; Roberts Mfg. Co. v. Schlick, 62 Minn. 332, 64 N. W. 826; Hersey v. Tully, 8 Colo. App. 110, 44 Pac. 854; McQuiddy Printing Co. v. Head, 7 Ala. App. 384, 62 South. 287; Meinhard, Schaul & Co. v. Bedingfield Mercantile Co., 4 Ga. App. 176, 61 S. E. 34; HARRILL v. DAVIS, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153, Wormser Cas. Corporations, 71. But see Durgin v. Smith, 133 Mich. 331, 94 N. W. 1044. As to the personal liability of promoters on contracts, see article by Henry O. Taylor, Esq., in 16 Am. Law Rev. 281. As to how a promoter may safeguard himself from personal liability, see Strause v. Richmond Woodworking Co., 109 Va. 724, 65 S. E. 659, 132 Am. St. Rep. 937, with which compare Fentress v. Steele & Sons, 110 Va. 578, 66 S. E. 870, where the promoter conducted negotiations so as to bind himself individually.

[20] Abbott v. Hapgood, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193; KOPPEL v. MASSACHUSETTS BRICK CO., 192 Mass. 223, 78 N. E. 128, Wormser Cas. Corporations, 87; Pennell v. Lothrop, 191 Mass.

some of the English cases.[21] In order to become bound, these cases say that the corporation must make a new contract on the terms of the old one, after it has been incorporated. Where it accepts and retains the benefits of the agreement, without making a new contract, the corporation may be held liable only in quasi contract.[22] Most courts hold, however, that contracts made by promoters on behalf of a projected corporation, if within the scope of its general powers, may be adopted by the corporation after its organization, and thus become binding upon it, and binding in its favor on the other party.[23] It is sometimes said that such contracts may be ratified by the corporation,[24] but this is inaccurate, for ratifica-

357, 77 N. E. 842. Cf. Penn Match Co. v. Hapgood, 141 Mass. 145, 7 N. E. 22; North Anson Lumber Co. v. Smith, 209 Mass. 333, 95 N. E. 838.

[21] KELNER v. BAXTER, L. R. 2 C. P. 174, Wormser Cas. Corporations, 83; Gunn v. Insurance Co., 12 C. B. (N. S.) 694; Melhado v. Railway Co., L. R. 9 C. P. 503; In re Empress Engineering Co., 16 Ch. Div. 125; In re Northumberland Hotel Co., 33 Ch. Div. 16; Spiller v. Skating Rink Co., 7 Ch. Div. 368; In re English, etc., Produce Co., L. R. [1906] 2 Ch. Div. 435; Natal Land Co. v. Pauline, etc., Syndicate, L. R. [1904] App. Cas. 120. And see, CUSHION HEEL SHOE CO. v. HARTT, 181 Ind. 167, 103 N. E. 1063, 50 L. R. A. (N. S.) 979, Wormser Cas. Corporations, 80.

[22] In re Empress Engineering Co., 16 Ch. Div. 125.

[23] Battelle v. Northwestern Cement & C. P. Co., 37 Minn. 89, 33 N. W. 327; Frankfort & S. Turnpike Co. v. Churchill, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Buffington v. Bardon, 80 Wis. 635, 50 N. W. 776; Pittsburg & T. Copper Min. Co. v. Quintrell, 91 Tenn. 693, 20 S. W. 248; Grape Sugar & Vinegar Mfg. Co. of Baltimore v. Small, 40 Md. 395; Stanton v. New York & E. Ry. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110; Little Rock & Ft. S. R. Co. v. Perry, 37 Ark. 164; Schreyer v. Turner Flouring Mills Co., 29 Or. 1, 43 Pac. 719; Bommer v. American Spiral Spring Butt Hinge Mfg. Co., 81 N. Y. 468; Scadden Flat Gold-Min. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440; Tuttle v. George A. Tuttle Co., 101 Me. 287, 64 Atl. 496, 8 Ann. Cas. 260. See Spiller v. Skating Rink Co., 7 Ch. Div. 368; Mason v. Harris, L. R. 11 Ch. Div. 97; Howard v. Patent Ivory Co., 38 Ch. D. 156.

[24] In Oakes v. Cattaraugus Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544, where a promoter of defendant corporation contracted with plaintiff on behalf of the corporation, before it came into existence, to pay him for services to be rendered to it, and after the incorporation the promoter ratified the contract as president, the contract being one which would have bound the corporation if made by the president, it was held by a divided court that it was bound by the contract by ratification. See, also, Whitney v. Wyman, 101 U. S. 393, 25 L. Ed. 1050; In re Quality Shoe Shop (D. C.) 212 Fed. 321; Mantle v. Jack Waite Mining Co., 24 Idaho, 613, 135 Pac. 854, 136 Pac. 1130. Central Trust Co. of Pittsburg v. Lappe, 216 Pa. 549, 65 Atl. 1111; Brantigam v. Dean & Co., 85 N. J. Law, 549, 89 Atl. 760, where the question of the corporation's ratification was declared to be a matter for the determination of the jury.

In Martin v. Remington-Martin Co., 95 App. Div. 18, 21, 88 N. Y. Supp. 573, Houghton, J. said: "A subsequently formed corporation is not bound

tion presupposes a principal existing at the time of the agent's action, whereas the corporation is not in existence at the time the contract is entered into by the promoter.[25] The liability in case of adoption does not rest upon the idea of any supposed agency of the promoters, but upon the immediate and voluntary act of the company.[26] There is no difference between the making of a contract by a corporation by adoption of an agreement originally made in advance for it by promoters, and the making of an entirely new contract. No greater formality is required in the one case than in the other; and if it could make an entirely new contract without the use of its seal, or without writing, or without formal action of its board of directors, it may also so adopt an agreement made for it by its promoters. And it is not necessary that adoption of the agreement be express. It may be shown from acts or acquiescence of the corporation or its authorized agents, as any similar contract might be shown.[27] The contract in case of adoption is to be regarded as made by the corporation as of the date of the adoption, and not as of the date of the agreement by the promoter; therefore a contract made by a promoter, and adopted by the corporation, is not within the statute of frauds, as not to be performed within a year, if it is to be performed within a year from such adoption, though not within a year from the date of the promoter's agreement,[28] for, as Judge Mitchell correctly declared: "What is called 'adoption,' in such cases, is in legal effect, the making of a contract of the date of adoption, and not as of some former date.[29]

If a contract is made on behalf of a corporation by its promoters,

by an agreement between its promoters. It is only where such an agreement is ratified by the corporation that it becomes binding upon it." And see Jackson v. Hooper, 76 N. J. Eq. 592, 75 Atl. 568, 27 L. R. A. (N. S.) 658. Ratification relates back to the execution of the contract by the promoters and renders the contract obligatory on the corporation from the outset. Stanton v. New York & E. Ry. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110.

[25] Weatherford, M. W. & N. W. Ry. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837; McArthur v. Times Print. Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653. Cf. Stanton v. New York & E. Ry. Co., 59 Conn. 272, 285, 22 Atl. 300, 21 Am. St. Rep. 110.

[26] Pittsburg & T. Copper Min. Co. v. Quintrell, 91 Tenn. 693, 20 S. W. 248; Badger Paper Co. v. Rose, 95 Wis. 145, 70 N. W. 302, 37 L. R. A. 162.

[27] Battelle v. Northwestern Cement C. P. Co., 37 Minn. 89, 33 N. W. 327; Bond v. Pike, 101 Minn. 127, 111 N. W. 916; Burden v. Burden, 8 App. Div. 160, 40 N. Y. Supp. 499; Schreyer v. Turner Flouring Mills Co., 29 Or. 1, 43 Pac. 719. And see, Streator Independent Tel. Co. v. Continental Tel. Const. Co., 217 Ill. 577, 75 N. E. 546; Tuttle v. George A. Tuttle Co., supra.

[28] McArthur v. Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653.

[29] McArthur v. Times Printing Co., supra.

and the corporation after its organization, and with knowledge of the facts, accepts its benefits, it must take them cum onere; and, if the contract has been performed by the other party, it may be enforced against the corporation. By accepting the benefits of the contract, the corporation, according to the weight of authority, impliedly adopts the contract.[80] Thus, where a proposition was made on behalf of a railroad company by its promoters, that, if a bonus should be subscribed and paid to it, it would build a road between certain points, and would carry coal at a stipulated rate, it was held that the corporation, by accepting the bonus after its organization, adopted the contract, and was bound to fulfill the stipulations.[81] In a Nebraska case, after articles of incorporation had been drawn up and signed by the promoters of a cattle company, but before they were filed, and before the time fixed in the articles for the commencement of business, a president was selected for the corporation by the promoters, and he, in their presence and with their approval, executed and delivered to a third person a note, purporting to be the note of the corporation, in payment for and in consideration of the sale and delivery of certain horses and cattle and a ranch and other property to the corporation. After the corporation was fully organized, and the time had arrived when it was authorized to commence business, the property came into its possession, and it continued to use and enjoy the same. It was held that this was an adoption of the note by the corporation, and that it was liable thereon.[82] On the other hand, Romer, L. J., said in a recent English case: "The idea that a company merely because it

[80] Weatherford, M. W. & N. W. Ry. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837; Id. (Tex. Civ. App.) 22 S. W. 70; Battelle v. Northwestern Cement & C. P. Co., 37 Minn. 89, 33 N. W. 327; MOORE & HANDLEY HARDWARE CO. v. TOWERS HARDWARE CO., 87 Ala. 206, 6 South. 41, 13 Am. St. Rep. 23, Wormser Cas. Corporations, 4; Paxton Cattle Co. v. First Nat. Bank, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852; Grape Sugar & Vinegar Mfg. Co. of Baltimore v. Small, 40 Md. 395; Little Rock & Ft. S. R. Co. v. Perry, 37 Ark. 164; Schreyer v. Turner Flouring Mills Co., 29 Or. 1, 43 Pac. 719; Streator Independent Tel. Co. v. Continental Tel. Const. Co., 217 Ill. 577, 75 N. E. 546. And see Rogers v. New York & T. Land Co., 134 N. Y. 197, 32 N. E. 27; Grand River Bridge Co. v. Rollins, 13 Colo. 4, 21 Pac. 897; Davis v. Valley Electric Light Co. (Sup.) 61 N. Y. Supp. 580; Kaeppler v. Redfield Creamery Co., 12 S. D. 483, 81 N. W. 907. Cf. Bell's Gap R. Co. v. Christy, 79 Pa. 54, 21 Am. Rep. 39, where the corporation was held not to be liable for services performed under an agreement with less than a majority of its promoters. And see, to the same effect, Tift v. Quaker City Nat. Bank, 141 Pa. 550, 21 Atl. 660.

[81] Weatherford, M. W. & N. W. Ry. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837.

[82] Paxton Cattle Co. v. First Nat. Bank, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852.

has obtained the advantage of the solicitor's work done before the formation of the company is liable in equity for the cost of that work appears to me to be wholly untenable." [33]

Where the promoters of a corporation have made a contract in its behalf, to be performed after it is organized, it may be deemed a continuing offer on the part of the other party to the agreement, like the offer in a subscription to the stock of a corporation to be formed in the future, and may be accepted and adopted by the corporation after its organization; and the exercise of any right inconsistent with the nonexistence of such contract is deemed by most courts to be conclusive evidence of such acceptance or adoption, provided, of course, the corporation has knowledge of the facts.[34]

A distinction has been drawn, with respect to the rule that a corporation which accepts the benefits of a contract made by its promoters takes it cum onere, between a promise made on behalf of the corporation in the contract itself, the benefits of which the corporation has accepted, and a promise in a previous contract to pay for services in procuring the latter to be made; and it was held by the Texas Supreme Court that, while a corporation accepting a bonus contracted for by its promoters was bound by the stipulations in consideration of which the bonus was subscribed, it was not bound, by reason of its acceptance of the bonus, by a contract made by its promoters to pay a man for services in procuring subscribers to the bonus, since the latter contract was no part of the contract the benefits of which it accepted.[35]

To make a corporation liable for services performed under a contract with its promoters before its organization, the services must have been intended at the time to inure to the benefit of the future corporation, and must have been rendered in its behalf, and with the expectation that it would be bound. It will not be liable if they were rendered on the credit of the promoters individually.[36] Ordinarily, the prospective corporation is looked to, as well as the promoters personally.[37]

[33] In re English, etc., Product Co., L. R. [1906] 2 Ch. Div. 435. But see Wintner v. Rosemont Realty Co., 101 App. Div. 30, 91 N. Y. Supp. 452.

[34] Weatherford, M. W. & N. W. Ry. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837.

[35] Weatherford, M. W. & N. W. Ry. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837, reversing Id. (Tex. Civ. App.) 23 S. W. 425.

[36] Perry v. Little Rock & Ft. S. Ry. Co., 44 Ark. 383. And see Davis v. Ravenna Creamery Co., 48 Neb. 471, 67 N. W. 436; Tryber v. Girard Creamery & Cold Storage Co., 67 Kan. 489, 73 Pac. 83.

[37] Fentress v. Steele & Sons, 110 Va. 578, 66 S. E. 870.

LIABILITY OF PROMOTERS TO CORPORATION AND STOCKHOLDERS

48. Promoters, when acting for a projected corporation, occupy towards it a fiduciary relation, and for any secret profits made by them in transactions entered into on behalf of the corporation they may be compelled to account.

It is well settled that the promoters of a projected corporation occupy a fiduciary relation towards it, similar to that of an agent to a principal, or of a trustee to a cestui que trust, although strictly speaking a promoter cannot be an agent of, or a trustee for, a corporation before its creation.[88] They have no right, in negotiations on behalf of the corporation, to derive any advantage over other stockholders without a full and fair disclosure of the transaction. Any secret profits made by them, they must refund to it. The fact that there is no fraudulent intent on their part does not relieve them. Because of their position, the law forbids them secretly to derive any advantage over other stockholders, and makes them accountable for any profits realized by them.[89] And they may be

[88] Jordan & Davis v. Annex Corporation, 109 Va. 625, 64 S. E. 1050, 17 Ann. Cas. 267.

[89] Chandler v. Bacon (C. C.) 30 Fed. 538; Woodbury Heights Land Co. v. Loudenslager, 55 N. J. Eq. 78, 35 Atl. 436; Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219, 27 Atl. 1094; Groel v. United Electric Co., of New Jersey, 70 N. J. Eq. 616, 622, 61 Atl. 1061; The Telegraph v. Loetscher, 127 Iowa, 383, 101 N. W. 773, 4 Ann. Cas. 667; Caffee v. Berkley, 141 Iowa, 344, 118 N. W. 267; Johnson v. Sheridan Lumber Co., 51 Or. 35, 93 Pac. 470; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149; Simons v. Vulcan Oil Mining Co., 61 Pa. 202, 100 Am. Dec. 628; McElhenny's Appeal, 61 Pa. 188; Short v. Stevenson, 63 Pa. 95; Emery v. Parrott, 107 Mass. 95; Central Land Co. v. Obenchain, 92 Va. 130, 22 S. E. 876; Getty v. Devlin, 54 N. Y. 403; Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498; Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441; Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. Rep. 159; Hichens v. Congreve, 4 Russ. 562; Bagnall v. Carlton, 6 Ch. Div. 371; Emma Silver Min. Co. v. Grant, 11 Ch. Div. 918; Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444; Ex-Mission Land & Water Co. v. Flash, 97 Cal. 610, 32 Pac. 600; Gover's Case, L. R. 20 Eq. 122; Erlanger v. Phosphate Co., 3 App. Cas. 1218; South Joplin Land Co. v. Case, 104 Mo. 572, 16 S. W. 390; Exter v. Sawyer, 146 Mo. 302, 47 S. W. 951; Hebgen v. Koeffler, 97 Wis. 313, 72 N. W. 745. See, also, Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423; Hayden v. Green, 66 Kan. 204, 71 Pac. 236; In re Olympia, [1898] 2 Ch. D. 153, affirmed Gluckstein v. Barnes, L. R. [1900] App. Cas. 240; Edenborn v. Sim, 206 Fed. 275, 124 C. C. A. 339. Parties who act as agents for a corporation in acquiring property for it

made to account in a suit by the corporation itself or its assignee or receiver;[40] or the other stockholders may individually maintain an action for their proportion of such profits,[41] or they may sue for damages in case of fraud.[42] A promoter, for instance, cannot purchase property, acting for the corporation, and then sell it to the corporation at an advance; nor can he negotiate a sale of property to the corporation, and secretly receive from the vendor a commission or bonus. In either case he will be compelled to account for the profits which he has realized.[43] In Pittsburg Min. Co. v. Spoon-

cannot make a profit out of the transaction; nor can they do so if they assume to act without precedent authority, if their transactions are accepted as the acts of agents by the corporation; and if, with a view to creating a corporation, persons represent themselves as acting for the company to be formed, and propose to sell at the prices they pay, and their purchases are taken on such representations, and stockholders invest thereon, it is a fraud on the company and interested parties to allow such agents to retain profits paid them in ignorance of the true sums actually advanced in making purchases. Simons v. Vulcan Oil Mining Co., supra.

[40] Pittsburg Min. Co. v. Spooner, supra; Chandler v. Bacon, supra; MOORE v. WARRIOR COAL & LAND CO., 178 Ala. 234, 59 South. 219, Ann. Cas. 1915B, 173, Wormser Cas. Corporations, 91; Colton Imp. Co. v. Richter, 26 Misc. Rep. 26, 55 N. Y. Supp. 486. In the last cited case, Laughlin, J., decided that promoters organizing a corporation to purchase land cannot retain profits made from the sale unless this was known to all the subscribers. That some of them knew it is no defense. Each subscriber is not bound to sue separately; the corporation itself may sue.

[41] Emery v. Parrott, supra; Getty v. Devlin, supra.

[42] Getty v. Devlin, supra.

[43] See the cases cited above. Promoters of a corporation, subsequently to its creation, and while they were its sole stockholders, voted to issue stock to themselves in payment for services in securing options on land, which they assigned to the corporation; this stock equaling the estimated profits to be derived from the options. Afterwards the promoters invited the public to subscribe for the stock, without disclosing the facts as to such stock, or getting their consent to the payment of such remuneration. It was held that they were guilty of fraud, and that the company could, without returning the lands acquired under the options, maintain an action for recovery of the stock, or damages for the loss thereof. Said the court: "Payment to promoters of remuneration for their services is not made valid by a vote passed by the corporation, when the corporation is in the sole control of the promoters, before the capital has been issued to the public. The persons to whom the promoters owe the duty which they owe by reason of the fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters; that is to say, the future stockholders." Hayward v. Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725. And see East Tennessee Land Co. v. Leeson, 183 Mass. 37, 66 N. E. 427; Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479, followed, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314; Lagunes Nitrate Co. v. Lagunes Nitrate Syndicate [1899] 2 Ch. 392; Pietsch v. Milbrath, 123 Wis. 647, 101 N. W. 388, 102 N. W.

er,[44] a complaint by a corporation for money alleged to have been received by the defendants to its use alleged, in substance, that the defendants, having obtained the right to purchase a certain mining option for $20,000, proceeded to form the plaintiff corporation to make such purchase, representing to the persons who subscribed for stock that the option would cost $90,000; and that, having first induced third persons to subscribe for the stock upon such representations, and to pay the corporation $100,000 for their stock, the defendants then, as officers of the plaintiff corporation, purchased the option for it nominally for $90,000, paying the $20,000 which it actually cost them, with the money received from the sale of stock, and converting the remaining $70,000 to their own use. It was held that the complaint stated a good cause of action in favor of the corporation.

In a Missouri case, C. secured an option on certain real estate of D. with a view to organizing a corporation and selling the realty to it, and C., together with B., who was employed by C., formed a corporation and secured subscriptions for the stock on representations that the land cost $32,000—which was $2,000 more than it actually did cost—and also that certain notes would be included in the sale. After the corporation was organized, C. informed the stockholders that the notes were not included in the sale, though they had been received by himself. C. received for the land from the corporation $32,000. C. thus realized a profit without the knowledge of the stockholders of $2,000 in cash and the notes which were worth $3,000. The court held that the corporation was entitled to hold C. to an accounting to it for his ill-gotten secret gains.[45]

And the Supreme Court of the United States recently decided that when the true consideration of a syndicate purchase is concealed and the property is conveyed at a higher figure in shares of stock to a corporation whose stock is held partly by the guilty members of the syndicate and partly by others, and the necessary increase of shares to pay for the property goes to some of the syndicate as a secret profit, the corporation may maintain an action to require those obtaining the shares to surrender them for cancel-

342, 68 L. R. A. 945, 107 Am. St. Rep. 1017. But see Tompkins v. Sperry, Jones & Co., 96 Md. 560, 54 Atl. 254; Old Dominion Copper Min. & Smelting Co. v. Lewisohn, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025; Hughes v. Cadena De Cobre Min. Co., 13 Ariz. 52, 108 Pac. 231.

[44] 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149.

[45] South Joplin Land Co. v. Case, 104 Mo. 572, 16 S. W. 390. See, also, Midwood Park Co. v. Baker, 128 N. Y. Supp. 954, affirmed 144 App. Div. 939, 129 N. Y. Supp. 1136, affirmed 207 N. Y. 675, 100 N. E. 1130; Crowe v. Malba Land Co., 76 Misc. Rep. 676, 135 N. Y. Supp. 454; Mississippi Lumber Co. v. Joice, 176 Ill. App. 110.

lation, even though the benefits would inure to some of the guilty as well as to the innocent stockholders.[46] Lurton, J., said: "The standing of the corporation results from the fact that there were innocent and deceived members of the corporation when the property was taken over by it." The Supreme Court's earlier decision in Old Dominion Copper Min. & Smelting Co. v. Lewisohn [47] was distinguished on the proposition that in that case "all of the owners of the property and all of the members of the buying corporation were the same persons."

This fiduciary relation exists between the promoter of a corporation and the corporation only where he is acting for the corporation. There is no rule of law which prevents a person who owns property, though purchased by him for the purpose, from promoting a corporation and selling the property to the corporation after it is organized. In such a case, in the absence of fraud, and if he is not acting also for the corporation, he may sell at such a price as he may be able to obtain from the board of directors, without regard to the original cost to him.[48] Yet if, at the time he sells, he

[46] DAVIS v. LAS OVAS CO., 227 U. S. 80, 33 Sup. Ct. 197, 57 L. Ed. 426, Wormser Cas. Corporations, 88, affirming 35 App. D. C. 372. Cf. Hyde Park Terrace Co. v. Jackson Bros. Realty Co., 161 App. Div. 699, 146 N. Y. Supp. 1037, where the defrauded stockholders alone were relieved, and not those with guilt or with knowledge. And see Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co., 251 Mo. 553, 158 S. W. 359.

[47] Old Dominion Copper Min. & Smelting Co. v. Lewisohn, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025. This case held that if the transaction is agreed to by all the stockholders existing at the time, even though they be dummy stockholders and mere creatures of the promoters, no fraud is committed upon the corporation and the corporation itself cannot rescind. Accord, Hughes v. Cadena De Cobre Mining Co., 13 Ariz. 52, 108 Pac. 231. Contra are Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479, followed again, despite the decision of the United States Supreme Court, in 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314; Arnold v. Searing, 78 N. J. Eq. 146, 78 Atl. 762; Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co., 251 Mo. 553, 158 S. W. 359; Brooker v. William H. Thompson Trust Co., 254 Mo. 125, 162 S. W. 187.

As to the rights of subsequent bona fide innocent purchasers of stock from the corporation's treasury, see Mason v. Carrothers, 105 Me. 392, 74 Atl. 1030. The court, pointing out that suit was brought by defrauded purchasers of treasury stock, and not by the corporation, did not have to choose between the doctrines of the United States and Massachusetts courts, supra.

[48] Densmore Oil Co. v. Densmore, 64 Pa. 43; Wills v. Nehalem Coal Co., 52 Or. 70, 96 Pac. 528; Parker v. Boyle, 178 Ind. 560, 99 N. E. 986; Lungren v. Pennell, 10 Wkly. Notes Cas. (Pa.) 297; Ladywell Min. Co. v. Brookes, 34 Ch. Div. 398; Central Land Co. v. Obenchain, 92 Va. 130, 22 S. E. 876; dictum in Foss v. Harbottle, 2 Hare, 461; Milwaukee Cold-Storage Co. v. Dexter, 99 Wis. 214, 74 N. W. 976, 40 L. R. A. 837; Spaulding v. North Mil-

occupies the position of a promoter, he is bound to deal openly, and in such a way that those having independent charge of the company, as well as those who are induced to become subscribers to the stock, may be fairly advised of the relation he bears to the property which he proposes to sell, in like manner as one who assumes to act as agent of another in the purchase of property.[49] If the promoters who are selling property to a corporation are also the directors of the corporation, so that they also purchase for it, it is a case of the officers and agents of an existing corporation purchasing property for the corporation from themselves, and the most perfect good faith is required.[50]

As said by Morris, J., in a recent Indiana case: "While a promoter notwithstanding the fiduciary relation, may sell property to the company which he is promoting, he may do so lawfully only when he shall have provided an independent board of directors, in no wise under his control, and make a full disclosure to the corporation, through them; or when he shall have made a full disclosure of all material facts to each original subscriber for shares of stock in the corporation; or when he shall have procured a ratification of the sale, after disclosing its circumstances, by vote of the stockholders of the completely established corporation." [51] The fullest disclosure of the promoters' entire connection should be made to the corporation and to those buying treasury stock.[52]

waukee Town Site Co., 106 Wis. 481, 81 N. W. 1064; Richardson v. Graham, 45 W. Va. 134, 30 S. E. 92. Cf. Ex-Mission Land & Water Co. v. Flash, 97 Cal. 610, 32 Pac. 600.

[49] Yeiser v. United States Board & Paper Co., 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724; Central Trust Co. v. East Tennessee Land Co. (C. C.) 116 Fed. 743; Hayward v. Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479; Yale Gas-Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 308, 25 L. R. A. 90, 42 Am. St. Rep. 159; Colton Imp. Co. v. Richter, 26 Misc. Rep. 26, 55 N. Y. Supp. 486; Gluckstein v. Barnes, [1900] App. Cas. 240; In re Leeds & Hanley Theatres of Varieties, [1902] 2 Ch. 809. There is no duty imposed on the promoters of a company to provide it with an independent board of directors, if the real truth is disclosed to those who are induced by the promoters to join the company. Erlanger v. New Sombrero Phosphate Co., 48 Law J. Ch. 73, 3 App. Cas. 1218, distinguished. Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate, [1899] 2 Ch. 392. But ordinarily an independent board should be provided. Parker v. Boyle, 178 Ind. 560, 99 N. E. 986; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618.

[50] Post, p. 636.

[51] Parker v. Boyle, 178 Ind. 560, 99 N. E. 986. To similar effect see, also, Wills v. Nehalem Coal Co., 52 Or. 70, 96 Pac. 528.

[52] Richlands Oil Co. v. Morriss, 108 Va. 288, 61 S. E. 762; Torrey v. Toledo Portland Cement Co., 158 Mich. 348, 122 N. W. 614.

To constitute a person a promoter of a projected corporation, so as to bring him within the operation of this rule, it must affirmatively appear that he was acting for and in behalf of the proposed corporation, or that he assumed to so act.[53]

UNDERWRITERS AND UNDERWRITING

48a. An underwriter is a person or firm, usually, but not necessarily, a large banking house, which agrees to take at a certain fixed price all of the stock of a projected corporation for which the investing public does not subscribe, in return for the payment of a stipulated commission.

Underwriting agreements are now resorted to very generally in order to float stock issues of large corporations. By the term is meant, as said by Cotton, L. J., in a leading case,[54] "an agreement entered into before the shares are brought before the public, that in the event of the public not taking up the whole of them, or the number mentioned in the agreement, the underwriter will, for an agreed commission, take an allotment of such part of the shares as the public has not applied for." And in the same case, Lindley, L. J., said: "'Underwriting,' in this kind of business, means agreeing to take so many shares, more or less in number, as are specified in the underwriting letter if the public do not subscribe for them." The profits made by underwriters are frequently very large, but it seems only fair to note at the same time that they oftentimes shoulder a considerable degree of risk.

[53] St. Louis, Ft. S. & W. R. Co. v. Tiernan, 37 Kan. 606, 15 Pac. 544; Goodwin v. Wilbur, 104 Ill. App. 45. One who engages with the owner of land in organizing a corporation to purchase it, by procuring subscriptions, and who frames the prospectus and becomes one of the first subscribers, is a promoter of the corporation. Woodbury Heights Land Co. v. Loudenslager, 55 N. J. Eq. 78, 35 Atl. 486, Id. (N. J.) 43 Atl. 671. And see other cases cited in note 35, supra.

[54] In re Licensed Trading Ass'n, L. R. 42 Ch. D. 1. See also, Electric Welding Co. v. Prince, 195 Mass. 242, 81 N. E. 306.

CHAPTER V

POWERS AND LIABILITIES OF CORPORATIONS

49. In General.
50. Express Powers.
51. Powers Incidental to Corporate Existence.
52. Powers Implied from Powers Expressly Granted.
53. Construction of Charters—In General.
54. Power to Take and Hold Real and Personal Property.
55. Power to Act as Trustee.
56–57. Powers as to Contracts and Conveyances.
58–61. Form and Mode of Corporate Contracts.

IN GENERAL

49. A corporation has such powers, and such powers only, as are conferred upon it by its charter. Powers may be conferred upon a corporation

(a) Expressly.

(b) Impliedly, because they are incidental to corporate existence.

(c) Impliedly, because they are necessary or proper in order to exercise the powers expressly conferred.

A corporation, being a mere creature of the Legislature, has such powers only as are conferred upon it by its charter. But it is not necessary that all powers, in order to exist, shall be conferred in express terms. It has, of course, all powers, expressly conferred, provided the Legislature was not prevented from conferring them by some constitutional limitation. In addition to this, many powers are impliedly conferred or attach as being incidental to corporate existence, though not expressly mentioned in the charter. Again, the charter impliedly confers all powers, though not expressly mentioned, which are reasonably necessary and proper for the execution of the powers that are expressly conferred. "Corporations are creatures of the Legislature, having no other powers than such as are given them by their charters, and such as are incidental or necessary to carry into effect the purposes for which they were established." [1]

[1] DOWNING v. MT. WASHINGTON ROAD CO., 40 N. H. 230, Wormser Cas. Corporations, 96; Colman v. Railway Co., 10 Beav. 1; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950; Byrne v. Schuyler Electric Mfg. Co., 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304; State ex rel. Crow v. Lincoln Trust Co., 144 Mo. 562, 46 S. W. 593; Franklin Nat. Bank v. Whitehead, 149

The question of corporate powers is largely one of fact rather than of law. This is illustrated in a leading recent English case, Attorney-General v. Mersey Railway Co.[2] The Court of Appeal, in the course of its opinion, through Buckley, L. J., said: "By way of illustration let me suppose that the main purpose found in the charter of a company is to establish and carry on an hotel, and that express power is given to buy land at a particular place and to build, and that as to anything further the charter is silent. It is quite clear law that all such acts as are reasonably necessary for effectuating that purpose are intra vires, such, for instance, as the purchase of furniture and of linen, of provisions, the hiring of servants. * * * Then I may instance other acts as to which it would be a question of fact in the case of the particular hotel whether it was such an act as would be reasonably incidental and consequential. If, for instance, the hotel were at Bundoran, or Rosapenna, or elsewhere in the county of Donegal, it might be intra vires to lay out and maintain in good order a golf links. If the hotel in question were the Savoy Hotel in the Strand, the proposition would cease to be true. * * * The question in each case is a question of fact: Is the particular act as to which it is in question whether it is intra vires an act which in the circumstances of that particular case is incidental to or consequential upon or reasonably necessary for effectuating the main purpose which the charter defines." On appeal to the House of Lords, that tribunal, upon its different view of the evidence, reversed the lower court, but adopted an identical view of the legal principle applicable.

The rule in England is that a corporation has the same power to contract and act as a natural person has, except in so far as it may be restricted by its charter, expressly or impliedly. But it is also held that, when a corporation is created for a particular purpose, the act creating it impliedly prohibits it from exercising any powers not necessary or proper to carry out that purpose. It was said by Blackburn, J., in Ashbury Railway Carriage & Iron Co. v. Riche:[3] "I take it that the true rule of law is that a corporation

Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 303; Best Brewing Co. v. Klassen, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26; Bankers' Union of the World v. Crawford, 67 Kan. 449, 73 Pac. 79, 100 Am. St. Rep. 465; Cumberland Telephone & Telegraph Co. v. Evansville (C. C.) 127 Fed. 187; People ex rel. v. Illinois Cent. R. Co., 233 Ill. 378, 84 N. E. 368, 16 L. R. A. (N. S.) 604, 122 Am. St. Rep. 181, 13 Ann. Cas. 285; Knapp v. Supreme Commandery, United Order of the Golden Cross of the World, 121 Tenn. 212, 118 S. W. 390; Williams v. Johnson, 208 Mass. 544, 95 N. E. 90.

[2] Attorney General v. Mersey Railway Co., L. R. [1907] 1 Ch. Div. 81; L. R. [1907] A. C. 415.

[3] L. R. 9 Exch. 224.

at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, as a natural person has. And this is important when we come to construe the statutes creating a corporation, for if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, does the statute creating the corporation by express provision or necessary implication show an intention in the Legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, as incident to it, a general capacity to contract, the question is, does the statute creating the corporation by express provision or necessary implication show an intention in the Legislature to prohibit, and so avoid, the making of a contract of this particular kind?" [4]

In this country the general doctrine is that corporations organized under acts of the Legislature have such powers, and such powers only, as are conferred, expressly or impliedly, by the acts. In Thomas v. West Jersey R. Co.[5] it was insisted that a corporation "may do any act which is not either expressly or impliedly prohibited by its charter, although where the act is unauthorized by the charter, a shareholder may enjoin its execution, and the state may, by proper process, forfeit the charter." The court, however, did not take this view, but said: "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

EXPRESS POWERS

50. A corporation has all powers expressly conferred upon it by its charter, unless conferred in violation of constitutional limitations.

Of the powers expressly conferred upon a corporation, there is little to be said. The questions which arise in this connection are chiefly questions of construction. The Legislature has the absolute

[4] South Yorkshire Ry. & River Dun Co. v. Great Northern Ry. Co., 9 Exch. 84.

[5] 101 U. S. 71, 25 L. Ed. 950.

power to confer upon a corporation any power it may see fit to confer, so long as it does not violate any limitation contained in the state or federal Constitution. A grant of powers in violation of constitutional limitations can have no effect.

POWERS INCIDENTAL TO CORPORATE EXISTENCE

51. Certain powers are incidental to corporate existence, and are impliedly conferred upon every corporation unless there is something to show an intention to exclude them. These powers are:

(a) To have perpetual or continuous succession during the period for which it is created.

(b) To have a corporate name, and to contract, to grant and receive, and to sue and be sued thereby.

(c) To purchase and hold real and personal property for purposes authorized by its charter.

(d) To have a common seal.

(e) To make by-laws for its government.

(f) The power of amotion or removal of members. But this power is not incident to a joint-stock corporation.[6]

Some of the powers above mentioned, as has been seen,[7] are essential to corporate existence, while others are incidental, but not essential, and may be withheld.

As we have seen in a former chapter, the power of perpetual succession, or succession during the period for which it is created, is not only an incident which attaches to every corporation, but is essential to corporate existence. A membership corporation, i. e., a corporation without shares of capital stock, therefore, has the implied power to elect members in the place of those who are removed by death or otherwise.[8]

So with the power to have a corporate name, and to contract obligations, receive and grant, and sue and be sued thereby. This power attaches as incidental to corporate existence. The power to contract is restricted to purposes authorized by the charter.[9]

The power to purchase and hold real or personal property is incidental to corporations, but not essential. This power, like the power to contract, is limited to purposes authorized by the charter.[10]

[6] 2 Kent, Comm. 277, 278.
[7] Ante, p. 14.
[8] 1 Bl. Comm. 475.
[9] Ante, pp. 18, 73; post, pp. 156, 193.
[10] Post, p. 151.

The power to have a common seal, though not essential to corporate existence, is an incident which attaches to every corporation without express provision. The necessity to use a seal will be considered in another place.[11]

Every corporation has the implied power to make by-laws for its government, but this power is not essential. It may be dispensed with if the charter sufficiently provides for the government of the body. This power will be considered at length in a subsequent chapter.[12]

The power of amotion, or removal of members, is said to be incident to corporations, and this is true of many corporations, like boards of trade, and other non-stock corporations; but no such power is incident to modern joint-stock corporations. This power will be further discussed in treating of the relation between the corporation and its members.[13]

POWERS IMPLIED FROM POWERS EXPRESSLY GRANTED

52. All powers that are reasonably necessary or proper for the execution of the powers expressly granted, and that are not expressly or impliedly excluded, are impliedly conferred.

Corporations not only have the powers expressly granted by the charter, and the particular powers which have been mentioned as incidental to corporate existence, but, in addition, they have all powers that are reasonably necessary or proper for the execution of the powers that are expressly granted, provided such powers are not withheld.

CONSTRUCTION OF CHARTERS—IN GENERAL

53. In the construction of charters the intention of the Legislature must be ascertained, and must govern. The rules are substantially the same as in the case of other statutes. The following rules may be particularly mentioned:

(a) In cases of doubt, charters are to be construed most strongly in favor of the public, and against the corporation.

(b) Where general words follow an enumeration of persons or things by words of particular and specific meaning, such general words are not to be construed in their widest

[11] Post, p. 194. [12] Post, p. 572. [13] Post, p. 505.

sense, unless such seems clearly to have been the intention of the Legislature, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

(c) If a charter expressly enumerates certain powers, this impliedly excludes all other powers except those mentioned, and such as may be necessary or proper to the execution of them.

When a corporation is formed under a special act, its powers are generally specified in the act, and the act, together with any other laws which are binding upon it, constitute its charter. When a corporation is formed under a general law, this law, together with the articles of association required by the law to be executed and filed by the corporators, and any other laws of the state which are applicable to such corporations, constitute its charter.[14]

Construction in Favor of the Public in Case of Doubt

In the construction of contracts between individuals it is a rule that the language must be taken most favorably, in case of doubt, against the party using it. The rule for construing corporate charters, at least if they grant exclusive privileges or extraordinary franchises, is different. It has often been held that charters secured under special legislative grants will, in case of doubt, be construed most strongly against the grantees and in favor of the public. As was said by an English judge: "The language of these acts * * * is to be treated as the language of the promoters of them. They ask the Legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favor of the public." [15] The same rule applies to the construction of the char-

[14] Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279, 62 N. W. 480; Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville, 69 Neb. 220, 95 N. W. 819; Overholser v. Oklahoma Interurban Traction Co., 29 Okl. 571, 119 Pac. 127; Metropolitan West Side Elevated R. Co. v. City of Chicago, 261 Ill. 624, 104 N. E. 165. A corporation may take advantage of the privileges and franchises granted by the general law by including in its articles of incorporation any of the privileges and franchises it may desire to exercise, and to that extent the articles stand as the legislative charter thereof, but it cannot exercise powers or privileges not enumerated therein, and can exercise no power not authorized by statute, though enumerated therein. State v. Portland General Electric Co., 52 Or. 502, 95 Pac. 722, 98 Pac. 160; People ex rel. Barney v. Whalen, 189 N. Y. 560, 82 N. E. 1131.

[15] Parker v. Railway Co., 7 Man. & G. 288. And see State ex rel. Walker

ters of corporations formed under general laws. "In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation, and in favor of the public." [16]

The rule of strict construction applies to grants of exclusive privileges,[17] to exemptions,[18] and generally to all grants of powers in derogation of common right.[19] "If the powers conferred are against common right, and trench in any way upon the privileges of other citizens, they are, in cases of doubt, to be construed strictly, but not so as to impair or defeat the objects of the incorpora-

v. Payne, 129 Mo. 468, 31 S. W. 797, 33 L. R. A. 576; Stourbridge Canal Co. v. Wheeley, 2 Barn. & Adol. 792; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137; Parrot v. Lawrence, 2 Dill. 332, Fed. Cas. No. 10,772; Mills v. St. Clair County, 8 How. (U. S.) 569, 12 L. Ed. 1201; Com. v. Erie & N. E. R. Co., 27 Pa. 339, 67 Am. Dec. 471; First M. E. Church of Chicago v. Dixon, 178 Ill. 260, 52 N. E. 887.

[16] Black v. Delaware & R. Canal Co., 24 N. J. Eq. 474; Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 26, 9 Sup. Ct. 409, 32 L. Ed. 837; CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, Wormser Cas. Corporations, 153; Ross-Meehan Brake-Shoe Foundry Co. v. Southern Malleable Iron Co. (C. C.) 72 Fed. 957; Bankers' Mut. Casualty Co. v. First Nat. Bank of Council Bluffs, 131 Iowa, 456, 108 N. W. 1046; Millville Gaslight Co. v. Vineland Light & Power Co., 72 N. J. Eq. 305, 65 Atl. 504. "By a familiar rule, every public grant of property, or privileges, or franchises, if ambiguous, is to be construed against the grantee and in favor of the public, because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant, and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the Legislature or of any public authority." CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., supra.

[17] Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773; Pearsall v. Great Northern R. Co., 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838; Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539; Clarksville & R. Turnpike Co. v. Montgomery County, 100 Tenn. 417, 45 S. W. 345, 58 L. R. A. 155.

[18] Lincoln St. Ry. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802. As to grant of exemption from taxation, post, p. 287.

[19] Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Bly v. White Deer Mountain Water Co., 197 Pa. 80, 46 Atl. 929; Somerville Water Co. v. Borough of Somerville, 78 N. J. Eq. 199, 78 Atl. 793.

tion." [20] Powers and privileges in derogation of common right, or such as are not common to individuals, will never be implied, but must be expressly conferred. As was said by Chief Justice Marshall: "The great object of an incorporation is to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt them from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist." [21]

On the other hand, when the language to be construed does not involve a grant of property or of rights in which the public is interested, it seems that the charter should be construed, not strictly, but according to its fair and natural meaning with reference to the purposes and objects of the corporation.[22] As said by Vice Chancellor Bacon in discussing the proper construction of the memorandum and articles of association of a corporation: "I wholly repudiate the notion that I am at liberty to adopt what has sometimes been called a 'liberal' construction. I have no more right to do that on the one hand than I am at liberty on the other to adopt a more rigorous or more strict construction than the express stipulations of the instruments require. What the law requires and what I am called upon to do is to put a just construction, and no other, upon these instruments." [23]

General Terms Following Special Terms

The rule of statutory construction, "that, where general words follow an enumeration of persons or things by words of particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to per-

[20] DOWNING v. MT. WASHINGTON ROAD CO., 40 N. H. 230, Wormser Cas. Corporations, 96. And see Whitaker v. Delaware & Hudson Canal Co., 87 Pa. 34.

[21] Providence Bank v. Billings, 4 Pet. (U. S.) 514, 7 L. Ed. 939.

[22] "We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created." Brown v. Winnisimmet Co., 11 Allen (Mass.) 326. See, also, DOWNING v. MT. WASHINGTON ROAD CO., 40 N. H. 230, Wormser Cas. Corporations, 96; Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515.

[23] London Financial Ass'n v. Kelk, 26 Ch. Div. 107, 134.

sons or things of the same general kind or class as those specifically mentioned," [24] applies, of course, to the construction of charters. Thus, where a corporation was authorized by its charter "to carry on the business of mechanical engineers and general contractors," it was held that the term "general contractors" would be referred to that which was immediately before, and authorized such contracts only as mechanical engineers were in the habit of making.[25] In construing charters, as in construing other statutes, the intention of the Legislature must always govern. Therefore, this rule must be disregarded where the legislative intention is plain to the contrary.[26]

Express Mention and Implied Exclusion

The general rule of statutory construction, that the express mention of one thing is tantamount to an exclusion of all others, applies to the construction of charters.[27] Therefore, if a charter expressly enumerates certain powers, this impliedly excludes all other powers except those mentioned, and such as may be necessary or proper to the execution of them. If, for instance, the charter of a corporation enumerates the purposes for which it may acquire and hold lands, it cannot acquire and hold land for any other purpose.[28] So, if a corporation is expressly authorized to lend money on bond and mortgage, it cannot lend on any other security.[29] And a bank authorized to do a banking business "by discounting" notes cannot buy them.[30]

[24] Black, Interp. Laws, 141.

[25] Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653. So, where the charter of a corporation authorized it "to purchase, lease, work, and sell mines, minerals, land, and buildings," the general words "land and buildings" were limited to land and buildings acquired for the purpose of purchasing, leasing, working or selling of mines and minerals. Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche, supra. There are many cases in which this rule of construction has been applied. See ante, p. 70, where some of the cases are referred to.

[26] Black, Interp. Laws, 141, 143; ante, p. 70.

[27] Black, Interp. Laws, 146; Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198, 23 Am. Rep. 683; Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513; Talmage v. Pell, 7 N. Y. 328; Doty v. American Telephone & Telegraph Co., 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167; PRAIRIE SLOUGH FISHING & HUNTING CLUB v. KESSLER, 252 Mo. 424, 159 S. W. 1080, Wormser Cas.-Corporations, 146.

[28] Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513.

[29] Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. (N. Y.) 31.

[30] Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198, 23 Am. Rep. 683; post, p. 165.

POWER TO TAKE AND HOLD REAL AND PERSONAL PROPERTY

54. In the absence of express restrictions in its charter or in some statute applicable to it, a corporation has the implied power to take and hold property, real or personal, by purchase, gift, devise or bequest. But—

(a) It cannot acquire or hold property for a purpose that is foreign to the objects for which it was created.

(b) In some jurisdictions there are statutory limitations on its power to take by devise.

The power to purchase and hold such real and personal property as the purposes of the corporation may render necessary or proper is incident, at common law, to all private corporations, unless they are specially restrained by their charter or by some statute. Such power is generally expressly conferred by the charter; but it is not necessary that it should be, for it is always implied, in the absence of express restriction.[81] And subject to the same limitations, it may take by gift, bequest, or devise.[82] As we shall presently see, it cannot purchase property for a purpose not authorized by its charter.[83] Nor has it any right to take property, either real or personal, by gift, bequest, or devise, for an unauthorized purpose.[84] Where a charter enumerates the purposes for which the corporation may acquire and hold real estate, it impliedly excludes all other purposes.[85] Therefore, where the charter of a railroad company authorized it to take lands for a right of way, and for certain enumerated purposes connected with the use and management of the road, it was held that it could not take lands by donation not for

[81] Co. Litt. 44c, 300b; 2 Kent. Comm. 281; Nicoll v. New York & E. R. Co., 12 N. Y. 121; Regents of the University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138; Blanchard's Gun-Stock Turning Factory v. Warner, 1 Blatchf. 258, Fed. Cas. No. 1,521; Lathrop v. Commercial Bank of Scioto, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; Rivanna Nav. Co. v. Dawson, 3 Grat. (Va.) 19, 46 Am. Dec. 183; Sherwood v. American Bible Soc., 4 Abb. Dec. (N. Y.) 227. Where a corporation is legally organized for the specific purpose of dealing in land, its power to hold land is not limited. Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225. A corporation is presumed in the absence of evidence to the contrary to have the right to purchase and hold real estate. People v. La Rue, 67 Cal. 526, 8 Pac. 84; Stockton Sav. Bank v. Staples, 98 Cal. 189, 32 Pac. 936.

[82] Cases above cited. As to devise, see post, p. 153.

[83] Post, p. 163.

[84] Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513.

[85] Ante, p. 150.

use in connection with the road.[36] In some states the amount or value of property which particular corporations may take is limited by charter or by statute. Such a restriction only applies to the value of the property at the time it is acquired, and a subsequent rise in value does not require the corporation to dispose of part of it, or affect its title.[37]

By the English statutes of mortmain, corporations were prohibited from purchasing lands without license from the king, but these statutes, except in Pennsylvania, were not adopted in this country, and did not become a part of our law.[38] They have been recognized as in force in Pennsylvania so far as applicable to its conditions, and as having the effect of rendering void all conveyances or devises of land to or for the use of a corporation, unless sanctioned by its charter or by act of the Legislature.[39] Even in Pennsylvania, however, it has been held by the United States supreme court that a conveyance of land to a corporation without legislative sanction vests the title in the corporation, subject to forfeiture at the instance of the commonwealth only.[40]

A corporation is not prevented from taking a grant of land in fee by the fact that its period of existence is limited to a term of years. Such a corporation may take a fee-simple title, and may sell the land whenever it is no longer necessary or convenient, though it could not hold and enjoy the same after the expiration of its charter.[41] "Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to

[36] Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513.

[37] 2 Inst. 722; Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

[38] 2 Kent, Comm. 281–283; Rivanna Nav. Co. v. Dawson, 3 Grat. (Va.) 19, 46 Am. Dec. 183; FAYETTE LAND CO. v. LOUISVILLE & N. R. CO., 93 Va. 274, 24 S. E. 1016, Wormser Cas. Corporations, 100; Moore's Heirs v. Moore's Devisees, 4 Dana (Ky.) 354, 29 Am. Dec. 417; Lathrop v. Commercial Bank of Scioto, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378.

[39] Methodist Church v. Remington, 1 Watts (Pa.) 219, 26 Am. Dec. 61. As to this topic, see Chase's Blackstone (4th Ed.) pp. 198, 199, and note.

[40] Runyan v. Coster, 14 Pet. (U. S.) 122, 10 L. Ed. 382.

[41] Nicoll v. New York & E. R. Co., 12 N. Y. 121; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; People v. Mauran, 5 Denio (N. Y.) 389; Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378; Rives v. Dudley, 56 N. C. 126, 67 Am. Dec. 231; Keith v. Johnson, 109 Ky. 421, 59 S. W. 487. A corporation authorized to hold real estate in fee may become lessee in a lease whose term exceeds the term of its charter existence. Lancaster County v. Lincoln Auditorium Ass'n, 87 Neb. 87, 127 N. W. 226. A corporation may hold a franchise extending beyond its own life. City of Minneapolis v. Minneapolis St. R. Co., 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259.

the original grantor or his heirs; but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter." [42] However, the doctrine that, on dissolution of a private corporation, the land reverts, has been repudiated by the entire weight of modern authority; and the rule now is that the land passes into administration for the benefit of creditors first and stockholders afterwards.[43] Where a corporation acquires title to land in fee simple, the land does not revert to the grantor or his heirs on abandonment of its use for corporate purposes, unless it is so provided in the charter or in some statute.[44]

At common law, none but natural persons can take in joint tenancy. A corporation cannot take such an estate, either jointly with another corporation or with a natural person. The reason assigned by the early writers is that they hold in different capacities and in different rights.[45] There is nothing, however, to prevent a corporation and a natural person, or two corporations, from holding as tenants in common.[46]

Power to Take by Devise

By the English statute of wills passed in the time of Henry VIII, corporations, by express exception, were not allowed to take real estate by will; and in some of our states, including New York, the statute of wills prohibits devises to a corporation, unless it be expressly authorized by its charter or by statute to take by devise.[47]

[42] 2 Kent, Comm. 282.

[43] Bacon v. Robertson, 18 How. (U. S.) 480, 15 L. Ed. 499; Heath v. Barmore, 50 N. Y. 302; Wilson v. Leary, 120 N. C. 90, 26 S. E. 630, 38 L. R. A. 240, 58 Am. St. Rep. 778. See, also, People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; Shayne v. Evening Post Pub. Co., 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777, 85 Am. St. Rep. 654; In re Higginson and Dean (1899) 1 Q. B., 79 L. T. Rep. 673; Richards v. Northwestern Coal & Min. Co., 221 Mo. 149, 119 S. W. 953 (collecting authorities). But as to public and charitable corporations, the old rule of reverter to the original grantor or his heirs still seemingly prevails. Church of Jesus Christ of Latter Day Saints v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481.

[44] Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378.

[45] Telfair v. Howe, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637.

[46] See New York & S. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412.

[47] See McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Starkweather v. American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133. Such a provision does not prevent a corporation from taking money under a will, though raised by a conversion of land under a power in the will. Downing v. Marshall, supra. But where real estate itself is devised to a corporation, which is incapable of taking real estate in that way, a court of equity has no power to convert it into money, and direct the payment of the money to it. Such direction must appear in the will. Starkweather v. American Bible Soc., supra. A devise to a corporation not authorized to take land by devise is not made

In the absence of such a restriction in a statute, or in the charter of a corporation, it may take real estate by devise as well as by purchase.[48] If the charter of a corporation prohibits it from taking by devise, it cannot take in another state, though there may be no prohibitory statute in the latter state, for a prohibitory clause in the charter of a corporation cleaves to it everywhere; but it has been held that a statute of wills of one state, since it has no extraterritorial effect, cannot prevent a corporation of that state from taking by devise in another state, where there is no such prohibition.[49]

It seems that the statute of wills, in prohibiting a devise to a corporation, does not render invalid a devise to a natural person in trust to apply the rents and profits for the use and benefit of a corporation, as the devise in such a case is not to the corporation, but to the trustee; but on this point there is some doubt, and the contrary has been held under the New York statute.[50]

Power to Take Mortgage

If a corporation is authorized to engage in a transaction by which a third person becomes indebted to it, it has the implied power, in the absence of prohibition in its charter, to take a mortgage on real estate to secure the debt; and such a transaction is not within a prohibition against dealing in lands.[51] Similarly it may take and hold personal property by way of pledge, or chattel mortgage.

valid by amendment of its charter after the testator's death. White v. Howard, 46 N. Y. 144.

[48] White v. Howard, 38 Conn. 342; Rivanna Nav. Co. v. Dawson, 3 Grat. (Va.) 19, 46 Am. Dec. 183. Moore's Heirs v. Moore's Devisees, 4 Dana (Ky.) 354, 29 Am. Dec. 417; American Bible Soc. v. Marshall, 15 Ohio St. 537; Hubbard v. Worcester Art Museum (C. C.) 179 Fed. 406. Contra, House of Mercy of New York v. Davidson, 90 Tex. 529, 39 S. W. 924.

[49] White v. Howard, supra. Contra, Starkweather v. American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133. Cf. Thompson v. Swoope, 24 Pa. 474. But where the laws of a state prohibit a corporation from taking by devise, a devise to a foreign corporation is void, though by its charter it is authorized to take by devise. White v. Howard, 46 N. Y. 144.

[50] McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290.

[51] Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709.

POWER TO ACT AS TRUSTEE

55. A corporation having power to take and hold property has the capacity to take and hold the same in trust, and to execute the trust, if the trust is not repugnant to the purposes for which it was created. In the latter case, the trust, if otherwise good, is not void, but a court of equity will appoint a new trustee to execute it.

It was at one time considered that a corporation aggregate had no capacity to act as trustee, executor, guardian, etc. The reason given by Blackstone why it could not act as executor or administrator was that it could not take the necessary oath. Another reason why it could not act as trustee, which was often assigned, was that a court of equity sometimes enforced a trust by laying hold of the conscience of the trustee, and a corporation aggregate had no conscience. The reason most commonly given was that appointment as trustee involved a personal trust, and therefore a corporation lacked one of the essential requisites of a good trustee—personal confidence. These reasons are all artificial and without weight, and the old doctrine which was based upon them has been exploded and repudiated; and it is now well settled that a corporation, if authorized by its charter, as in the case of modern trust companies, hospitals, universities, etc., may act as a trustee to the same extent as a natural person.[52] Statutes have been enacted, in many states, authorizing the formation of corporations with the power to act as trustee, executor, administrator, or guardian, and such statutes have been held valid.[53] Independently of any statute, where a corporation has the power to take real and personal property by conveyance and by devise, it may also so take and hold property in trust in the same manner, and to the same extent, as a

[52] Vidal v. Girard, 2 How. (U. S.) 127, 183, 11 L. Ed. 205; Trustees of Phillips Academy v. King, 12 Mass. 546; Chambers v. City of St. Louis, 29 Mo. 543; Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418; White v. Rice, 112 Mich. 403, 70 N. W. 1024; Sheldon v. Chappell, 47 Hun (N. Y.) 59; State v. Higby Co., 130 Iowa, 69, 106 N. W. 382, 114 Am St. Rep. 409; Conley v. Daughters of the Republic (Tex.) 156 S. W. 197. If the trusts are within the general scope of the purposes of the organization of the corporation, or relate to matters which will promote and aid the general purpose of such corporation, it may take and hold land in trust, and can be compelled to execute such trusts if it accepts them. Hossack v. Ottawa Development Ass'n, 244 Ill. 274, 91 N. E. 439.

[53] Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418; Union Bank & Trust Co. v. Wright (Tenn. Ch. App.) 58 S. W. 755, 52 L. R. A. 469.

natural person may. If the trust is repugnant to, or inconsistent with, the purpose for which the corporation was created, it cannot be compelled to execute the trust; but the trust, if otherwise unexceptionable, will not be void, and a court of equity will appoint a new trustee to carry out its objects.[54] If property is conveyed, bequeathed, or devised to a corporation in trust, and the trusts are in themselves valid, but the corporation, by reason of its purpose, is incompetent to execute them, the heirs of the grantor or testator cannot take advantage of such inability. The objection can be raised only by the state in its sovereign capacity, by a quo warranto or other proper judicial proceeding.[55] As a matter of fact, at the present day, a large part of trust business is carried on by trust companies.

POWERS AS TO CONTRACTS AND CONVEYANCES

56. A corporation has no power to enter into any contract that is not expressly or impliedly authorized by its charter. But any contract that is reasonably necessary, suitable, or proper for carrying out the powers expressly conferred is impliedly authorized. Among the powers impliedly conferred upon every corporation, in the absence of express restrictions in its charter, are the following:

(a) A corporation has the implied power to purchase such real and personal property as its purposes may require; but it has no power to purchase property for a purpose foreign to the objects for which it was created.

(b) A corporation generally has the implied power to sell and convey or mortgage real or personal property owned by it. But a railroad company, or other quasi public corporation, cannot dispose of or mortgage property which is needed in order to carry on the business for which it was created, unless so authorized. Nor can a corporation transfer or mortgage its primary franchise without express authority.

(c) It has the power to borrow money whenever the nature of its business renders it proper, suitable, or expedient.

(d) It has the power to execute a bond for any purpose for which it may contract a debt.

(e) In this country it has the power to make or indorse promissory notes, and to draw, indorse, or accept bills of ex-

[54] Vidal v. Girard, 2 How. (U. S.) 127, 183, 11 L. Ed. 205. [55] Id.

change, if it is a usual or proper means of accomplishing the objects for which it was created, and appropriate for the transaction of its business.

(f) Subject to certain exceptions, it has no power to enter into a contract to loan its money or credit unless the power is expressly conferred. And it cannot bind itself by an accommodation note or bill.

(g) It has no implied power to enter into a contract of partnership. But it may contract jointly with another.

(h) Though there are some cases to the contrary, by the better opinion a corporation has no power, unless expressly authorized, to subscribe for or purchase stock in another corporation. But it may in good faith take and hold stock in another corporation to secure a loan previously made by it, or a debt due it, or in payment of such loan or debt.

(i) In some jurisdictions it is held that a corporation has no implied power to purchase its own stock, either for the purpose of selling or reissuing it, or for the purpose of holding or retiring it, though it may take its own stock to secure a loan previously made or a debt due it, or in payment of such loan or debt. In most jurisdictions in this country a corporation may, in the absence of express restrictions, purchase its own stock, provided the purchase be not to the injury of its creditors or minority stockholders.

(j) A corporation has no power to consolidate with another corporation, unless the power is expressly conferred upon it.

57. The presumption is that contracts of a corporation are within its powers, and the burden of showing the contrary rests upon the party who objects.

Since a corporation has such powers only as are expressly or impliedly conferred upon it, by its charter, it follows that it cannot legally enter into any contract that is not expressly or impliedly authorized.[56] A contract in excess of its powers is said to be ultra

[56] Coleman v. Railway Co., 10 Beav. 1; East Anglian Rys. Co. v. Eastern Counties Ry. Co., 11 C. B. 775; Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9; Pearce v. Madison & I. R. Co., 21 How. (U. S.) 441, 16 L. Ed. 184; DOWNING v. MT. WASHINGTON ROAD CO., 40 N. H. 230, Wormser Cas. Corporations, 96; Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Weckler v. First Nat. Bank of Hagerstown, 42 Md. 581, 20 Am. Rep. 95; Chewacla Lime Works v. Dismukes, 87 Ala. 344,

vires. Whether it is void or not is a question upon which the courts do not agree. We shall consider the effect of ultra vires contracts in a subsequent chapter.

Powers Impliedly Conferred

As has been stated generally in a former section, power to enter into a particular contract need not be expressly conferred. On the contrary, the power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which the corporation was created, is always implied, where there is no positive restriction in the charter.[57] "When a charter or act of incorporation and valid statutory law are silent as to what contracts a corporation may make, as a general rule it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, and none other. The creation of a corporation for a specific purpose implies a power to use the necessary and usual means to effectuate that purpose." [58]

The purposes of a corporation's organization are very material in determining the question of corporate powers. "Where a corporation is organized for business or trading purposes and the only persons interested therein, other than its business creditors, are its stockholders, and their only interest therein is to secure dividends on their investment, the question of ultra vires is of comparatively small importance, except in behalf of the people of the state in their public capacity, and the courts treat the question as it relates to such a corporation very differently than they do in the case of a banking corporation. A banking corporation occupies a different relation to the public, in that it invites individuals to submit to it the possession and care of their money and property. All banking institutions occupy a fiduciary position. The courts, in considering the effects of ultra vires acts, have always recognized the difference between business and trading corporations and corpo-

6 South. 122, 5 L. R. A. 100; Tomkinson v. Railway Co., 35 Ch. Div. 675; Simmons Nat. Bank v. Dilley Foundry Co., 95 Ark. 368, 130 S. W. 162.

[57] Morville v. American Tract Soc., 123 Mass. 129, 136, 25 Am. Rep. 40. And see Union Bank v. Jacobs, 6 Humph. (Tenn.) 515; London & N. W. Ry. Co. v. Price, 11 Q. B. Div. 485; Simpson v. Hotel Co., 8 H. L. Cas. 712; Ft. Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167; Colorado Springs Co. v. American Pub. Co., 97 Fed. 843, 38 C. C. A. 433; Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; Flaherty v. Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 Atl. 58; Venner v. Chicago City R. Co., 236 Ill. 349, 86 N. E. 266.

[58] Munn v. Commission Co., 15 Johns. (N. Y.) 52, 8 Am. Dec. 219.

rations whose purposes are largely fiduciary." [59] In other words, the nature of the corporation itself, its aims, objects, and purposes, must be taken carefully into account, as well as the abstract nature of the particular act in question.

Thus, a corporation, unless restricted by its charter, has the implied power to lease or mortgage property lawfully held by it under its charter, and not immediately needed for its own business; [60] or to sell property that will no longer be needed at all; [61] or to borrow money when necessary, and to execute instruments to secure the loan.[62] A zinc mining company having contracted to sell more ore than it proved able to produce, its purchase elsewhere of ore to fulfill the contract was held within its implied powers.[63] A corporation established "for the purpose of manufacturing and selling glass" may contract to purchase glassware from a like corporation to keep up its own stock and supply its customers while its works are being put in order.[64] A corporation authorized to purchase and hold water power created by the erection of dams, and to hold real estate, may, when the water power has been lawfully extinguished, sell its lands, and, as part of the contract of sale, agree to raise the grade.[65] So, a railroad corporation may agree to transport as a common carrier, over connecting railroads, goods intrusted to it for carriage over its own line.[66] Many other illustrations will appear in the following paragraphs.

As a general rule, subject to exceptions which we shall presently

[59] Gause v. Commonwealth Trust Co., 196 N. Y. 134, 153, 154, 89 N. E. 476, 24 L. R. A. (N. S.) 967. See article, 3 Calif. Law Review, at page 29, approving classification of corporations suggested in Canfield & Wormser, Cas. Priv. Corp. 229, 230. See, also, Hess v. W. & J. Sloane, 66 App. Div. 522, 73 N. Y. Supp. 313, affirmed on opinion below 173 N. Y. 616, 66 N. E. 1110.

[60] Post, p. 165. Where a corporation chartered to manufacture cars constructed larger boilers than necessary, but such as would be necessary to supply its future needs, it was not beyond its powers to sell steam generated in such boilers. People ex rel. Maloney v. Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366.

[61] Dupee v. Boston Water Power Co., 114 Mass. 37; post, p. 165.

[62] Post, pp. 171, 172.

[63] Young v. United Zinc Co., 198 Fed. 593, 117 C. C. A. 301.

[64] Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315. But a corporation for the purpose of manufacturing and selling gold and silver ware cannot, as a part of its business, engage in the purchase and sale of goods of the same general character, but which it cannot advantageously manufacture. People ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166, 38 N. E. 990. Sed qu.

[65] Dupee v. Boston Water Power Co., 114 Mass. 37.

[66] Swift v. Pacific Mail S. S. Co., 106 N. Y. 206, 12 N. E. 583; Hill Mfg. Co. v. Boston & L. R. Corp., 104 Mass. 122, 6 Am. Rep. 202; Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693.

notice, when a corporation is given general authority to engage in business, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories. It may, like a natural person, make all contracts, not prohibited, which are necessary or proper to enable it to attain its legitimate objects.[67] A corporation may incur liability for a reward by offering the same for the apprehension of criminals who have committed crimes against its property or its employés.[68] A railway company may maintain and manage an accident and relief-fund department for its employés.[69] If the charter of a street railroad company specifies a particular motive power, it excludes all other motive powers; but, if the motive power is in no way limited or defined, any motive power may be used that may be fit and appropriate to enable the company to operate its road.[70]

In a recent Virginia Case,[71] where a business corporation took out a policy of life insurance on its president, who was its general manager and principal incorporator, and whose relation to and knowledge of its financial and manufacturing interests were such that his death could not fail to result in serious loss to its creditors, its stockholders, and all others interested in its prosperity, it was held, in a suit brought by the corporation upon the policy, after the death of the president, that such a contract of insurance was well within the powers of the business corporation.

Powers not Impliedly Conferred

But, while power on the part of a corporation to make such contracts as are reasonably necessary to attain its legitimate purposes will be implied, a corporation has no implied power to enter into contracts in aid of other purposes. The fact that a particular con-

[67] Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412. Acts of a corporation, which, if standing alone or engaged in as a business, would be beyond its implied powers, are not necessarily ultra vires, when they are incidental to a transaction which in its general scope is within the corporate purposes. Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co., 60 Ohio St. 96, 53 N. E. 711, 64 L. R. A. 395. A corporation engaged in mining graphite, and refining and marketing its products, has the power to purchase the business of a dealer in a stove polish, which it manufactured. Lee v. U. S. Graphite Co., 161 Mich. 157, 125 N. W. 748.

[68] Norwood & Butterfield Co. v. Andrews, 71 Miss. 641, 16 South. 262; Central Railroad & Banking Co. v. Cheatham, 85 Ala. 292, 4 South. 828, 7 Am. St. Rep. 48; American Exp. Co. v. Patterson, 73 Ind. 430; Ricord v. Central Pac. R. Co., 15 Nev. 167.

[69] State ex rel. Sheets v. Pittsburg, C., C. & St. L. R. Co., 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. Rep. 635.

[70] Halsey v. Rapid Transit St. Ry. Co., 47 N. J. Eq. 380, 20 Atl. 859.

[71] Mutual Life Ins. Co. of New York v. Board, Armstrong & Co., 115 Va. 836, 80 S. E. 565, L. R. A. 1915F, 979.

tract may be profitable to the corporation is immaterial.[72] Powers merely convenient or useful are not to be implied if not essential in view of the nature, purposes, and object of the corporation.[73]

It has been held, for instance, that a railroad company, which has been given the power only to construct, maintain, and operate a certain railroad, and to do all that may be necessary for the purpose of carrying on and working the road, has no power to pledge its funds for the purpose of supporting or aiding in the support of another corporation to operate a connecting steamboat line, however much such an arrangement may increase the traffic on the railroad.[74] So, it has been held that a railroad company has no implied power to purchase and operate a steamboat, at least on waters at the terminus of its line, or at any other place where a steamboat is not necessary to the operation of the road;[75] or to lease and operate another railroad;[76] or to lease or transfer its own road to another corporation or person;[77] or to enter into a consolidation agreement with another railroad corporation;[78] or to lease or trans-

[72] Coleman v. Railway Co., 10 Beav. 1; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Tomkinson v. Railway Co., 35 Ch. Div. 675; Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334; Gulf Yellow Pine Lumber Co. v. Chapman, 159 Ala. 444, 48 South. 662; and the other cases cited above.

[73] People ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166, 38 N. E. 990; Gause v. Commonwealth Trust Co., 196 N. Y. 134, 89 N. E. 476, 24 L. R. A. (N. S.) 967; ALTON MFG. CO. v. GARRETT BIBLICAL INSTITUTE, 243 Ill. 298, 90 N. E. 704, Wormser Cas. Corporations, 105.

[74] Coleman v. Railway Co., 10 Beav. 1. But see Green Bay & M. R. Co. v. Union Steamboat Co., 107 U. S. 98, 2 Sup. Ct. 221, 27 L. Ed. 413.

[75] Pearce v. Madison & I. R. Co., 21 How. (U. S.) 441, 16 L. Ed. 184; Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353. It would doubtless be different if a corporation were chartered to construct and operate a railroad along a route crossing a wide river, or under other circumstances rendering transportation by water necessary to the operation of the road. And surely no real objection could be made to the operation of a system of ferryboats at the points where water transportation to the destination is requisite.

[76] East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775.

[77] Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950; York & M. Line R. Co. v. Winans, 17 How. (U. S.) 31, 15 L. Ed. 27; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; Id., 118 U. S. 630, 7 Sup. Ct. 24, 30 L. Ed. 284; Black v. Delaware & R. Canal Co., 22 N. J. Eq. 130; CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, Wormser Cas. Corporations, 153; Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; post, p. 165.

[78] Pearce v. Madison & I. R. Co., 21 How. (U. S.) 441, 16 L. Ed. 184; Clearwater v. Meredith, 1 Wall. (U. S.) 25, 17 L. Ed. 604.

fer to another a telegraph line which it has constructed and is operating under its charter.[79]

So, where a corporation was empowered to lay out and maintain a road from some point in the vicinity of Mt. Washington to the top of the mountain, to take tolls of passengers and for carriages, to build and own tollhouses, and to take land for their road, it was held that the corporation had no power to purchase omnibuses, wagons, horses, etc., and engage in the carriage of passengers and their baggage on its road.[80] A manufacturing corporation cannot engage in the business of buying and selling goods, except so far as necessary or incidental to the business of manufacturing.[81] It has been held that a manufacturing corporation authorized to engage in the manufacture of firearms and other implements of war cannot lawfully engage in the manufacture of railroad locks.[82]

It has been held that a railroad corporation cannot enter into a valid contract to pay money to defray the expenses of holding a festival, though by bringing strangers into the place their business may be greatly increased.[83] On the other hand, it has been held that a subscription by a hotel company to a fund to establish a military encampment, which would be likely to attract strangers to town, was not ultra vires.[84] A corporation cannot practice law

[79] American Union Tel. Co. v. Union Pac. Ry. Co. (C. C.) 1 McCrary, 541, 1 Fed. 745; post, p. 165.

[80] DOWNING v. MT. WASHINGTON ROAD CO., 40 N. H. 230, Wormser Cas. Corporations, 96.

[81] Powell v. Murray, 3 App. Div. 273, 38 N. Y. Supp. 233, affirmed 157 N. Y. 717, 53 N. E. 1130; Bosshardt & Wilson Co. v. Crescent Oil Co., 171 Pa. 109, 32 Atl. 1120; Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334; Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery (C. C.) 119 Fed. 709; Id., 126 Fed. 712, 61 C. C. A. 630.

[82] Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504. So, a corporation for the purpose of manufacturing and dealing in metal goods cannot contract with another company, engaged in manufacturing carbons for electric lighting, to sell its carbons for a term of years. Holmes, Booth & Haydens v. Willard, 125 N. Y. 75, 25 N. E. 1083, 11 L. R. A. 170.

[83] Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221. And see Tomkinson v. Railway Co., 35 Ch. Div. 675.

[84] In Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234, it was held that a subscription by an hotel company to a fund to establish a military encampment, which would be likely to attract strangers, necessarily requiring hotel accommodations, was not ultra vires. So, it has been held by the Illinois court that a business corporation may subscribe money in consideration of securing the location of a post office near its place of business. B. S. Green Co. v. Blodgett, 159 Ill. 169, 42 N. E. 176, 50 Am. St. Rep. 146, affirming 55 Ill. App. 556. And in Temple Street Cable Ry. v. Hellman, 103 Cal. 634, 37 Pac. 530, the giving of its note by a street railroad company, as an inducement to the establishment of a baseball park, which would increase its traffic,

or medicine.[85] These professions are essentially and distinctively personal in nature and purpose. Other illustrations are given below.[86] As has been already remarked, the determination of these and of similar questions of implied powers involves the resolving of a compound problem of law and fact.

Power to Purchase Real or Personal Property

We have already seen that a corporation, unless prohibited, has the capacity to take and hold the title to both real and personal

was sustained against an attack upon it as ultra vires. And see Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22, 102 Am. St. Rep. 145. A bank may pay a five-year pension to the family of a deceased official. Henderson v. Bank of Australasia, 40 Ch. Div. 170. An insurance company may, as a matter of good business, pay a loss for which it is not legally liable. Taunton v. Royal Ins. Co., 2 H. & M. 135; Hennessy v. Muhleman, 40 App. Div. 175, 57 N. Y. Supp. 854; Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456.

[85] Matter of Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879; People v. John H. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697; State Electro-Medical Institute v. State, 74 Neb. 40, 103 N. W. 1078, 12 Ann. Cas. 673. As to the making of political contributions by corporations, see People ex rel. Perkins v. Moss, 187 N. Y. 410, 80 N. E. 383, 11 L. R. A. (N. S.) 528.

[86] National banks have no authority to sell railroad bonds on commission. Weckler v. First Nat. Bank of Hagerstown, 42 Md. 581, 20 Am. Rep. 95. A railroad corporation cannot engage in banking as by issuing paper designed to circulate as bank notes, or deal in notes and bills. People ex rel. Attorney General v. River Raisin & L. E. R. Co., 12 Mich. 389, 86 Am. Dec. 64; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240. In Byrne v. Schuyler Electric Mfg. Co., 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304, the officers of an insolvent corporation, for the purpose of avoiding dissolution, transferred all its property to another corporation, which had been organized to continue its business, and accepted, in payment, stock in the new corporation, to be held by trustees named by such officers. The contract was held ultra vires. A railroad corporation has no power to employ a person to make a report on mines of which its road is the outlet, though its business is benefited thereby. George v. Nevada Cent. R. Co., 22 Nev. 228, 38 Pac. 441. A corporation authorized by its charter to make contracts of fire and marine insurance, to loan money on bottomry, respondentia, or mortgage, to buy mortgaged property when necessary to secure debts, and to purchase and hold property necessary to carry on its business, but being expressly prohibited from exercising banking powers, cannot loan money on the discount of notes; and this would be so without such express prohibition. New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100. A society incorporated for religious worship has no power to contract for a steamboat excursion, to raise money for church purposes, and cannot recover for expenses or loss of anticipated profits by reason of the defendant's breach of such a contract. Harriman v. First Bryan Baptist Church, 63 Ga. 186, 36 Am. Rep. 117. In Illinois an hotel company is unauthorized to engage in the real estate business. Stacy v. Glen Ellyn Hotel & Springs Co., 223 Ill. 546, 79 N. E. 133, 8 L. R. A. (N. S.) 966.

property. It must not be supposed, however, that it has an unlimited power to purchase property, for it has not. It has the implied power, in the absence of express restrictions, to purchase any property, real or personal, that may be reasonably necessary or proper to accomplish the purposes for which it was created.[87] But it has no power to purchase property for a purpose foreign to the objects of its creation.[88] A corporation established "for the purpose of manufacturing and selling glass" may contract to purchase glassware from a like corporation, in order to keep up its own stock and supply its customers while its works are being put in order, for this is necessary in order to carry on its business.[89] A railroad company has the implied power to purchase iron rails for use in building its road, but a purchase of rails to sell them again on speculation would be ultra vires; and the same is true of other corporations. A manufacturing corporation, though it may purchase materials to use in manufacture, cannot purchase to sell on specula-

[87] Personal property: Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315; Moss v. Averell, 10 N. Y. 449; Mahoney v. Butte Hardware Co., 19 Mont. 377, 48 Pac. 545; Id., 27 Mont. 463, 71 Pac. 674; Iowa Drug Co. v. Souers, 139 Iowa, 72, 117 N. W. 300, 19 L. R. A. (N. S.) 115. Real property: Ante, p. 151; Co. Litt. 44c, 300b; 2 Kent, Comm. 281; Spear v. Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; Nicoll v. New York & E. R. Co., 12 N. Y. 121; Old Colony R. Corp. v. Evans, 6 Gray (Mass.) 25, 38, 66 Am. Dec. 394; Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138; Freeman v. Sea View Hotel Co., 57 N. J. Eq. 68, 40 Atl. 218; Stockton Sav. Bank v. Staples, 98 Cal. 189, 32 Pac. 936; Klein v. Independent Brewing Ass'n, 231 Ill. 594, 83 N. E. 434; Rachels v. Stecher Cooperage Works, 95 Ark. 6, 128 S. W. 348. As we have seen, a corporation may purchase and take a fee-simple title to land, though the period of its existence is limited to a term of years. Ante, p. 152.

[88] Personal property: Pearce v. Madison & I. R. Co., 21 How. (U. S.) 441, 16 L. Ed. 184; DOWNING v. MT. WASHINGTON ROAD CO., 40 N. H. 230, Wormser Cas. Corporations, 96; Day v. Spiral Springs Buggy Co., 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781; Bosshardt & Wilson Co. v. Crescent Oil Co., 171 Pa. 109, 32 Atl. 1120. Real property: President, etc., of Bank of Michigan v. Niles, Walk. Ch. (Mich.) 99; Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513; National Home Bldg. & Loan Ass'n v. Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245. A corporation chartered to manufacture cars, and empowered to purchase and hold such real estate as might be necessary for the successful prosecution of its business, has no power to purchase real estate on which it lays out a town, with streets, sewerage, water and light systems, and erect dwellings, schoolhouses, churches, and business houses, in order to furnish homes and the conveniences and necessities of life to its employés, since such scheme is not necessary to the prosecution of its business. People ex rel. Maloney v. Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 665, 64 L. R. A. 366. But see Steinway v. Steinway & Sons, 17 Misc. Rep. 43, 40 N. Y. Supp. 718.

[89] Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315.

tion.[90] A railroad, steamboat, or canal company can purchase grain or other produce for its own use, but it cannot purchase the same to transport it to another market, and sell it.[91] A bank authorized by its charter to carry on the business of banking "by discounting bills, notes, and other evidences of debt, * * * and by exercising such incidental powers as may be necessary to carry on such business," has no power to buy notes or bonds, and deal in them in such a way.[92] Nor can a railroad company deal in bills or notes.[93] But either a bank or a railroad company can take bills or notes in the course of its business, as to secure a debt due to it; and the same is true of all other corporations.[94]

And so it is with purchases of real estate. A railroad, banking, or manufacturing corporation may purchase such real estate as may be necessary for the convenient transaction of its business; but it cannot enter into a valid contract to purchase land, not for use in its business, but as a speculation.[95]

It has been said that a corporation has no power, unless it is expressly conferred, to purchase property of any kind on credit, unless it is needed for immediate use, or the investment of existing funds.[96]

Power to Sell, Lease, Mortgage, or Pledge Property

In the absence of express restrictions in its charter, and subject to exceptions to be presently noticed, a corporation has the implied power to sell and convey or transfer,[97] or to lease,[98] all or a part of

[90] Day v. Spiral Springs Buggy Co., 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352. And see Chewacla Lime-Works v. Dismukes, 87 Ala. 344, 6 South. 122, 5 L. R. A. 100; Bosshardt & Wilson Co. v. Crescent Oil Co., 171 Pa. 109, 32 Atl. 1120. Purchases by a cotton mill corporation of cotton for future delivery on margin are not ultra vires, if for legitimate use and not speculation. Sampson v. Camperdown Cotton Mills (C. C.) 82 Fed. 833.

[91] Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781.

[92] Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198, 23 Am. Rep. 683; Niagara County Bank v. Baker, 15 Ohio St. 68; Talmage v. Pell, 7 N. Y. 328; First Nat. Bank of Rochester v. Pierson, 24 Minn. 140, 31 Am. Rep. 341. But see National Pemberton Bank v. Porter, 125 Mass. 333, 28 Am. Rep. 235.

[93] Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

[94] Goodrich v. Reynolds, supra; McIntire v. Preston, 5 Gilman (Ill.) 48, 48 Am. Dec. 321.

[95] President, etc., of Bank of Michigan v. Niles, Walk. Ch. (Mich.) 99; Id., 1 Doug. 401, 41 Am. Dec. 575; Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513; Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369.

[96] Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9.

[97] Post v. Beacon Vacuum Pump & Electric Co., 84 Fed. 371, 28 C. C. A. 431; Morisette v. Howard, 62 Kan. 463, 63 Pac. 756; In re Kingsbury Collier-

[98] See note 98 on following page.

its real or personal property.[98] And whenever a corporation has the power to borrow money, or to otherwise incur debts, it has, as incidental thereto, unless expressly restricted, the implied power to execute a mortgage on its property, real or personal, or to pledge its property, to secure its debts, whether the debts have been previously contracted, or are contracted at the time, or are to be contracted in the future.[1] The power of a corporation to execute a

les, Ltd., L. R. 2 Ch. Div. (1907) 259; Peters v. Waverly Water Front Improvement & Development Co., 113 Va. 318, 74 S. E. 168. It is not ultra vires for a manufacturing corporation to give away some of its manufactured goods for the purpose of extending their reputation. Steinway v. Steinway & Sons, 17 Misc. Rep. 43, 40 N. Y. Supp. 718.

[98] Simpson v. Hotel Co., 8 H. L. Cas. 712; Featherstonehaugh v. Lee Moore Porcelain Clay Co., L. R. 1 Eq. 318; Brown v. Winnisimmet Co., 11 Allen (Mass.) 326 (a ferryboat company possessing vessels for which it has no present use may lease them to the government for use in warlike operations); People ex rel. Maloney v. Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 665, 64 L. R. A. 366; Plant v. Macon Oil & Ice Co., 103 Ga. 666, 30 S. E. 567; Anderson v. Shawnee Compress Co., 17 Okl. 231, 87 Pac. 315, 15 L. R. A. (N. S.) 846. A corporation engaged in carrying on a department store may lease space to a person who is to conduct a department therein in consideration of a percentage of the moneys to be derived from sales. Standard Fashion Co. v. Siegel-Cooper Co., 44 App. Div. 121, 60 N. Y. Supp. 739. A corporation authorized to hold real estate may lease it for use in a business which it is not authorized to carry on. Nye v. Storer, 168 Mass. 53, 46 N. E. 402; Nantasket Beach Steamboat Co. v. Shea, 182 Mass. 147, 65 N. E. 57.

[99] Hendee v. Pinkerton, 14 Allen (Mass.) 381; State ex rel. v. Western Irrigating Canal Co., 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166; Leggett v. New Jersey Mfg. & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Dupee v. Boston Water Power Co., 114 Mass. 37; Aurora Agricultural & Horticultural Soc. v. Paddock, 80 Ill. 263; Benbow v. Cook, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454; Reynolds' Heirs v. Stark County Com'rs, 5 Ohio, 204; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 30; Maben v. Gulf Coal & Coke Co., 173 Ala. 259, 55 South. 607, 35 L. R. A. (N. S.) 396; Shaw v. Hollister Land & Improvement Co., 166 Cal. 257, 135 Pac. 965. "All civil corporations, * * * unless expressly restrained by the act which establishes them, or by some subsequent act, have, and always have had an unlimited control over their respective properties, and may alienate in fee, or make what estates they please, for years, for life, or in tail, as fully as any individual may do with respect to his own property." 1 Kyd, Corp. 108.

[1] Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 280; Curtis v. Leavitt, 15 N. Y. 9; Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412; Eureka Iron & Steel Works v. Bresnahan, 60 Mich. 332, 27 N. W. 524; In re Patent File Co., 6 Ch. App. 83; Aurora Agricultural & Horticultural Soc. v. Paddock, 80 Ill. 263; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Jones v. New York Guaranty & Indemnity Co., 101 U. S. 622, 25 L. Ed. 1030; Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. Ed. 117; Booth v. Robinson, 55 Md. 419; Hendee v. Pinkerton, 14 Allen (Mass.) 381; Thompson v. Lambert, 44 Iowa, 239; Detroit v. Mutual Gaslight Co., 43 Mich. 594, 5 N. W. 1039; Evans v. Boston Heating Co., 157 Mass. 37, 31 N. E. 698; Leggett v. New Jersey Mfg. & Banking Co., 1 N. J.

mortgage on its property can only be co-extensive with its power to alienate absolutely, since every mortgage may become an absolute conveyance by foreclosure.[2] In like manner a corporation may make an assignment of its property for the payment of its debts.[3]

A corporation on a solvent, going basis has no power to transfer all its property, thus effecting a practical dissolution, without the unanimous consent of its stockholders;[4] but if the corporation is

Eq. 541, 23 Am. Dec. 728; Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; Leo v. Union Pac. R. Co. (C. C.) 17 Fed. 273; Duncomb v. New York, H. & N. R. Co., 84 N. Y. 190; Jackson v. Brown, 5 Wend. (N. Y.) 590; Memphis & L. R. Co. v. Dow (C. C.) 19 Fed. 388; Bardstown & L. R. Co. v. Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; Jessup v. Bridge, 11 Iowa, 572, 79 Am. Dec. 513; Hays v. Galion Gas Light & Coal Co., 29 Ohio St. 330; Bell & Coggeshall Co. v. Kentucky Glass Works Co., 48 S. W. 440, 20 Ky. Law Rep. 1089; Id., 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180; Fidelity Trust Co. v. Louisville Gas Co., 118 Ky. 588, 81 S. W. 927, 111 Am. St. Rep. 302; Copper Belle Min. Co. v. Costello, 12 Ariz. 105, 95 Pac. 803; Tierney v. Ledden, 143 Iowa, 286, 121 N. W. 1050, 21 Ann. Cas. 105; Howeth v. Colbourne Bros. Co., 115 Md. 107, 80 Atl. 916; C. West v. Dyson, 230 Pa. 619, 79 Atl. 782. And a corporation having the power to execute a mortgage on its property to secure its debts may, in the absence of special restrictions, execute a mortgage to secure future advances. Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547, 2 N. E. 909; Barry v. Merchants' Exchange Co., supra. Jones v. New York Guaranty & Indemnity Co., supra; Richards v. Merrimack & C. R. R. R., 44 N. H. 127. Under a mortgage executed by a corporation to secure bonds and covering lands thereafter to be acquired by the mortgagor and described in the mortgage, the lien of the mortgagees on lands subsequently acquired by the mortgagor is superior to the title acquired by purchasers with notice on the foreclosure of a mechanic's lien on the same property, filed subsequent to the acquisition of the fee by the mortgagor. United States Mortgage & Trust Co. v. Eastern Iron Co., 120 App. Div. 679, 105 N. Y. Supp. 291, affirmed in 195 N. Y. 589, 89 N. E. 1114. Where a corporation has power to purchase its own shares, it may borrow money on mortgage to pay for them. Mannington v. Hocking Valley R. Co. (C. C.) 183 Fed. 133.

[2] Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Kavanaugh v. City of St. Louis, 220 Mo. 496, 119 S. W. 552.

[3] Post, p. 691.

[4] Abbott v. American Hard Rubber Co., 33 Barb. (N. Y.) 578; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448; People v. Ballard, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737; Easun v. Buckeye Brewing Co. (C. C.) 51 Fed. 156; Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189; Elyea v. Lehigh Salt Min. Co., 169 N. Y. 29, 61 N. E. 992; Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 N. E. 670; Coleman v. Hagey (semble) 252 Mo. 102, 158 S. W. 829. But see, contra, Tanner v. Lindell R. Co., 180 Mo. 1, 79 S. W. 155, 103 Am. St. Rep. 534; Cohen v. Big Stone Gap Iron Co., 111 Va. 468, 69 S. E. 359, Ann. Cas. 1912A, 203; Mayben v. Gulf Coal & Coke Co., 173 Ala. 259, 55 So. 607, 35 L. R. A. (N. S.) 396; Peters v. Waverly Water-Front Improvement & Development Co., 113 Va. 318, 74 S. E. 168; BOWDITCH v. JACKSON CO., 76 N. H. 351, 82 Atl. 1014, Ann. Cas. 1913A, 366, Wormser Cas. Corporations, 226.

insolvent, or the business is unprofitable, and the enterprise a failure, a majority of the stockholders may sell all the corporate property,[5] which latter rule rests on the doctrine of necessity in order to avoid complete loss.

In the absence of statutory authority a corporation can neither sell nor mortgage its franchises.[6] But the power to mortgage corporate franchises may be, and often is, conferred by statute.[7] And even in the absence of statute it has been held that an electric lighting company "has power to mortgage its property and franchises,[8] other than the primary franchise of corporate existence.

By the weight of authority, a railroad company, or other corporation that is vested with the power of eminent domain, and charged with peculiar duties to the public, as telegraph, gas, and water companies, cannot, in the absence of express authority from the Legisture, alienate, by absolute conveyance or by lease, property that is essential to enable it to properly perform its functions.[9] Nor, by

[5] Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Lauman v. Lebanon Valley R. Co., 30 Pa. 42, 72 Am. Dec. 685; Miners' Ditch Co. v. Zellerbach, 37 Cal. 579, 99 Am. Dec. 30; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; Phillips v. Providence Steam Engine Co., 21 R. I. 302, 43 Atl. 598, 45 L. R. A. 560; Morisette v. Howard, 62 Kan. 463, 63 Pac. 756; Bartholomew v. Derby Rubber Co., 69 Conn. 521, 38 Atl. 45, 61 Am. St. Rep. 57; Rogers v. Pell, 154 N. Y. 518, 49 N. E. 75 (assignment for benefit of creditors); Werle v. Northwestern Flint & Sandpaper Co., 125 Wis. 534, 104 N. W. 743; Hoag v. Edwards, 69 Misc. Rep. 237, 124 N. Y. Supp. 1035. See also, Hayden v. Official Hotel Red-Book & Directory Co. (C. C.) 42 Fed. 875. Post, p. 691.

[6] Carpenter v. Black Hawk Gold Min. Co., 65 N. Y. 43, 50; Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547, 2 N. E. 909; Beebe v. Richmond Light, Heat & Power Co., 13 Misc. Rep. 737, 35 N. Y. Supp. 1; Susquehanna Canal Co. v. Bonham, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315; Arthur v. President, etc., of Commercial & R. Bank of Vicksburg, 9 Smedes & M. (Miss.) 394, 48 Am. Dec. 719; City Water Co. v. State, 88 Tex. 600, 32 S. W. 1033; New Orleans, J. & G. N. R. Co. v. Harris, 27 Miss. 517; Stewart v. Jones, 40 Mo. 140; Daniels v. Hart, 118 Mass. 543; Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

[7] See Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547, 2 N. E. 909; Davidson v. Westchester Gaslight Co., 99 N. Y. 558, 2 N. E. 892; East Boston Freight R. Co. v. Eastern R. Co., 13 Allen (Mass.) 422; Wright v. Milwaukee Electric Railway & Light Co., 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47, 60 Am. St. Rep. 74; Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America, 82 Fed. 124, 27 C. C. A. 73.

[8] American Loan & Trust Co. v. General Electric Co., 71 N. H. 192, 51 Atl. 660. Compare Pierce v. Emery, 32 N. H. 504. Contra, Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547, 557, 558, 2 N. E. 909.

[9] Com. v. Smith, supra. "In the case of a railroad company," it was said by Hoar, J., in this case, "created for the express and sole purpose of constructing, owning, and managing a railroad; authorized to take land for this purpose under the power of eminent domain; whose powers are to be

the weight of authority, can it execute a mortgage on such property, in the absence of express authority, even to secure legitimate debts; for, as has been stated, the power to mortgage can only be coextensive with the power to alienate absolutely, since every mortgage may become an absolute conveyance by foreclosure.[10] A

exercised by officers expressly designated by statute; having public duties, the discharge of which is the leading object of its creation; required to make returns to the Legislature—there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body, of its own will. Such a franchise is not in its own nature transmissible. * * * And although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in business depends upon the performance of its public duties. Having once established its road, if that and the franchise of managing, using, and taking tolls and fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill, and buy another; but a railroad company cannot make a new railroad at its pleasure." And see Beman v. Rufford, 1 Sim. (N. S.) 550; Winch v. Railway Co., 5 De Gex & S. 562; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950; York & M. Line R. Co. v. Winans, 17 How. (U. S.) 31, 15 L. Ed. 27; Black v. Delaware & R. Canal Co., 22 N. J. Eq. 390; CENTRAL TRANSP. CO. v. PULLMAN'S PALACE-CAR CO., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, Wormser Cas. Corporations, 153; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748; American Union Tel. Co. v. Union Pac. Ry. Co. (C. C.) 1 McCrary, 541, 1 Fed. 745; Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385; Wolford v. Crystal Lake Cemetery Ass'n, 54 Minn. 440, 56 N. W. 56; Cumberland Telephone & Telegraph Co. v. Evansville (C. C.) 127 Fed. 187; Kean v. Johnson, 9 N. J. Eq. 401; Georgia Railroad & Banking Co. v. Haas, 127 Ga. 187, 56 S. E. 313, 119 Am. St. Rep. 327, 9 Ann. Cas. 677; Weld v. Board of Gas & Electric Light Com'rs, 197 Mass. 556, 84 N. E. 101; City of South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 Pac. 490; Attorney General v. Haverhill Gas Light Co., 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266; note 99, p. 166, supra, and cases there cited. But see Bardstown & L. R. Co. v. Metcalfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; Miller v. Rutland & W. R. Co., 36 Vt. 452.

[10] Com. v. Smith, supra, and other cases cited above; Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; Kavanaugh v. City of St. Louis, 220 Mo. 496, 119 S. W. 552; compare American Loan & Trust Co. v. General Electric Co., 71 N. H. 192, 51 Atl. 660. With the decision last cited, compare Pierce v. Emery, 32 N. H. 504. See Hunt v. Memphis Gaslight Co., 95 Tenn. 136, 31 S. W. 1006, where it was held that, when its charter does not confer the power of eminent domain or exclusive privilege, a gas company can

railroad company, or similar corporation, however, has the same implied power as any other corporation, in the absence of special restraint, to alienate property which it has acquired otherwise than by the exercise of the power of eminent domain, and which is not necessary to enable it to perform its duties to the public.[11] And it has, of course, the same power to mortgage such unessential property, if it does so for an authorized purpose.[12]

The Legislature generally expressly authorizes these quasi public corporations to mortgage their property and franchises under certain circumstances. Of course, authority to mortgage for a specified purpose would, under familiar rules of construction, exclude all other purposes. If the Legislature confers upon such a corporation power to mortgage its property without limitation, it authorizes a mortgage of the entire corporate property.[13] If it confers the power to sell and transfer or alien absolutely, this will give the power to mortgage.[14] And power to mortgage includes, as a necessary incident, the power to borrow money and issue bonds therefor.[15] Where a railroad company has express authority to mortgage its property, a mortgage executed by it, covering both its property and franchise, will not be avoided as to the property by the fact that there was no authority to mortgage the franchise.[16] The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale and to transfer them with the corporate property of the company to the purchaser.[17]

mortgage its entire property to secure bonds and floating indebtedness, though the charter does not expressly confer the right to mortgage.

[11] Hendee v. Pinkerton, 14 Allen (Mass.) 381; Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Benton v. City of Elizabeth, 61 N. J. Law, 411, 39 Atl. 683, 906; Id., 61 N. J. Law, 693, 40 Atl. 1132; Union Pac. R. Co. v. Chicago, M. & St. P. R. Co., 51 Fed. 309, 2 C. C. A. 174. See, also, Delaware L. & W. R. Co. v. Welser, 233 Pa. 154, 81 Atl. 994.

[12] Hendee v. Pinkerton, supra.

[13] Pumphrey v. Threadgill, 9 Tex. Civ. App. 184, 28 S. W. 450. As to what passes under a general railroad mortgage, the effect on after-acquired property, etc., see Philadelphia, W. & B. R. Co. v. Woelpper, 64 Pa. 366, 3 Am. Rep. 596; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. Ed. 199; Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Hammock v. Farmers' Loan & Trust Co., 105 U. S. 77, 26 L. Ed. 1111; Platt v. New York & Sea Beach Ry. Co., 9 App. Div. 87, 41 N. Y. Supp. 42, affirmed on opinion below 153 N. Y. 670, 48 N. E. 1106.

[14] East Boston Freight R. Co. v. Eastern R. Co., 13 Allen (Mass.) 422; McAllister v. Plant, 54 Miss. 106.

[15] Gloninger v. Pittsburgh & C. R. Co., 139 Pa. 13, 21 Atl. 211.

[16] Id.; Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547, 2 N. E. 909. See also, City of Quincy v. Chicago, B. & Q. R. Co., 94 Ill. 537.

[17] New Orleans, S. F. & L. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct.

Power to Borrow Money

Except in so far as there may be express restrictions in its charter, a private corporation may, like an individual, borrow money, whenever the nature of its business renders it proper or expedient that it should do so.[18] But it cannot do so for an unauthorized purpose.[19]

It has been held, for instance, that building associations have no implied power to borrow money.[20] It seems clear that they have no power to borrow money for the purpose of lending it out again, for this is not within their purpose.[21]

Power to Execute Bonds

Corporations, including railroad companies, have the implied power to execute bonds for any purpose for which they may lawfully contract a debt, in the absence of restrictions in their charter. "A bond is merely an obligation under seal. A corporation having

1009, 29 L. Ed. 244; Chadwick v. Old Colony R. Co., 171 Mass. 239, 50 N. E. 629. The right to be a corporation, i. e., the primary franchise, does not pass under a sale of the franchises. People v. Cook, 110 N. Y. 443, 18 N. E. 113; New York ex rel. Schurz v. Cook, 148 U. S. 397, 13 Sup. Ct. 645, 37 L. Ed. 498; Minor v. Erie R. Co., 171 N. Y. 566, 64 N. E. 454.

[18] Barry v. Merchants Exchange Co., 1 Sandf. Ch. (N. Y.) 280; Curtis v. Leavitt, 15 N. Y. 9; Nelson v. Eaton, 26 N. Y. 410; Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412; In re Patent File Co., 6 Ch. App. 83; Heironimus v. Sweeney, 83 Md. 146, 34 Atl. 823, 33 L. R. A. 99, 55 Am. St. Rep. 333; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. Law, 513, 7 Atl. 318; Booth v. Robinson, 55 Md. 419; Commercial Bank of New Orleans v. Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248; Bradbury v. Boston Canoe Club, 153 Mass. 77, 26 N. E. 132; Hays v. Galion Gas Light & Coal Co., 29 Ohio St. 330; Star Mills v. Bailey, 140 Ky. 194, 130 S. W. 1077, 140 Am. St. Rep. 370; Mannington v. Hocking Valley R. Co. (C. C.) 183 Fed. 133; Johnson v. Johnson Bros., 108 Me. 272, 80 Atl. 741, Ann. Cas. 1913A, 1303; Gaitley v. Albany Foundry Co., 157 App. Div. 10, 141 N. Y. Supp. 676; American Nat. Bank v. Wheeler-Adams Auto Co., 31 S. D. 524, 141 N. W. 396. A mutual fire insurance company can borrow money to pay losses, and give its notes therefor. Orr v. Mercer Co. Mut. Fire Ins. Co., 114 Pa. 387, 6 Atl. 696. It has been held not appropriate for a savings bank to borrow money for investment purposes, but appropriate to raise funds to avert a run on the bank. Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9. See, also, National Bank of Republic v. Young, 41 N. J. Eq. 531, 7 Atl. 488.

[19] In re Cork & Youghal Ry. Co., 4 Ch. App. 748; In re National Building Society, 5 Ch. App. 309; Wenlock v. River Dee Co., 19 Q. B. Div. 155; Bacon v. Mississippi Ins. Co., 31 Miss. 116; Adams & Westlake Co. v. Deyette, 8 S. D. 119, 65 N. W. 471, 31 L. R. A. 497, 59 Am. St. Rep. 751.

[20] In re National Building Society, supra.

[21] State ex rel. Colburn v. Oberlin Building & Loan Ass'n, 35 Ohio St. 258; North Hudson Mut. Bldg. & Loan Ass'n v. First Nat. Bank of Hudson, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845.

the capacity to sue and be sued, the right to make contracts, under which they may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual, and peculiarly appropriate, form of corporate agreement." [22] When a statute specifies a particular manner in which bonds shall be executed by a corporation, as is often the case, a failure to comply with the statute renders the bonds invalid.[23]

Bonds of corporations, and the coupons attached thereto, will be regarded as negotiable instruments, and as subject to the rules of law relating to such instruments, if it appears from the form in which they were issued, and the mode of giving them circulation, that they were intended to have this character; and they will be transferable like negotiable bills and notes, and subject to the rules protecting bona fide holders.[24]

Power to Make Negotiable Instruments

It is held in England that a corporation cannot issue negotiable instruments unless the power is given expressly or by necessary implication from the nature and character of its business. Thus the power will be implied in the case of a corporation created for the purpose of trading,[25] but not in the case of a railway company [26] or of a mining company.[27] In this country the rule is dif-

[22] Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672. And see White Water Valley Canal Co. v. Vallette, 21 How. (U. S.) 414, 16 L. Ed. 154; Barry v. Merchants Exchange Co., 1 Sandf. Ch. (N. Y.) 280; Curtis v. Leavitt, 15 N. Y. 9.

[23] Com. v. Smith, supra. See Kemmerer v. St. Louis Blast Furnace Co., 212 Fed. 63, 128 C. C. A. 519. And compare First Savings & Trust Co. v. Waukesha Canning Co., 211 Fed. 927, 128 C. C. A. 305.

[24] White v. Vermont & M. R. Co., 21 How. (U. S.) 575, 16 L. Ed. 221; American Nat. Bank v. American Wood Paper Co., 19 R. I. 149, 32 Atl. 305, 29 L. R. A. 103, 61 Am. St. Rep. 746; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. Ed. 199; Carr v. Le Fevre, 27 Pa. 413; Lexington v. Butler, 14 Wall. (U. S.) 282, 20 L. Ed. 809; Philadelphia & R. R. Co. v. Smith, 105 Pa. 195; Philadelphia & R. R. Co. v. Fidelity Ins. Trust & Safe Deposit Co., 105 Pa. 216; Curtis v. Leavitt, 15 N. Y. 9; Woodbury v. Allegheny & K. R. Co. (C. C.) 72 Fed. 371; Louisville, N. A. & C. R. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; McCormick v. Unity Co., 239 Ill. 306, 87 N. E. 924 (semble); Stegmaier v. Keystone Coal Co., 225 Pa. 221, 74 Atl. 58; Broomall v. North American Steel Co., 70 W. Va. 591, 74 S. E. 863. As to the bonds of a joint-stock association, see Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108.

[25] Bateman v. Railway Co., L. R. 1 C. P. 499; In re General Estates Co., L. R. 3 Ch. 758; In re Peruvian Co., L. R. 2 Ch. 617.

[26] Bateman v. Railway Co., supra.

[27] Dickinson v. Valpy, 10 B. & C. 128; Neale v. Turton, 4 Bing. 149. See, also, Bramah v. Roberts, 3 Bing. N. C. 963; Bult v. Morrell, 12 Ad. & E. 745;

ferent. A corporation has the implied power to make or indorse promissory notes, and to draw, indorse, or accept bills of exchange, if it is a usual or appropriate means of accomplishing the objects and purposes for which it was created. It has impliedly the power to execute negotiable instruments when it has the power to borrow money.[28] But if such acts are foreign to the purposes of the charter, or repugnant thereto, the power does not exist.[29] The right to set up the defense that the execution or indorsement of a negotiable instrument by a corporation was ultra vires, in order to defeat a recovery by a bona fide holder for value, will be considered in explaining the effect of ultra vires contracts.[30]

Power to Lend Money or Credit—Accommodation Paper

A private corporation has ordinarily no implied power to lend money. The rule would be open to exception where the loan is strictly necessary and appropriate to the carrying out of the corporate enterprise. Thus, in an Illinois case, it was held that a brewery company has the implied power to make a loan for the erection of a saloon in which it is required by contract that only the beer

Thompson v. Universal Salvage Co., 1 Exch. 694; Steele v. Harmer, 14 M. & W. 831.

[28] Union Bank v. Jacobs, 6 Humph. (Tenn.) 515; Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. Law, 513, 7 Atl. 318; Moss v. Averell, 10 N. Y. 449; Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Commercial Bank of New Orleans v. Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; Richmond, F. & P. R. Co. v. Snead, 19 Grat. (Va.) 354, 100 Am. Dec. 670; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Ward v. Johnson, 95 Ill. 215; McIntire v. Preston, 5 Gilman (Ill.) 48, 48 Am. Dec. 321; Orr v. Mercer Co. Mut. Fire Ins. Co., 114 Pa. 387, 6 Atl. 696; Hardy v. Merriweather, 14 Ind. 203; Ex parte Estabrook, 2 Lowell, 547, Fed. Cas. No. 4,534; Bradbury v. Boston Canoe Club, 153 Mass. 77, 26 N. E. 132; Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 282; National Loan & Investment Co. v. Rockland Co., 94 Fed. 335, 36 C. C. A. 370; ALTON MFG. CO. v. GARRETT BIBLICAL INSTITUTE, 248 Ill. 298, 90 N. E. 704, Wormser Cas. Corporations, 105; Knapp v. Tidewater Coal Co., 85 Conn. 147, 81 Atl. 1063; Waterbury v. United Telephone Co., 69 Or. 49, 138 Pac. 232. A railroad company, for instance, being empowered to construct and operate its road, may incur debts in carrying out its object; and, where a debt has been lawfully incurred, it may execute a promissory note or accept a bill of exchange in payment thereof, or it may raise money on a bill or note for the purpose of making such payment. Union Bank v. Jacobs, supra.

[29] National Park Bank v. German-American Mutual Warehouse & Security Co., 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; Bacon v. Mississippi Ins. Co., 31 Miss. 116. Thus, a corporation cannot, even for a consideration paid, bind itself by indorsing promissory notes for accommodation of the maker. National Park Bank v. German-American Mutual Warehouse & Security Co., supra. And see note 33, infra, p. 174, and cases there cited.

[30] Post, p. 218.

manufactured by such company shall be sold.[31] As a general rule, the power to become guarantor or surety for another person or corporation is not ordinarily incident to corporations for railroading, banking, insurance, manufacturing, etc.[32] Nor has a corporation any implied authority or power to accept a bill of exchange as an accommodation, or to execute an accommodation note, or to indorse a bill or note as an accommodation.[33] Such contracts as

[31] Kraft v. West Side Brewery Co., 219 Ill. 205, 76 N. E. 372; Holm v. Claus Lipsius Brewing Co., 21 App. Div. 204, 47 N. Y. Supp. 518; Garrison Canning Co. v. Stanley, 133 Iowa, 57, 110 N. W. 171; Laughlin v. Chicago Ry. Equipment Co., 182 Ill. App. 280; Bank of Berwick v. George Vinson Shingle & Mfg. Co., 132 La. 861, 61 South. 850; Frese v. Mutual Life Ins. Co. of New York, 11 Cal. App. 387, 105 Pac. 265. Manufacturing corporations may advance funds to a manufacturer to enable him to furnish goods. Holmes, Booth & Haydens v. Willard, 125 N. Y. 75, 25 N. E. 1083, 11 L. R. A. 170 (semble). See Leigh v. American Brake-Beam Co., 205 Ill. 147, 68 N. E. 713, holding that a corporation organized to manufacture and sell railway appliances is not authorized to lend.

[32] National Park Bank v. German-American Mutual Warehouse & Security Co., 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; Memphis Grain & Elevator Co. v. Memphis & C. R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798; Madison, W. & M. Plank-Road Co. v. Watertown & P. Plank-Road Co., 7 Wis. 59; Lucas v. White Line Transfer Co., 70 Iowa, 542, 30 N. W. 771, 59 Am. Rep. 449; Culver v. Reno Real Estate Co., 91 Pa. 367; Hall v. Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75; Humboldt Min. Co. v. American Manufacturing, Mining & Milling Co., 10 C. C. A. 415, 62 Fed. 356; Ætna Nat. Bank v. Charter Oak Life Ins. Co., 50 Conn. 167; Garrison Canning Co. v. Stanley, 133 Iowa, 57, 110 N. W. 171; Gulf Yellow Pine Lumber Co. v. Chapman, 159 Ala. 444, 48 South. 662 (semble); Kellogg-Mackay Co. v. Havre Hotel Co., 199 Fed. 727, 118 C. C. A. 165. A contract by which a railroad company guaranteed payment of interest and dividends, on the bonds and stock of a hotel company along the line of its road, held, beyond its powers. Western Maryland R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 2 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362. No authority in a corporation to lend its credit to another is to be implied from the fact that it may be beneficial to the corporation to do so. Germania Safety-Vault & Trust Co. v. Boynton, 19 C. C. A. 118, 71 Fed. 797; Rogers v. Jewell Belting Co., 184 Ill. 574, 56 N. E. 1017; Best Brewing Co. v. Klassen, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26; Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville, 69 Neb. 220, 95 N. W. 819; Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; Ward v. Joslin, 105 Fed. 224, 44 C. C. A. 456. "It is no part of the ordinary business of commercial corporations, and, a fortiori, still less so of noncommercial corporations, to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are ultra vires, whether in the indirect form of going on accommodation bills, or otherwise becoming liable for the debts of others." Green's Brice, Ultra Vires, 252.

[33] National Park Bank v. German-American Mutual Warehouse & Security Co., supra; National Bank of Republic v. Young, 41 N. J. Eq. 531, 7 Atl. 488; Ex parte Estabrook, 2 Lowell, 547, Fed. Cas. No. 4,534; Ætna Nat. Bank v.

these are clearly foreign to the objects of most corporations. The fact that a consideration is received by the corporation for entering into the contract has been said to make no difference.[84] We shall see in another place that a corporation cannot always successfully defend against accommodation paper, where it has passed into the hands of a bona fide purchaser for value;[85] but this is based on the law of negotiable paper.

There may be circumstances under which a corporation would have the power to guaranty the debt of another person or corporation. Being authorized to make all contracts that may be necessary for accomplishing the purpose of its creation, a corporation, in making a contract which it is authorized to make, may, as a part of the consideration, become a guarantor.[86] Thus where de-

Charter Oak Life Ins. Co., 50 Conn. 167; Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. 742, 30 C. C. A. 409; Preston v. Northwestern Cereal Co., 67 Neb. 45, 93 N. W. 136; J. G. Brill Co. v. Norton & T. St. R. Co., 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525; Cook v. American Tubing & Webbing Co., 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193; Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 Pac. 509, 132 Am. St. Rep. 1058; Bradley Engineering & Mfg. Co. v. Heyburn, 56 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127 (semble); Simmons Nat. Bank v. Dilley Foundry Co., 95 Ark. 368, 130 S. W. 162; Haupt v. Vint, 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 518; Piser v. Serota & Gans, 182 Ill. App. 390; Jacobus v. Jamestown Mantel Co., 149 App. Div. 356, 134 N. Y. Supp. 418. See National Bank of Cynthiana v. Mattingly, 33 S. W. 415, 37 S. W. 953, 18 Ky. Law Rep. 425, where recovery was allowed on accommodation paper under peculiar circumstances. A corporation can execute accommodation paper with the consent of its stockholders. Martin v. Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 25 N. E. 303; Murphy v. Arkansas & L. Land & Improvement Co. (C. C.) 97 Fed. 723. Contra, Steiner v. Steiner Land & Lumber Co., 120 Ala. 128, 26 South. 494. And see Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. 742, 30 C. C. A. 409; Perkins v. Trinity Realty Co., 69 N. J. Eq. 723, 61 Atl. 167, affirmed in 71 N. J. Eq. 304, 71 Atl. 1135.

[84] National Park Bank v. German-American Mutual Warehouse & Security Co., supra. See, also, Carlaftes v. Goldmeyer Co., 72 Misc. Rep. 75, 129 N. Y. Supp. 396.

[85] Post, p. 218.

[86] National Bank of Commerce v. Allen, 90 Fed. 545, 33 C. C. A. 169; Lake Street El. R. Co. v. Carmichael, 184 Ill. 348, 56 N. E. 372. Under the implied power which a corporation has to make such contracts as are necessary and usual as a means of accomplishing the purposes of its creation, it has been held that a corporation dealing in lumber may become surety on a building contractor's bond in order to get his business. Wheeler, Osgood & Co. v. Everett Land Co., 14 Wash. 630, 45 Pac. 316; Wittmer Lumber Co. v. Rice, 23 Ind. App. 586, 55 N. E. 868; Central Lumber Co. v. Kelter, 201 Ill. 503, 66 N. E. 543; Interior Woodwork Co. v. Prasser, 108 Wis. 557, 84 N. W. 833. Contra, In re S. P. Smith Lumber Co. (D. C.) 132 Fed. 620. A brewing corporation may guaranty the rent of a customer. Winterfield v. Cream City Brewing Co., 96 Wis. 239, 71 N. W. 101. It may become surety on a liquor bond. Horst v. Lewis, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460. It may contract

fendant, a mercantile corporation guaranteed the payment of a letter of credit issued by plaintiffs, J. P. Morgan & Co., to a woman going abroad, and J. P. Morgan & Co. honored the drafts thereafter drawn by her; in a suit upon the guaranty, it appearing that defendant company might guarantee a letter of credit under some circumstances, as, for instance, if it were sending a buyer abroad, and it appearing further that there was nothing in the transaction calculated to apprise the plaintiffs that the proceeds of the letter of credit were to be devoted to purposes other than those of defendant company, it was held that defendant corporation was liable on its guaranty to the plaintiffs, J. P. Morgan & Co.[37] And, a railroad company, for the purpose of disposing of bonds issued to it by a municipal corporation in payment of subscriptions to its stock, may guaranty their payment.[38] So, where one railroad company makes an authorized lease of its road to another, the lessee may, as part of the consideration for the contract, guaranty the payment of bonds issued by the lessor.[39] And a railroad company, which has power by its charter to issue its own bonds, has power to guaranty the bonds of another railroad company, which it has taken in payment of a debt due it, and which it sells or transfers in payment of its own debt; the guaranty being given to enable it to dispose of the bonds to better advantage.[40] And corporations holding ne-

to indemnify the surety on the official bond of a saloonkeeper whom it desires to conduct the business of a hotel and bar owned by it. Timm v. Grand Rapids Brewing Co., 160 Mich. 371, 125 N. W. 357, 27 L. R. A. (N. S.) 186. Where a manufacturing and mercantile corporation has sold goods on credit to a hotel keeper, whose only means of payment is derived from profits in such business, it has implied power to pledge its credit to assist him to borrow money to enable him to continue his business. Hess v. W. & J. Sloane, 66 App. Div. 522, 73 N. Y. Supp. 313, affirmed 173 N. Y. 616, 66 N. E. 1110. A corporation may execute a guaranty contract to aid in the collection of a debt owing to it, arising in the due course of its business, and to protect itself from loss. North Texas State Bank v. Crowley-Southerland Commission Co. (Tex. Civ. App.) 145 S. W. 1027. See, also, Todd v. Kentucky Union Land Co. (C. C.) 57 Fed. 47 (implied power to obligate itself as surety or guarantor "when it does so for its own benefit" founded on a valuable consideration), affirmed in Marbury v. Kentucky Union Land Co., 62 Fed. 335, 10 C. C. A. 393, and followed; Fidelity Trust Co. v. Louisville Gas Co., 118 Ky. 588, 81 S. W. 927, 111 Am. St. Rep. 302.

[37] J. P. MORGAN & CO. v. HALL & LYON CO., 34 R. I. 273, 83 Atl. 113, Wormser Cas. Corporations, 114. And see National Home Bldg. & Loan Ass'n v. Home Savings Bank, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245.

[38] Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. Ed. 117.

[39] Low v. California Pac. R. Co., 52 Cal. 53, 28 Am. Rep. 629.

[40] Rogers Locomotive & Machine Works v. Southern Railroad Ass'n (C. C.) 34 Fed. 278. And see Arnot v. Erie R. Co., 67 N. Y. 315; Ellerman v. Chicago

gotiable paper may indorse the same for the purpose of negotiating it.[41]

Generally speaking, then, the power to lend money or credit is not to be implied, unless the power is expressly conferred in the corporate charter or unless such agreement is reasonably suitable and necessary in the proper conduct of the corporate enterprise. Business usage and custom must be taken into account, as well as the presence or absence of consideration flowing to the corporation. The question is not a mere abstract question of law, but must be resolved in the light of the surrounding facts and circumstances of each particular case, always bearing in mind the nature and aims of the particular corporation and the approved prevalent methods in the community whereby its variety of business is usually conducted.

Contracts of Partnership

A corporation ordinarily has no power to enter into a contract of partnership, unless the power is expressly conferred upon it. The power will not be implied, for the manner in which the business of a corporation is conducted is regarded as inconsistent with such a contract.[42] As was said in a Massachusetts case, in refer-

Junction Railways & Union Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287; Marbury v. Land Co., 10 C. C. A. 393, 62 Fed. 335; Central Trust Co. v. Columbus, H. V. & T. R. Co. (C. C.) 87 Fed. 815; Broadway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603. When the charter of a land company gave it power to acquire mining and timber lands, to take the ore and timber therefrom and manufacture them, and to acquire rights of way "to export" its products, with all powers necessary to the full enjoyment of the powers granted, and authorized it, in furtherance of those powers, to consolidate with any railroad company, it had power to acquire stock of a railroad company, and to guaranty its bonds and the dividends on its preferred stock, in order to secure the construction of a railroad. Marbury v. Land Co., supra.

[41] Bank of Genesee v. Patchin Bank, 13 N. Y. 309.

[42] Whittenton Mills v. Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681; Mallory v. Hanaur Oil Works, 86 Tenn. 598, 8 S. W. 396; Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Marine Bank of Chicago v. Ogden, 29 Ill. 248; Williams v. Johnson, 208 Mass. 544, 95 N. E. 90. Cf. Catskill Bank v. Gray, 14 Barb. (N. Y.) 471; where a corporation was held liable to third persons as a partner, and BREINIG v. SPARROW, 39 Ind. App. 455, 80 N. E. 37, Wormser Cas. Corporations, 118. And see Allen v. Woonsocket Co., 11 R. I. 288. If a corporation does enter into and carry out a contract of partnership, and receives more than its share of the profits, it has been held that it cannot defeat an action by the other party to recover his share on the plea of ultra vires. Standard Oil Co. v. Scofield, 16 Abb. N. C. (N. Y.) 372; Boyd v. American Carbon-Black Co., 182 Pa. 206, 37 Atl. 937; Geurinck v. Alcott, 66 Ohio St. 94, 63 N. E. 714; Fechteler v. Palm Bros. & Co., 133 Fed. 462, 66 C. C. A. 336. A corporation cannot sue for breach of a contract of partnership between it and individuals to recover as damages the probable profits which would have accrued, had the partnership been continued until

ence to a manufacturing corporation which had undertaken to form a partnership: "There is one obvious and important distinction between such a society as this charter creates and that of a partnership. An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation, as such, can bind the society. In a partnership, each member binds the society as a principal. If, then, this corporation can enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property." [43] An agreement among a number of corporations, or between corporations and natural persons, engaged in manufacture, to select a committee composed of representatives from each, and to turn over to such committee the property and machinery of each, to be managed and operated by the committee for the common benefit, the profits and losses to be shared in equal proportions, and the arrangement to last for a specified time, is a contract of partnership, and therefore within this rule.[44] It might be said, however, that some cases might suggest themselves where, for one reason or another, the power to enter into a partnership might be implied as reasonably appropriate and necessary to the consummation of the corporate objects. Such instances would be rare and exceptional.

The rule that corporations cannot enter into a partnership agreement does not prevent a corporation and a natural person, or two corporations, from entering into a joint contract, or taking property as tenants in common. Thus, two corporations, or a corporation and a natural person, may be mortgagees in the same mortgage, or obligees in the same bond, or promisees in the same note, and, in like manner, they may execute a joint note, bond, or other contract. So, where money is deposited in bank in the joint names

the time fixed for its termination. Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 837. The fact that one railroad company owned a greater part of the stock of another railroad company, and that the same person was president of both corporations, does not of itself prove that the companies were partners. Southern Pac. R. Co. v. W. T. Meadors & Co., 104 Tex. 469, 140 S. W. 427.

[43] Whittenton Mills v. Upton, supra. But it has been held that it is not ultra vires for a corporation to enter into a contract with an individual to engage in a certain venture, and share profits and losses, where all the management of the enterprise is intrusted to the corporation. Bates v. Coronado Beach Co., 109 Cal. 160, 41 Pac. 855.

[44] Mallory v. Hanaur Oil Works, supra. And see Burke v. Concord R. R., 61 N. H. 160.

of two corporations, they are tenants in common or joint creditors, and may maintain a joint action to enforce their rights.[45] Nor does the rule that a corporation cannot enter into a partnership prevent a railroad company from entering into a traffic agreement with connecting carriers for the transportation of freight and passengers over the connecting lines and for a dividing of the receipts therefrom.[46]

Contracts to Prevent Competition—Trusts—Pools

For the same reason that a corporation is without power, unless it be specially conferred, to enter into a partnership,[47] it is without power to enter into a combination with other corporations through the medium of a trust for the purpose of bringing the business and property under one management. Such a trust agreement, whether effected by formal corporation or by the collective action and agency of the stockholders, is ultrá vires; and, when its effect is unreasonably to stifle competition and create a monopoly, the agreement is illegal and void on the ground of public policy.[48] Thus, in the case of the so-called "Sugar Trust," it was held that where a corporation by the collective action of its stockholders enters into a partnership of independent corporations through the medium of a trust, disregarding all statutory restraints as to the consolidation of corporations, it is guilty of a violation of its char-

[45] New York & S. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; Marine Bank of Chicago v. Ogden, 29 Ill. 248. Where a corporation and another have assumed to enter into a partnership, and jointly transacted business together, they may recover, by reason of their joint interest, upon obligations made to them in their partnership name, irrespective of their partnership rights and duties inter se, or the power of the corporation to enter into a partnership. French v. Donohue, 29 Minn. 111, 12 N. W. 354; Wilson v. Carter Oil Co., 46 W. Va. 469, 33 S. E. 249. Where several creditors of an insolvent, one a corporation, formed a partnership to take the insolvent's stock and dispose of it to the best advantage, the arrangement was not so illegal as to warrant dismissal of a bill for an accounting. Kelly v. Biddle, 180 Mass. 147, 61 N. E. 821.

[46] Sussex R. Co. v. Morris & E. R. Co., 19 N. J. Eq. 13; Morris & E. R. Co. v. Sussex R. Co., 20 N. J. Eq. 542; Elkins v. Camden & A. R. Co., 36 N. J. Eq. 241; Stewart v. Erie & Western Transportation Co., 17 Minn. 372 (Gil. 348); Chicago, P. & St. L. Ry. Co. v. Ayres, 140 Ill. 644, 30 N. E. 687; Chicago & A. R. Co. v. Mulford, 162 Ill. 522, 44 N. E. 861, 35 L. R. A. 599; Post v. Southern Ry. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

[47] Ante, p. 177.

[48] PEOPLE v. NORTH RIVER SUGAR REFINING CO., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843, Wormser Cas. Corporations, 20; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; Standard Oil Co. v. U. S. 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; American Tobacco Co. v. U. S., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663.

ter, and such failure to perform its corporate duties as renders it liable to dissolution.[49] "It is quite clear," said the court, "that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the state a gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control. * * * But graver still is the illegal action substituted for the conduct which the state has a right to expect and require. It has helped to create an anomalous trust, which is in substance and effect a partnership of twenty separate corporations. The state permits in many ways an aggregation of capital, but, mindful of the possible dangers to the people, overbalancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission, and grows out of its corporate grants." As we have seen, a corporation formed for the purpose of preventing competition and creating a monopoly is illegal, as contrary to public policy.[50] And, upon the same principle, any agreement between corporations which has for its object the creation of a monopoly by stifling competition or otherwise is illegal and void.[51] Such agreements, whether between corporations or individuals, are in many jurisdictions declared illegal by statute.[52]

[49] PEOPLE v. NORTH RIVER SUGAR REFINING CO., supra, Wormser Cas. Corporations, 20.

[50] Ante, p. 73.

[51] Chicago Gaslight Co. v. People's Gaslight & Coke Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; People ex rel. Peabody v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189; State ex rel. Snyder v. Portland Natural Gas Co., 153 Ind. 483, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. Rep. 314; State v. Nebraska Distilling Co., 29 Neb. 700, 46 N. W. 155; Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385; Trenton Potteries Co. v. Oliphant, 56 N. J. Eq. 680, 39 Atl. 923; Id., 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; Dunbar v. American Telephone & Telegraph Co., 224 Ill. 9, 79 N. E. 423, 115 Am. St. Rep. 132, 8 Ann. Cas. 57; People ex rel. v. Union Gas & Electric Co., 254 Ill. 395, 98 N. E. 768; post, p. 236.

[52] Act July 2, 1890, c. 647, 26 Stat. 209. Under the act a contract between manufacturers of iron pipe in different states, whereby free competition was restrained, and prices determined by a committee, was held unlawful. Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. Cf. U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. U. S., 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. A combination of

Although traffic agreements between connecting carriers which have not for their object the prevention of competition are legal,[53] pooling arrangements, or other contracts between railway companies owning competing lines, the object of which is to prevent competition, in the absence of express authority, are illegal and ultra vires.[54] It was held in New Hampshire, however, that a contract between competing railway companies made for the purpose of preventing competition, but not for the purpose of raising the prices of transportation above a reasonable standard, is not void as against public policy.[55] Under the act of Congress of July 2, 1890, declaring illegal "every contract, combination, in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations," [56] it was at first apparently held that the prohibited contracts include *all* contracts or combinations in restraint of trade or commerce, whether the restraint imposed is reasonable or unreasonable, and that the act applies to a contract between competing carriers by rail forming an association for maintaining and regulating rates of transportation.[57] A contract by a railway corporation to give exclusive or special privileges over its road to shippers is, of course, illegal and void.[58]

stockholders in two competing railway companies to form a holding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, violates the act. Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. Where such holding company was adjudged illegal, a stockholder could not enforce return of the specific stock transferred by him to the company, since he was himself a conspirator. Continental Securities Co. v. Northern Securities Co., 66 N. J. Eq. 274, 57 Atl. 876. See also, the so-called Clayton Act (Act Cong. Oct. 15, 1914, c. 321, 38 Stat. 730), amplifying the so-called Sherman Anti-Trust Act of July 2, 1890, supra.

[53] Ante, p. 159.

[54] Hartford & N. H. R. Co. v. New York & N. H. R. Co., 3 Rob. (N. Y.) 411; Stewart v. Erie & Western Transp. Co., 17 Minn. 372 (Gil. 348); Texas & P. Ry. Co. v. Southern Pac. Ry. Co., 41 La. Ann. 970, 6 South. 888, 17 Am. St. Rep. 445. A pooling arrangement between rival railroad companies, fixing freight rates, is prima facie illegal. Cleveland, C., C. & I. Ry. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593.

[55] Manchester & L. R. Co. v. Concord R. R., 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582. And see Post v. Southern Ry. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

[56] See note 52, p. 180, supra.

[57] U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; U. S. v. Joint-Traffic Ass'n, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259.

[58] Messenger v. Pennsylvania R. Co., 36 N. J. Law, 407, 13 Am. Rep. 457; Id., 37 N. J. Law, 531, 18 Am. Rep. 754; Scofield v. Lake Shore & M. S. Ry.

But the more recent cases seem to repudiate the view first adopted by the United States Supreme Court that the Sherman Act (Act Cong. July 2, 1890) forbids all restraints of trade, whether reasonable or unreasonable, and a decided intention to return to the common-law rule forbidding only unreasonable restraints on trade has been manifested. In Standard Oil Co. v. U. S.[59] the "rule of reason" was enunciated, and it was again repeated in the Tobacco Trust [60] decision. In the former case, the Standard Oil Corporation was held to be acting improperly in restraint of trade, and was ordered dissolved; but the court went on to say that only unreasonable and unfair restraints were illegal, and, although this may be said to be dictum, it was nevertheless emphatically repeated in the later case of the Tobacco Trust under much similar facts.

In the case of International Harvester Co. of America v. State of Missouri ex inf. Attorney General,[61] a state statute confining to manufacturers and vendors of articles, prohibitions against combinations to regulate prices and lessen competition, and excluding therefrom combinations of wage-earners, was held not repugnant to the Constitution of the United States as denying the equal protection of the laws.

In the last analysis, the issue is one of reconciling business interests and legitimate trade demands with the equally imperative necessity for proper regulation and supervision. The Supreme Court has acted wisely and properly in placing the ban only upon improper, unfair, and unreasonable interferences with freedom of trade and competition. Reasonable acts should not be hindered.

The recent decisions may be taken to have established that only such combinations are forbidden by the law as by reason of the intent or the inherent nature of the contemplated acts prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.

Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; Brundred v. Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589; Chicago & A. R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824; Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

[59] 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

[60] American Tobacco v. U. S., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. See also the decision of the United States District Court for New Jersey, United States v. United States Steel Corporation (D. C.) 223 Fed. 55, in the proceedings brought by the United States to dissolve the United States Steel Corporation, opinion per Buffington, J.

[61] 234 U. S. 199, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525.

Power to Acquire and Hold Stock in Another Corporation

Although it appears to be otherwise in England [62] and in some of our states,[63] it is generally held in this country that a corporation has no power to subscribe for or to purchase stock in another corporation, unless such power is expressly given in its charter or is reasonably implied in it.[64] "Were this not so," it has been said,

[62] In re Asiatic Banking Corp., L. R. 4 Ch. App. 252; In re Barned's Banking Co., L. R. 3 Ch. App. 105.

[63] Booth v. Robinson, 55 Md. 419; Davis v. United States Electric Power & Light Co., 77 Md. 35, 25 Atl. 982; Iowa Lumber Co. v. Foster, 49 Iowa, 25, 31 Am. Rep. 140; Calumet Paper Co. v. Stotts Inv. Co., 96 Iowa, 147, 64 N. W. 782, 59 Am. St. Rep. 362; White v. G. W. Marquardt & Sons, 105 Iowa, 145, 74 N. W. 930; Traer v. Lucas Prospecting Co., 124 Iowa, 107, 99 N. W. 290; Joseph Bancroft & Sons Co. v. Bloede, 106 Fed. 396, 45 C. C. A. 354, 52 L. R. A. 734; STATE ex inf. HADLEY v. MISSOURI PAC. R. CO., 237 Mo. 338, 141 S. W. 643, Wormser Cas. Corporations, 124; Robotham v. Prudential Ins. Co. of America, 64 N. J. Eq. 673, 53 Atl. 842 (statutory provision); Bigelow v. Calumet & Hecla Min. Co. (C. C.) 167 Fed. 704, affirmed 167 Fed. 721, 94 C. C. A. 13 (statutory provision).

[64] Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9; Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati, 36 Ohio St. 350, 38 Am. Rep. 594; Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; Pearson v. Concord R. Corp., 62 N. H. 537, 13 Am. St. Rep. 590; Mechanics' & Workingmen's Mut. Sav. Bank & Bldg. Ass'n of New Haven v. Meriden Agency Co., 24 Conn. 159; Milbank v. New York, L. E. & W. R. Co., 64 How. Prac. (N. Y.) 20; Byrne v. Schuyler Electric Mfg. Co., 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304; Denny Hotel Co. of Seattle v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130; Hazlehurst v. Savannah, G. & N. A. R. Co., 43 Ga. 13; Buckeye Marble & Freestone Co. v. Harvey, 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71; Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412; Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047; People ex rel. Peabody v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; People ex rel. Moloney v. Pullman Palace Car Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366; State ex rel. Jackson v. Newman, 51 La. Ann. 833, 25 South. 408, 72 Am. St. Rep. 476; McAlester Mfg. Co. v. Florence Cotton & Iron Co., 128 Ala. 240, 30 South. 632; Nebraska Shirt Co. v. Horton, 3 Neb. (Unof.) 888, 93 N. W. 225; Lester v. Bemis Lumber Co., 71 Ark. 379, 74 S. W. 518; California Nat. Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; (compare Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 26 Sup. Ct. 613, 50 L. Ed. 1036); First Nat. Bank v. Hawkins, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007; De La Vergne Refrigerating Mach. Co. v. German Savings Inst., 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 65; Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County, 99 Ala. 1, 14 South. 490, 42 Am. St. Rep. 17; Woodberry v. McClurg, 78 Miss. 831, 29 South. 514; Converse v. Emerson, Talcott & Co., 242 Ill. 619, 90 N. E. 269; Hermitage Hotel Co. v. Dyer, 125 Tenn. 302, 142 S. W. 1117; Irvine v. Chicago, Wilmington & Vermillion Coal Co., 200 Fed. 953, 119 C. C. A. 333; People ex rel. v. Union Gas & Electric Co., 254 Ill. 395, 98 N. E. 768. A corporation cannot organize a subordinate corporation. Lagrone v. Timmerman, 46 S. C. 372, 24 S. E. 290. A foreign corporation

"one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing such shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining the control of the bank's stock." [65] The power to purchase stock in other corporations may, of course, be expressly granted,[66] and it may be implied when it is a necessary or reasonable means of carrying out the powers conferred.[67]

cannot be allowed to purchase the stock of, and so control, a domestic corporation. Buckeye Marble & Freestone Co. v. Harvey, supra. The purchase by a national bank of the stock of another corporation is ultra vires, and the bank is not estopped to deny its liability for the debts of such corporation, though it has received dividends. California Nat. Bank v. Kennedy, supra. See, also, First Nat. Bank v. Hawkins, supra; Chemical Nat. Bank of New York v. Havermale, 120 Cal. 601, 52 Pac. 1071, 65 Am. St. Rep. 206; Vandagrift v. Rich Hill Bank, 163 Fed. 823, 90 C. C. A. 129 (semble). But see White v. G. W. Marquardt & Sons, 105 Iowa, 145, 74 N. W. 930; Tourtelot v. Whithed, 9 N. D. 407, 84 N. W. 8; Hunt v. Hauser Malting Co., 90 Minn. 282, 96 N. W. 85. A corporation may promote a new corporation to conduct a similar business, where it is authorized, in addition to manufacturing, to acquire stocks of corporations and vote thereon. Rubino v. Pressed Steel Car Co. (N. J. Ch.) 53 Atl. 1050. In such case it may organize and hold stocks of corporations in other states. Dittman v. Distilling Co., of America, 64 N. J. Eq. 537, 54 Atl. 570. Cf. Coler v. Tacoma Ry. & Power Co., 64 N. J. Eq. 117, 53 Atl. 680; Id., 65 N. J. Eq. 347, 54 Atl. 413, 103 Am. St. Rep. 786. Though the articles express a power to own stock in other corporations, in the absence of statute or authority to do so, such stock cannot be voted at stockholders' meetings. Parsons v. Tacoma Smelting & Refining Co., 25 Wash. 492, 65 Pac. 765; but see Bigelow v. Calumet & Heckla Min. Co. (C. C.) 167 Fed. 704, affirmed 167 Fed. 721, 94 C. C. A. 13.

[65] Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati, 36 Ohio St. 350, 38 Am. Rep. 594.

[66] See In re Buffalo, N. Y. & E. R. Co. (Sup.) 37 N. Y. Supp. 1048; Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; Trust Co. of Georgia v. State, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520; Joseph Bancroft & Sons Co. v. Bloede, 106 Fed. 396, 45 C. C. A. 354, 52 L. R. A. 734; Clark v. Memphis Street Ry. Co., 123 Tenn. 232, 130 S. W. 751. Cf. Anglo-American Land, Mortgage & Agency Co. v. Lombard, 132 Fed. 721, 68 C. C. A. 89. Although a New Jersey corporation may hold stock in other corporations, it being unlawful under the constitution and decisions in Washington for any corporation to hold stock and exercise the rights of stockholders in a corporation of that state, the New Jersey courts will restrain an arrangement, on bill filed by a stockholder in a New Jersey corporation, whereby it was to transfer its property and franchises to a Washington corporation and the latter was to issue its stock therefor. Coler v. Tacoma Ry. & Power Co., 65 N. J. Eq. 347, 54 Atl. 413, 103 Am. St. Rep. 786.

[67] Pearson v. Concord R. Corp., 62 N. H. 537, 13 Am. St. Rep. 590, holding

Thus a power to acquire stock in another company may be implied from the power to consolidate with it, as a proper step towards consolidation or as necessarily included in the grant of so large a power.[68] But power to invest in the shares of another corporation is not to be implied because both are engaged in a similar kind of business.[69]

The chief objection to the power of a corporation to acquire the stock of another corporation is the tendency to create a monopoly and prevent competition. In a Missouri case, a railroad company had acquired stock in an express company and a refrigerator company operating over its lines. Quo warranto proceedings were brought against the railroad, and it was held that an express and refrigerator business could be carried on by the railroad itself, and if it could do so directly, it might do so indirectly by owning the stock of the companies engaged directly in the business, and in that it did not appear that the ownership of the stock in these companies prevented competition in either the express or the refrigerator business, the action of quo warranto would not lie.[70]

In recent years there has come into existence a class of corporations known as holding companies. These corporations are organized exclusively for the purpose of acquiring and holding stock in other corporations. Their validity has been upheld in some states, including New York, but in others, notably Illinois, they have been condemned because of their tendency to create monopolies.[71]

Even the jurisdictions that hold that a corporation has not implied power to acquire stock in another corporation admit some qualifications to the rule. A corporation may in good faith take and hold stock in another corporation to secure a debt which is due.

that an insurance company, an educational corporation, a savings bank, or the like, could properly and legally invest its funds in shares of other corporations. "The power, if not expressly mentioned in their charters, is necessarily implied, for the preservation of the funds with which such institutions are endowed, and to render their funds productive."

[68] Todd v. Kentucky Union Land Co. (C. C.) 57 Fed. 47; Marbury v. Kentucky Union Land Co., 62 Fed. 335, 10 C. C. A. 393; Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 75 Fed. 433, 22 C. C. A. 378; MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co., 29 Mont. 428, 75 Pac. 89.

[69] See Pearson v. Concord R. Corp. 62 N. H. 537, 13 Am. St. Rep. 590; People ex rel. Peabody v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319.

[70] State ex inf. Hadley v. Missouri Pac. R. Co., 241 Mo. 1, 144 S. W. 863. And see STATE ex inf. HADLEY v. MISSOURI PAC. RY. CO., 237 Mo. 338, 141 S. W. 643, Wormser Cas. Corporations, 124.

[71] People ex rel. Peabody v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319. See page 179, supra, and note 51.

it, or in payment of a debt,[72] and it may acquire stock by levy and sale.[73] A corporation having power to lend money may accept stock in another corporation as security for a loan, and by enforcement of its rights as pledgee may become the owner of the stock.[74] Although dealing in stocks is not expressly prohibited by the national banking act, such prohibition is implied from a failure to grant the power;[75] but a national bank, in the honest exercise of the power to compromise a doubtful debt owing to it, may take stocks with a view to their subsequent sale or conversion into money, so as to make good or reduce an anticipated loss;[76] and a national bank may accept stock as security for a loan.[77]

It has been held that a private corporation, for the purpose of retiring from business and with the consent of its stockholders, may sell all its property to another corporation and take stock in the latter in payment, for distribution among the stockholders;[78] but an agreement by which a corporation is to sell its property and good will to another corporation and restrict itself to holding stock in the latter, through which its proper business is to be carried on, is ultra vires.[79]

Where a corporation subscribes and pays for stock in another corporation, but is without power to do so, it may collect the dividends thereon and sell and dispose of the stock, but may not vote thereon.[80]

[72] Talmage v. Pell, 7 N. Y. 328; First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 23 L. Ed. 679; Tourtelot v. Whithed, 9 N. D. 407, 84 N. W. 8; Fidelity Ins. Co. v. German Sav. Bank, 127 Iowa, 591, 103 N. W. 958.

[73] Germania Nat. Bank v. Case, 99 U. S. 628, 25 L. Ed. 448.

[74] Germania Nat. Bank v. Case, 99 U. S. 633, 25 L. Ed. 448; Kennedy v. California Sav. Bank, 101 Cal. 495, 35 Pac. 1039, 40 Am. St. Rep. 69. But see Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati, 36 Ohio St. 350, 38 Am. Rep. 594.

[75] First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 23 L. Ed. 679.

[76] Id.

[77] Germania Nat. Bank v. Case, supra.

[78] Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448. And see Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Pinkus v. Minneapolis Linen Mills, 65 Minn. 40, 67 N. W. 643; Metcalf v. American School Furniture Co. (C. C.) 122 Fed. 115. A corporation, though authorized to take stock in other corporations, may not, without the consent of all its stockholders, transfer all its property to another corporation and take in payment the stock of such corporation. Morris v. Elyton Land Co., 125 Ala. 263, 28 South. 513; Elyton Land Co. v. Dowdell, 113 Ala. 177, 20 South. 981, 59 Am. St. Rep. 105.

[79] McCutcheon v. Merz Capsule Co., 71 Fed. 789, 19 C. C. A. 108, 31 L. R. A. 415.

[80] State ex rel. Jackson v. Newman, 51 La. Ann. 833, 25 South. 408, 72 Am. St. Rep. 476; Bigbee & W. R. Packet Co. v. Moore, 121 Ala. 379, 25 South. 602.

Power of Corporation to Acquire and Hold its Own Stock

In England it is held that, unless expressly authorized, a corporation has no power to purchase its own stock, either for the purpose of selling or reissuing it, or for the purpose of holding or retiring it, as such a transaction is considered foreign to the purposes of a corporation, and an illegitimate employment of its capital.[81] The same rule prevails in some jurisdictions in this country.[82] In support of this doctrine it is urged that a purchase of shares, if made out of the capital, effects a reduction of the fund on which creditors have a right to rely, and that in any case, even if made from the net profits, it reduces the number of stockholders, to whom the creditors may have a right ultimately to look for payment, to the injury of the creditors, as well as of the other stockholders, who may be called upon to pay the demands of creditors.[83] On the other hand, if the shares acquired by the corporation are to be resold by it, that is said to be an improper and unauthorized speculation in the company's own shares. Moreover, it has been said, it "tends inevitably to breaches of their duty on the part of the directors, and to fraud and rigging the market on the part of the corporation itself." [84]

The doctrine, however, does not prevent a corporation from taking its own stock as security for, or in payment of, a debt due to it,[85] or from selling shares of its own stock which it acquired by

[81] Trevor v. Whitworth, L. R. 12 App. Cas. 409. See, also, Belerby v. Rovland & M. S. S. Co., [1902] 2 Ch. 14; Hope v. International Financial Society, 4 Ch. Div. 327.

[82] Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275, 43 Am. Rep. 425; State ex rel. Colburn v. Oberlin Building & Loan Ass'n, 35 Ohio St. 258. And see Hamor v. Taylor-Rice Engineering Co. (C. C.) 84 Fed. 392; Herring v. Ruskin Co-op. Ass'n (Tenn. Ch. App.) 52 S. W. 327; Adams & Westlake Co. v. Deyette, 8 S. D. 119, 65 N. W. 471, 31 L. R. A. 497, 59 Am. St. Rep. 751; German Sav. Bank v. Wulfekuhler, 19 Kan. 65; Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 Atl. 70; Osage City Cemetery Ass'n v. Hanslip, 82 Kan. 20, 107 Pac. 785; Bear Creek Lumber Co. v. Second Nat. Bank of Cumberland, 120 Md. 566, 87 Atl. 1084; St. Louis Carriage Mfg. Co. v. Hilbert, 24 Mo. App. 338; Currier v. Lebanon Slate Co., 56 N. H. 262; Latulippe v. New England Inv. Co., 77 N. H. 31, 86 Atl. 361; Cartwright v. Dickinson, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. Rep. 910.

[83] See Trevor v. Whitworth, supra; Coppin v. Greenlees & Ransom Co., supra; 18 Harv. L. R. 531.

[84] Green's Brice, Ultra Vires, 95.

[85] Taylor v. Miami Exporting Co., 6 Ohio, 177; Coppin v. Greenlees & Ransom Co., supra; First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 23 L. Ed. 679; Ex parte Holmes, 5 Cow. (N. Y.) 426; City Bank of Columbus v. Bruce, 17 N. Y. 507; State ex rel. Page v. Smith, 48 Vt. 266, 284; Williams v. Savage Mfg. Co., 3 Md. Ch. 418, 452; Morgan v. Lewis, 46 Ohio St. 1, 17 N. E. 558; Barto v. Nix, 15 Wash. 563, 46 Pac. 1033; Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 Atl. 70.

gift [86] or by bequest.[87] The national banking act expressly prohibits a national bank from making any loan or discount on the security of the shares of its own capital stock, or from becoming the purchaser or holder thereof, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and it is further provided that stock so purchased or acquired shall, within six months from the date of its purchase, be sold or disposed of at public or private sale, or, in default thereof, a receiver may be appointed to close up the business.[88]

In most jurisdictions, however, the doctrine that a corporation cannot purchase its own stock is not recognized; and in fact it is the prevailing doctrine, in the United States at least, that, in the absence of express restrictions, a corporation may purchase its own stock, provided the purchase be not to the prejudice of its stockholders or creditors.[89] In case of purchase by the corporation, the

[86] Lake Superior Iron Co. v. Drexel, 90 N. Y. 87.

[87] Rivanna Nav. Co. v. Dawson, 3 Grat. (Va.) 19, 46 Am. Dec. 183.

[88] First Nat. Bank v. Stewart, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592. See Rev. St. U. S. § 5201 (U. S. Comp. St. 1913, § 9762). If the fact that a national bank has made such prohibited loan can be urged against the validity of the transaction by any one except the government, it can be done only before the contract is executed and while the security is still subsisting in the hands of the bank. First Nat. Bank v. Stewart, supra.

[89] Chicago, P. & S. W. R. Co. v. President, etc., of Town of Marseilles, 84 Ill. 145, 643; Clapp v. Peterson, 104 Ill. 26; Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328; City Bank of Columbus v. Bruce, 17 N. Y. 507; Dupee v. Boston Water Power Co., 114 Mass. 37; New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Dock v. Schlichter-Jute Cordage Co., 167 Pa. 370, 31 Atl. 656; Chapman v. Iron Clad Rheostat Co., 62 N. J. Law, 497, 41 Atl. 690; Iowa Lumber Co. v. Foster, 49 Iowa, 25, 31 Am. Rep. 140; Wisconsin Lumber Co. v. Greene & W. Tel. Co., 127 Iowa, 350, 101 N. W. 742, 69 L. R. A. 968, 109 Am. St. Rep. 387; Shoemaker v. Washburn Lumber Co., 97 Wis. 585, 73 N. W. 333; Marvin v. Anderson, 111 Wis. 387, 87 N. W. 226; Porter v. Plymouth Gold Min. Co., 29 Mont. 347, 74 Pac. 938, 101 Am. St. Rep. 569; Joseph v. Raff, 82 App. Div. 47, 81 N. Y. Supp. 546, affirmed 176 N. Y. 611, 68 N. E. 1118; First Nat. Bank v. Salem Capital Flour Mills Co. (C. C.) 39 Fed. 89; Burnes v. Burnes (C. C.) 132 Fed. 485; Dalton Grocery Co. v. Blanton, 8 Ga. App. 809, 70 S. E. 183; Vail v. Hamilton, 85 N. Y. 453, 457, 458; Moses v. Soule, 63 Misc. Rep. 203, 118 N. Y. Supp. 410, affirmed 136 App. Div. 904, 120 N. Y. Supp. 1136; Adam v. New England Inv. Co., 33 R. I. 193, 80 Atl. 426; San Antonio Hardware Co. v. Sanger (Tex. Civ. App.) 151 S. W. 1104; State ex rel. Page v. Smith, 48 Vt. 266; United States Min. Co. v. Camden & Driscoll, 106 Va. 663, 56 S. E. 561, 117 Am. St. Rep. 1028; Gilchrist v. Highfield, 140 Wis. 476, 123 N. W. 102, 17 Ann. Cas. 1257; In re Castle Braid Co. (D. C.) 145 Fed. 224; Cole v. Cole Realty Co., 169 Mich. 347, 135 N. W. 329; Cullen v. Friedland, 152 App. Div. 124, 136 N. Y. Supp. 659; Richards v. Ernst Wiener Co., 145 App. Div. 353, 129 N. Y. Supp. 951; Id., 207 N. Y. 59, 100 N. E. 592. A sale of its stock by a corporation, with an

stock does not merge, but may be reissued.[90] The power may not be exercised to the injury of the stockholders [91] or of creditors of the corporation, and, if so exercised, a court of equity will grant relief.[92] If the contract of purchase is made and payment completed while the corporation is solvent, it should be held, even in jurisdictions that follow the English doctrine, that, though insolvency thereafter ensues, the trustee in bankruptcy should not be permitted to recover the corporate payments;[93] but if the contract is made when the corporation is insolvent,[94] or if the purchase would render the corporation insolvent,[95] it is clearly invalid and will not be permitted under either the English or American doctrine, as creditors are thereby injured. Even if the corporation be solvent and act in good faith, the purchase may be impeached by creditors who can prove that they are injured thereby.[96]

A New York corporation, recently, while solvent, made a contract to purchase certain shares of its own stock, giving a note for the purchase price. When the note given in payment matured, the

option to the purchaser to return it and receive back his money, is valid. Vent v. Duluth Coffee & Spice Co., 64 Minn. 307, 67 N. W. 70. And see Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Fremont Carriage Mfg. Co. v. Thomsen, 65 Neb. 370, 91 N. W. 376. See article by I Maurice Wormser, 24 Yale Law Journal, 177.

[90] State ex rel. Page v. Smith, 48 Vt. 266; Commonwealth v. Boston & A. R. R., 142 Mass. 146, 7 N. E. 716; Moses v. Soule, 63 Misc. Rep. 203, 118 N. Y. Supp. 410, affirmed 136 App. Div. 904, 120 N. Y. Supp. 1136.

[91] Lowe v. Pioneer Threshing Co. (C. C.) 70 Fed. 646; Price v. Pine Mountain Iron & Coal Co. (Ky.) 32 S. W. 267; Augsburg Land & Improvement Co. v. Pepper, 95 Va. 92, 27 S. E. 807. Cf. Berger v. United States Steel Corp., 63 N. J. Eq. 809, 53 Atl. 68; Oliver v. Rahway Ice Co., 64 N. J. Eq. 596, 54 Atl. 460; Wisconsin Lumber Co. v. Greene & W. Tel. Co., 127 Iowa, 350, 101 N. W. 742, 69 L. R. A. 968, 109 Am. St. Rep. 387; Adam v. New England Inv. Co., 33 R. I. 193, 80 Atl. 426.

[92] Clapp v. Peterson, 104 Ill. 26; Commercial Nat. Bank v. Burch, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331; Adams & Westlake Co. v. Deyette, 5 S. D. 418, 59 N. W. 214, 49 Am. St. Rep. 887; Id., 8 S. D. 119, 65 N. W. 471, 31 L. R. A. 497, 59 Am. St. Rep. 751; Hall v. Henderson, 126 Ala. 449, 28 South. 531, 61 L. R. A. 621, 85 Am. St. Rep. 53. And see cases supra, note 89.

[93] Joseph v. Raff, 82 App. Div. 47, 81 N. Y. Supp. 546, affirmed short 176 N. Y. 611, 68 N. E. 1118. See, also, Tierney v. Butler, 144 Iowa, 553, 123 N. W. 213.

[94] Hall & Farley v. Alabama Terminal & Improvement Co., 173 Ala. 398, 56 South. 235; Tiger v. Rogers Cotton Cleaner & Gin Co., 96 Ark. 1, 130 S. W. 585, 30 L. R. A. (N. S.) 694, Ann. Cas. 1912B, 488; Alexander v. Relfe, 74 Mo. 495; Currier v. Lebanon Slate Co., 56 N. H. 262.

[95] Burnes v. Burnes (C. C.) 132 Fed. 485; Atlanta & Walworth Butter & Cheese Ass'n v. Smith, 141 Wis. 377, 123 N. W. 106, 32 L. R. A. (N. S.) 137, 135 Am. St. Rep. 42.

[96] Copper Belle Min. Co. v. Costello, 12 Ariz. 318, 100 Pac. 807.

corporation was insolvent. It was held that payment of the note should be postponed until after the claims of the general creditors had been satisfied.[97] In other words, if at the time the stockholder is to receive payment for the shares of stock which he has sold, the payment by the corporation would prejudice its creditors, payment cannot be enforced. This holding is sound on principle, for, even though the corporation is solvent when the agreement is made, the law should attach the condition that payment cannot be enforced if to enforce payment would deprive the creditors of assets. The decision, however, was rested on a penal statute of New York, which made it a misdemeanor for a director to vote to apply "funds of a corporation, except the surplus profits, directly or indirectly to the purchase of shares of its own stock." [98] The court declared that, "as the illegality of a purchase by a corporation of its stock rests upon the fact that it withdraws assets upon which the creditors have a superior right or lien, it seems to us that, even though the company may have been solvent when the contract to purchase was made, if it becomes insolvent later or is made insolvent by the transaction and is in that condition at the time when payment is to be made, the vendor cannot as against creditors be permitted to take the assets for that purpose in a state in which the statutes make it a criminal offense to apply directly or indirectly anything but surplus profits to the purchase by a corporation of its own stock." [99]

Where the purchase of its own shares of stock by a corporation is made from surplus as distinguished from capital, it is difficult to see how creditors can be injured, and if the corporation as a whole is benefited by the purchase, and there is no injury to minority stockholders, there seems no valid reason for forbidding the directors to employ the corporate surplus in this manner.[1] The weight of modern American authority is all in this direction and contrary to the English view.

[97] IN RE FECHHEIMER FISHEL CO., 212 Fed. 357, 129 C. C. A. 33, Wormser Cas. Corporations, 129.

[98] Penal Law N. Y. (Consol. Laws, c. 40) § 664, subd. 5.

[99] See "The Power of a Corporation to Acquire Its Own Stock," by I. Maurice Wormser, 24 Yale Law Journal, 177, 188.

[1] See Lowe v. Pioneer Threshing Co. (C. C.) 70 Fed. 646 (semble); Clark v. E. C. Clark Mach. Co., 151 Mich. 416, 115 N. W. 416. In Richards v. Ernst Wiener Co., 207 N. Y. 59, 100 N. E. 592, the New York court held the burden to be upon the corporation, the vendee, to prove that there was no surplus out of which the purchase of its shares could be lawfully made; but in the federal courts under similar facts the burden has been placed upon the vendor to the corporation to show that there was a surplus. Hamor v. Taylor-Rice Engineering Co. (C. C.) 84 Fed. 392. See, also, article by I. Maurice Wormser, 24 Yale Law Journal, 177, 188.

Power to Consolidate

A corporation has no power to consolidate with another corporation, unless the power is expressly conferred upon it.[2] This is because the effect of the consolidation is ordinarily to create a new and distinct corporation, to which the consent of the state is necessary.[3] The consent of the state may be expressed in the charter,[4] or in a general enabling act,[5] or by legislative ratification.[6] The power must be conferred upon each of the consolidating corporations;[7] but it has been held that power given to one railroad company to consolidate with any other company authorized any other company to consolidate with it.[8]

Unless the power to consolidate is contained in the charter,[9] a

[2] Pearce v. Madison & I. R. Co., 21 How. (U. S.) 441, 16 L. Ed. 184; Ferguson v. Meredith, 1 Wall. (U. S.) 25, 17 L. Ed. 604; Kavanagh v. Omaha Life Ass'n (C. C.) 84 Fed. 295; COLE v. MILLERTON IRON CO., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615, Wormser Cas. Corporations, 379; East Line & R. R. Ry. Co. v. State, 75 Tex. 434, 12 S. W. 690; Topeka Paper Co. v. Oklahoma Pub. Co., 7 Okl. 220, 54 Pac. 455; Overstreet v. Citizens' Bank, 12 Okl. 383, 72 Pac. 379; Knapp v. Supreme Commandery, United Order of the Golden Cross of the World, 121 Tenn. 212, 118 S. W. 390; William B. Riker & Son Co. v. United Drug Co., 79 N. J. Eq. 580, 82 Atl. 930, Ann. Cas. 1913A, 1190. An attempted consolidation of a domestic and a foreign railroad company, in the absence of statutory authorization, does not create a corporation de facto. American Loan & Trust Co. v. Minnesota & N. W. R. Co., 157 Ill. 641, 42 N. E. 153. Cf. Shadford v. Detroit, Y. & A. A. R., 130 Mich. 300, 89 N. W. 960. Power to a railroad company to "unite" its road with another does not authorize consolidation. Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849. Consolidation of corporations in any other manner than that provided for by statute is unlawful. People v. North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; Unckles v. Colgate, 148 N. Y. 529, 43 N. E. 59. See Business Corporations Law N. Y. (Consol. Laws, c. 4) §§ 7–11.

[3] Ante, p. 34.

[4] Nugent v. Putnam County, 19 Wall. (U. S.) 241, 22 L. Ed. 83. The grant of power to consolidate may be withdrawn before a consolidation has taken place. Pearsall v. Great Northern R. Co., 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838; Louisville & N. R. Co. v. Kentucky, supra.

[5] Black v. Delaware & R. Canal Co., 24 N. J. Eq. 455. A consolidation under a statute which authorizes the consolidation of "any two corporations * * * whose objects and business are, in general, of the same nature," is not invalidated by the fact that one of the constituent corporations was itself created by a prior consolidation. Jones v. Missouri-Edison Electric Co. (C. C.) 135 Fed. 153. See, also, Birmingham Ry., Light & Power Co. v. Enslen, 144 Ala. 343, 39 South. 74; Mayfield v. Alton Ry., Gas & Electric Co., 198 Ill. 528, 65 N. E. 100.

[6] Mead v. New York, H. & N. R. Co., 45 Conn. 199.

[7] Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849.

[8] In re Prospect Park & C. I. R. Co., 67 N. Y. 371. But see Morrill v. Smith County, 89 Tex. 529, 36 S. W. 56.

[9] Mansfield, C. & L. M. R. Co. v. Brown, 26 Ohio St. 223; Nugent v. Put-

consolidation can be effected, notwithstanding subsequent legislative authority, only by unanimous consent of the stockholders.[10] But, under a reserved power on the part of the Legislature to alter or amend the charter, the Legislature may authorize a consolidation without such consent.[11]

The effect of the consolidation is ordinarily to create a new corporation and to work a dissolution of the consolidating corporations.[12] One corporation may, however, absorb another by purchasing the other's assets, stock and franchises, and issuing its own shares to the shareholders of the other, continuing its own existence with enlarged powers.[13] Whether the consolidation works a dissolution of the constituent corporations depends upon the statute authorizing it.[14] So, too, the powers of the consolidated corporation depend upon the statute authorizing the consolidation.[15] The legislative intention is, of course, the controlling test. As a

nam County, 19 Wall. (U. S.) 241, 22 L. Ed. 83; Mayfield v. Alton Ry., Gas & Electric Co., 198 Ill. 528, 65 N. E. 100.

[10] Clearwater v. Meredith, 1 Wall. (U. S.) 25, 17 L. Ed. 604; Black v. Delaware & R. Canal Co., 24 N. J. Eq. 455; Mills v. Central R. Co., 41 N. J. Eq. 1, 2 Atl. 453; Botts v. Simpsonville & B. C. Turnpike Road Co., 88 Ky. 54, 10 S. W. 134, 2 L. R. A. 594; Deposit Bank of Owensborough v. Barrett (Ky.) 13 S. W. 337. As to the remedies of dissenting stockholders, see Tanner v. Lindell R. Co., 180 Mo. 1, 79 S. W. 155, 103 Am. St. Rep. 534.

[11] Nugent v. Putnam County, 19 Wall. (U. S.) 241, 22 L. Ed. 83; Hale v. Cheshire R. Co., 161 Mass. 443, 37 N. E. 307; Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225; McKee v. Chautauqua Assembly, 130 Fed. 537, 65 C. C. A. 8; post, p. 269.

[12] Clearwater v. Meredith, 1 Wall. (U. S.) 25, 17 L. Ed. 604; Atlantic & G. R. Co. v. Georgia, 98 U. S. 361, 25 L. Ed. 185; Yazoo & M. V. R. Co. v. Adams, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. Ed. 395; State ex rel. Brown v. Bailey, 16 Ind. 46, 79 Am. Dec. 405; Fee v. New Orleans Gas Light Co., 35 La. Ann. 413; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 200, 317, 28 South. 956, 60 L. R. A. 33; Kansas, O. & T. Ry. Co. v. Smith, 40 Kan. 192, 19 Pac. 636; Wagner v. Atchison, T. & S. F. R. Co., 9 Kan. App. 661, 58 Pac. 1018; Rio Grande W. Ry. Co. v. Telluride Power & Transmission Co., 16 Utah, 125, 51 Pac. 147; Jones v. Missouri-Edison Electric Co. (C. C.) 135 Fed. 153; W. Scheidel Coil Co. v. Rose, 242 Ill. 484, 90 N. E. 221; Diggs v. Fidelity & Deposit Co., 112 Md. 50, 75 Atl. 517, 20 Ann. Cas. 1274; Chicago Title & Trust Co. v. Doyle, 259 Ill. 489, 102 N. E. 790, 47 L. R. A. (N. S.) 1066.

[13] Central R. & Banking Co. v. Georgia, 92 U. S. 665, 23 L. Ed. 757; Chicago, S. F. & C. Ry. Co. v. Ashling, 160 Ill. 373, 43 N. E. 373; Pingree v. Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274.

[14] Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; State ex rel. Houck v. Lesueur, 145 Mo. 322, 46 S. W. 1075; Chicago Title & Trust Co. v. Doyle, 259 Ill. 489, 102 N. E. 790, 47 L. R. A. (N. S.) 1066. And see cases cited in two preceding notes.

[15] Shields v. Ohio, 95 U. S. 319, 24 L. Ed. 357; Shaw v. Covington, 194 U. S. 593, 24 Sup. Ct. 754, 48 L. Ed. 1131.

rule, the consolidated corporation succeeds to the rights and franchises of the constituent corporations,[16] as, for example, the right to acquire property under the power of eminent domain,[17] a right to occupy the streets,[18] or an exclusive right to supply gas.[19] By virtue of the consolidation the title of the constituent corporations to real property vests in the new corporation,[20] and choses in action of the constituent companies are assigned to it.[21] As a rule the new corporation becomes liable for the debts and liabilities of the constituent companies.[22] Ordinarily, but not necessarily, the new corporation does not secure immunities, e. g., exemption from taxation, which the old corporation possessed.

Presumption

The presumption being in favor of right doing, the contracts of a corporation will be presumed to be within the legitimate scope

[16] Zimmer v. State, 30 Ark. 677; Miller v. Lancaster, 5 Cold. (Tenn.) 514; Mead v. New York, H. & N. R. Co., 45 Conn. 199; Fisher v. New York Cent. & H. R. R. Co., 46 N. Y. 644; Covington Gaslight Co. v. City of Covington (Ky.) 58 S. W. 805; Consolidated Gas Co. v. Commissioners of Baltimore County, 98 Md. 689, 57 Atl. 29. That the consolidated company succeeds to the right of one of the constituent companies to receive bonds which a municipal corporation is authorized to issue to it, see Livingston County v. First Nat. Bank, 128 U. S. 102, 9 Sup. Ct. 18, 32 L. Ed. 359. Cf. Harshman v. Bates County, 92 U. S. 569, 23 L. Ed. 747. See 10 Cyc. 305. That the consolidated company succeeds to the right of one of the constituent companies to receive bonds voted by a municipal corporation to aid in building its road, see Bates County v. Winters, 112 U. S. 325, 5 Sup. Ct. 151, 28 L. Ed. 744. As to exemption from taxation, post, p. 694.

[17] Toledo, A. A. & G. T. Ry. v. Dunlap, 47 Mich. 456, 11 N. W. 271; Trester v. Missouri Pac. R. Co., 33 Neb. 171, 49 N. W. 1110. And see Abbott v. New York & N. E. R. Co., 145 Mass. 459, 15 N. E. 91.

[18] Africa v. City of Knoxville (C. C.) 70 Fed. 729.

[19] New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516. Compare Shaw v. Covington, 194 U. S. 593, 24 Sup. Ct. 754, 48 L. Ed. 1131, where, in view of the provisions of the consolidation statute, it was held that an exclusive privilege to conduct an electric light, heat, or power business, which had been conferred upon one of the constituent corporations, was not continued in the consolidated corporation.

[20] Cashman v. Brownlee, 128 Ind. 266, 27 N. E. 560; Day v. New York S. & W. R. Co., 58 N. J. Law, 677, 34 Atl. 1081; Greene v. Woodland Ave. & W. S. St. R. Co., 62 Ohio St. 67, 56 N. E. 642.

[21] University of Vermont v. Baxter's Estate, 42 Vt. 99; Bank of Long Island v. Young, 101 App. Div. 88, 91 N. Y. Supp. 849. A consolidated corporation under sections 7 to 10 of the New York Business Corporation Law (Consol. Laws, c. 4) succeeds to the rights of the constituent corporations and may claim a mechanic's lien for materials furnished prior to the consolidation. Chambers v. George Vassar's Sons & Co., 81 Misc. Rep. 562, 143 N. Y. Supp. 615.

[22] Post, p. 694.

and purpose of the corporation until the contrary appears, and the burden of showing the contrary rests upon the party who objects.[23] The presumption is that a conveyance to a corporation authorized to acquire land for some purposes only was taken by it for a lawful purpose. If the purpose was in fact illegal, the fact must be affirmatively shown.[24]

SAME—FORM AND MODE OF CORPORATE CONTRACTS

58. It was at one time held that, save in a few cases, a corporation could not contract except under its corporate seal. It is now settled, however, that, except in so far as there may be express restrictions in its charter or in some statute, a corporation can contract by resolutions or by agents, and without a seal, in any case where a natural person could contract without a seal. And, like a natural person, it may be liable quasi ex contractu.

59. If the charter of a corporation, or some statute, prescribes a particular mode or form for entering into contracts, that mode and form must be followed. But—

(a) The statute must be mandatory, and not merely directory.

(b) The statute will not be so construed as to prevent recovery, where the contract has been executed and consideration furnished by one of the parties, unless such a legislative intent is clear.

60. A seal need not be affixed by the officers of a corporation. It is sufficient if they direct it to be done by another, or adopt a seal affixed by another.

61. A seal does not prevent inquiry into the consideration for a corporate contract for the purpose of determining whether it is ultra vires.

Under the old common law, the general rule was that a corporation could only manifest its intention, and so enter into contracts,

[23] DOWNING v. MT. WASHINGTON ROAD CO., 40 N. H. 230, Wormser Cas. Corporations, 96; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950; Barker v. Mechanic Fire Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; Nelson v. Eaton, 26 N. Y. 410; Patterson v. Robinson, 116 N. Y. 193, 22 N. E. 372; Ellerman v. Chicago Junction Railways & Union Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287.

[24] Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138.

by the use of its corporate seal.[25] To this rule there were some exceptions, based upon necessity or convenience. Whenever to hold the general rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, it was allowed to contract without seal. The retainer of an inferior servant,[26] and the doing of acts frequently recurring or too insignificant to be worth the trouble of affixing the common seal, were established exceptions. In England a distinction between trading and nontrading corporations has become established,[27] and to-day a trading corporation may accept bills of exchange or execute promissory notes,[28] and make other contracts in the direct course of their business,[29] and may appoint agents by parol.[30] In the United States the old rule requiring the use of the seal is no longer recognized to any extent, if at all.[31] On the contrary, "unless its charter or governing statute requires it, a corporation may contract without the use of its corporate seal in all cases in which individuals can bind themselves without the use of a seal.[32] In all cases where it is not so restricted, it may appoint or employ an attorney, agent, or servant by parol or by writing not under seal;[33] and any contract made by him in writing not under

[25] "A corporation," said Blackstone, "being an invisible body, cannot manifest its intention by any personal act or oral discourse. It therefore speaks and acts only by its common seal. For, though the particular members may express their private consents to any act by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole." 1 Bl. Comm. 475. See Horn v. Ivy, 1 Vent. 47; East London Waterworks Co. v. Bailey, 12 Moore, 532, 4 Bing. 283; Dunston v. Coke Co., 3 Barn. & Adol. 125.

[26] See Horn v. Ivy, 1 Vent. 47.

[27] See Church v. Imperial Gaslight & C. Co., 6 Ad. & E. 846; Mayor of Ludlow v. Charlton, 6 M. & W. 815.

[28] Church v. Imperial Gaslight & C. Co., supra; ante, p. 172.

[29] Morawetz, Corp. § 338.

[30] South of Ireland Colliery Co. v. Waddle, L. R. 4 C. P. 617, affirming L. R. 3 C. P. 463; Henderson v. Australia Steam Navigation Co., 5 El. & Bl. 409.

[31] Bank of Columbia v. Patterson, 7 Cranch (U. S.) 299, 3 L. Ed. 351, per Mr. Justice Story; Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. Ed. 552; Gottfried v. Miller, 104 U. S. 521, 26 L. Ed. 851; Leinkauf v. Calman, 110 N. Y. 50, 17 N. E. 389.

[32] Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 South. 687. A bill in equity may be answered by a corporation only under seal. R. Frank Williams Co. v. United States Baking Co., 86 Md. 475, 38 Atl. 990. See Littells v. Creek Lumber Co., 99 Miss. 241, 54 South. 841.

[33] See Topping v. Bickford, 4 Allen (Mass.) 120; Bank of Columbia v. Patterson, supra; Goodwin v. Union Screw Co., 34 N. H. 378; Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Hand v. Clearfield Coal Co., 143 Pa. 408, 22 Atl. 709; Lathrop v. Commercial Bank of Scioto, 8 Dana (Ky.)

seal, or orally, within the scope of his authority and of the legitimate purposes of the corporation, will be binding as the contract of the corporation.[84] And a corporation may, like a natural person, ratify any contract made by a person on its behalf, which it could have authorized him to make.[85] So, also, a corporation may be liable, like a natural person, on contracts implied, as a matter of fact, from corporate acts,[86] and on quasi contractual obligations, or con-

114, 33 Am. Dec. 481. "Authority in the agent may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals." Sherman v. Fitch, 98 Mass. 59. See, also, G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 23, 36 C. C. A. 633. Flaherty v. Atlantic Lumber Co., 58 N. J. Eq. 467, 44 Atl. 186; Brown v. British & American Mortg. Co., 86 Miss. 388, 38 South. 312. The seal of a corporation is not necessary to the validity of a power of attorney to confess judgment. Ford v. Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902.

[84] Bank of Columbia v. Patterson, supra. And see Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; Fleckner v. Bank of United States, 8 Wheat. (U. S.) 338, 357, 5 L. Ed. 631. Australian Royal Mail Steam Nav. Co. v. Marzetti, 32 Eng. Law & Eq. 572; Muscatine Water Co. v. Muscatine Lumber Co., 85 Iowa, 112, 52 N. W. 108, 39 Am. St. Rep. 284; Regents of the University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138; City of Selma v. Mullen, 46 Ala. 411; Board of Education of State of Illinois v. Greenebaum, 39 Ill. 609; Town of New Athens v. Thomas, 82 Ill. 259; B. S. Green Co. v. Blodgett, 159 Ill. 169, 42 N. E. 176, 50 Am. St. Rep. 146; Trustees of Christian Church of Wolcott v. Johnson, 53 Ind. 273; Fowler v. Bell (Tex. Civ. App.) 35 S. W. 822; Allen v. City of Portland, 35 Or. 420, 58 Pac. 509; Speirs v. Union Drop-Forge Co., 174 Mass. 175, 54 N. E. 497. If the seal be not affixed to a contract, the authority of the officer executing it must be shown. Fontana v. Pacific Can. Co., 129 Cal. 51, 61 Pac. 580.

[85] Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Peterson v. Mayor, etc., of City of New York, 17 N. Y. 450; Fister v. La Rue, 15 Barb. (N. Y.) 323. In this case it was said: "It is well settled, at least in this country, that where a person is employed for a corporation by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services according to the agreement. Having availed itself of the services, and received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract."

[86] Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Goodwin v. Union Screw Co., 34 N. H. 378; Cicotte v. Corporation of Catholic, etc., Church, 60 Mich. 552, 27 N. W. 682; Proprietors of Canal Bridge v. Gordon, 1 Pick. (Mass.) 297, 11 Am. Dec. 170; City of Selma v. Mullen, 46 Ala. 411; Town of New Athens v. Thomas, 82 Ill. 259; Lowe v. Ring, 115 Wis. 575, 92 N. W. 238; Lawford v. Billericay, etc., Council, L. R. 1 K. B. [1903] 772; Greenburg v. S. D. Childs & Co., 242 Ill. 110, 89 N. E. 679; Endakaitis v. St. George's Lithuanian Soc., 87 Conn. 1, 86 Atl. 562; Apsey v. Chattel Loan Co., 216 Mass. 364, 103 N. E. 899.

tracts implied, as a matter of law, because of benefits conferred, or because of duties imposed by law.[37]

If the charter of a corporation, or some statute applicable to it, expressly prescribes a certain mode or form for entering into contracts, that mode and form must be followed,[38] provided the requirement is mandatory, and not merely directory.[39] Even where there is such a provision, and it is not complied with, the corporation may be liable. Thus, if it enters into a contract, but not in the form prescribed by its charter or a statute, and receives the consideration, it cannot always escape liability to pay therefor on the ground that the contract was not in the prescribed form, though it might have defeated a recovery so long as the contract remained wholly executory. In Pixley v. Western Pac. R. Co.,[40] the charter of a railroad company declared that no contract should be binding on the company unless in writing. The directors orally employed the plaintiffs to render services for the company, and, after the services were rendered, it was sought to defeat a recovery therefor because the contract was not in writing. The court held, however, that the charter, properly interpreted, only related to executory contracts, and did not exempt the company from liability to pay for the services after having had the benefit of them. "It may be," it was said, "that, while such contract remains executory on both sides, an action could not be maintained by either party to enforce it; but where one of the contracting parties has completely performed it on his part, and thereby rendered to the other the consideration stipulated, the party, having received the consideration promised, cannot be permitted to escape liability on the naked letter of the statute, because the meaning of the law is not such as to afford immunity from liability in such a case." [41] So, in North Carolina, where the Code provides that contracts by corporations for over $100 must be in writing, it is held that the provision does

[37] Bank of Columbia v. Patterson, 7 Cranch (U. S.) 299, 3 L. Ed. 351; Danforth v. President, etc., of Schoharie & D. Turnpike Road, 12 Johns. (N. Y.) 227; Seagraves v. City of Alton, 13 Ill. 366; Trustees of Cincinnati Tp. v. Ogden, 5 Ohio, 23; Jefferys v. Gurr, 2 Barn. & Adol. 833.

[38] Head v. Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. Ed. 229; Bissell v. Spring Valley Tp., 110 U. S. 162, 3 Sup. Ct. 555, 28 L. Ed. 105. As that all contracts shall be in writing, and signed by a particular officer or officers. Topping v. Bickford, 4 Allen (Mass.) 120; Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623.

[39] Southern Life Ins. & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448; Witte v. Fishing Co., 2 Conn. 260; Bulkley v. Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271; Bliss v. Harris, 38 Colo. 72, 87 Pac. 1076.

[40] Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623.

[41] And see Fister v. La Rue, 15 Barb. (N. Y.) 323.

not apply to executed contracts.[42] If, under such a statute, the verbal contract is executed in part only, the corporation cannot be compelled to continue the contract, but is liable for what it has received by the part performance.[43]

In general, where an officer is the proper officer to execute a contract on behalf of the corporation, a person dealing with him is entitled to assume that he is acting regularly, and that all formalities or acts of the corporation or its officers relating to the internal management of its affairs on which the right to execute the contract is conditioned have been performed, and the rights of such person will not be affected because they have not been performed.[44]

Contracts under Seal

A seal is said by Lord Coke to be wax, with an impression; and no doubt anciently wax was the only substance used, but it is no longer essential. The impression may be made on a wafer attached to the instrument, or any other substance sufficiently tenacious to adhere, and capable of receiving an impression. It is therefore held sufficient if the impression is made on the paper itself on which the instrument is written. It need not be on a separate substance attached to the paper.[45] In some states, statutes have been passed making a scrawl or scroll sufficient, and in some this has been held sufficient independently of any statute;[46] but by the

[42] Curtis v. Piedmont Lumber & Mining Co., 109 N. C. 401, 13 S. E. 944; Clowe v. Imperial Pine Product Co., 114 N. C. 304, 19 S. E. 153.

[43] Roberts v. P. A. Deming Woodworking Co., 111 N. C. 432, 16 S. E. 415.

[44] Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548; Kuser v. Wright, 52 N. J. Eq. 825, 31 Atl. 397; Schultze v. Van Doren, 64 N. J. Eq. 465, 53 Atl. 815; Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co., 41 Barb. (N. Y.) 9; Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187; Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081. "The doctrine which validates securities within the apparent powers of the corporation, but improperly, and therefore illegally, issued, applies only in favor of bona fide holders for value. A person who takes such a security with knowledge that the conditions on which alone the security was authorized were not fulfilled is not protected, and in his hands the security is invalid, though the imperfection is in some matter relating to the internal affairs of the corporation, which would be unavailable against a bona fide holder of the same security." Hackensack Water Co. v. DeKay, supra. See, also, Head v. Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. Ed. 229; Beatty v. Marine Ins. Co., 2 Johns. (N. Y.) 109, 3 Am. Dec. 401; Badger v. American Popular Life Ins. Co., 103 Mass. 244, 4 Am. Rep. 547; Dana v. Bank of St. Paul, 4 Minn. 385 (Gil. 291); Leonard v. American Ins. Co., 97 Ind. 299; Greensboro Gas Co. v. Home Oil & Gas. Co., 222 Pa. 4, 70 Atl. 940, 128 Am. St. Rep. 790.

[45] Clark, Cont. (3d Ed.) 63–65.

[46] Phillips v. Insley, 113 Md. 341, 77 Atl. 850, 140 Am. St. Rep. 408. See General Construction Law N. Y. (Consol. Laws, c. 22) §§ 43–45.

weight of authority, at common law, an impression is essential;[47] and in the case of a corporation, of course, it must be by the duly authorized agent of the corporation. It has been held that a fac simile of the seal of a corporation, printed upon blank forms of obligations, prepared to be executed by the corporation, at the same time when the blanks were printed, and by the same agency, was not a seal at common law.[48]

Where a corporation executes a contract or conveyance required to be under seal, the seal of the corporation must be affixed, and by an officer or agent duly authorized.[49] It is not necessary that it shall be affixed by the officer personally. In the case of a contract under seal by a natural person, "if a stranger seal an instrument by the allowance, or commandment precedent, or agreement subsequent, of the person who is to seal it, that is sufficient." [50] The same is true of contracts under seal by corporations. Thus, where the corporate seal was affixed by a printer to the bonds of a corporation, by direction of its officers, and the officers afterwards adopted his act, and signed and issued the bonds, it was held that this was a sufficient sealing by the corporation.[51]

In equity, omission of a seal does not always invalidate an instrument executed by a corporation, even in cases where it would

[47] See note 45, supra.

[48] Bates v. Boston & N. Y. C. R. Co., 10 Allen (Mass.) 251. A mortgage purporting to be under seal is not invalid because only a scroll, and not the corporate seal, is attached. Thayer v. Nehalem Mill Co., 31 Or. 437, 51 Pac. 202. And see Sarmiento v. Davis Boat & Oar Co., 105 Mich. 300, 63 N. W. 205, 55 Am. St. Rep. 446; Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433.

[49] A deed of conveyance by a corporation must be executed in the corporate name and under the corporate seal. A corporation, like an individual, may adopt any seal which is convenient for the occasion. It must, however, be shown to have been so adopted, and it must be affixed as the seal of the corporation, and by an officer or agent duly authorized. Danville Seminary v. Mott, 136 Ill. 289, 28 N. E. 54. And see Garrett v. Belmont Land Co., 94 Tenn. 459, 29 S. W. 726; Allen v. Brown, 6 Kan. App. 704, 50 Pac. 505; Caldwell v. Morganton Mfg. Co., 121 N. C. 339, 28 S. E. 475. Seals of the agents who execute the instrument will not do. Regents of the University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138. Where an act prescribing the forms of acknowledgments provided that, in case the corporation had no seal, the affidavit of the acknowledging officer might state that the corporation had no seal, it was held that the effect of the act was to do away with the necessity of a seal in a deed by a corporation having no seal. Pullis v. Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095. See, also, Turner v. Kingston Lumber & Mfg. Co., 106 Tenn. 1, 58 S. W. 854; Florida R. Co. v. Thomas, 55 Fla. 287, 45 South. 720.

[50] Cruise, Dig. tit. 32, c. 2, § 55.

[51] Royal Bank of Liverpool v. Grand Junction Railroad & Depot Co., 100 Mass. 444, 97 Am. Dec. 115.

be invalid at law. A mortgage by a corporation, for instance, may be a good equitable mortgage, though by the omission of the seal it is not good as a legal mortgage.[52]

Where the deed of a corporation, signed by a person authorized to execute the same, recites that it is sealed with the corporate seal, it will be presumed that what purports to be a seal, placed after the person's name, was the seal of the corporation.[53] On the trial of an action, the plaintiff, after proving that the contract upon which the action was based was signed by the president and secretary of the defendant, a corporation, and that the corporate seal of the corporation was affixed thereto, offered it in evidence. There was no evidence offered by plaintiff to prove that the president and secretary had authority to make the contract. The Court of Appeals held, one judge dissenting, that the contract should have been received in evidence.[54]

The mere fact that a deed has the seal of the corporation attached does not make it the deed of the corporation, unless the signatures of the executive officers of the corporation are proven, and that the seal was affixed by some one duly authorized. There is a presumption, however, under such circumstances, that it was so affixed,[55] but the presumption is not conclusive, and may always be rebutted.[56] In the absence of express requirement to that effect, it

[52] Allis v. Jones (C. C.) 45 Fed. 148; Precious Blood Soc. v. Elsythe, 102 Tenn. 40, 50 S. W. 759; Hines v. Imperial Naval Stores Co., 101 Miss. 802, 58 South. 650. And see, Southern Plantations Co. v. Kennedy Heading Co., 104 Miss. 131, 61 South. 166.

[53] Benbow v. Cook, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454; Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515; District of Columbia v. Camden Iron Works, 181 U. S. 453, 21 Sup. Ct. 680, 45 L. Ed. 948; G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 23, 36 C. C. A. 633. And see First Nat. Bank v. G. V. B. Min. Co. (C. C.) 89 Fed. 439; Thayer v. Nehalem Mill Co., 31 Or. 437, 51 Pac. 202.

[54] Quackenboss v. Globe & Rutgers Fire Ins. Co., 177 N. Y. 71, 69 N. E. 223.

[55] Bliss v. Harris, 38 Colo. 72, 87 Pac. 1076; Edwards v. Snow Hill Supply Co., 150 N. C. 173, 63 S. E. 740; Quackenboss v. Globe & Rutgers Fire Ins. Co., 177 N. Y. 71, 69 N. E. 223; UNITED SURETY CO. v. MEENAN, 211 N. Y. 39, 105 N. E. 106, Wormser Cas. Corporations, 139.

[56] Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715, 17 L. Ed. 339. It was held in this case that, where neither the president nor the secretary pro tem., who signed a mortgage on behalf of a corporation, nor the regular secretary, who was the regular custodian of the seal, had any knowledge of the way in which the mortgage became sealed, the burden of proof was thrown upon the party seeking to enforce it to show the circumstances under which the seal was affixed, and that it was rightfully and properly done. See, also, Bliss v. Kaweah, C. & I. Co., 65 Cal. 502, 4 Pac. 507; Andres v. Fry, 113 Cal. 124, 45 Pac. 534; Gorder v. Plattsmouth Canning Co., 36 Neb. 548, 54 N. W. 830; Yanish v. Pioneer Fuel Co., 64 Minn. 175, 66 N. W. 198; Leggett

is not necessary that the deed of a corporation, executed by an agent under authority of a vote at a stockholders' or directors' meeting, shall recite the vote.[57]

Effect of Seal

In the case of corporate contracts under seal, as in the case of sealed contracts by natural persons, the prevailing modern doctrine is that want of consideration may be shown, or the consideration may be shown to have been such that the corporation had no authority to enter into the contract. The seal of a corporation like the seal of an individual, when affixed to a contract, is now merely presumptive evidence of consideration in most of the states. "Although the agreement be under seal," said Lord Campbell, "we may examine to see whether there was any, and what, consideration for the contract to pay money, when we are to determine whether the contract was or was not ultra vires." [58]

As we have pointed out, corporate bonds may be negotiable instruments, in which case inquiry into the consideration would not be permitted, in order to defeat liability to a bona fide holder.[59]

v. New Jersey Mfg. & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; In re West Jersey Traction Co., 59 N. J. Eq. 63, 45 Atl. 282; Reed v. Helois Carbide Specialty Co., 64 N. J. Eq. 231, 53 Atl. 1057; Hall v. Farmers' & Merchants' Bank, 145 Mo. 418, 46 S. W. 1000; Graham v. Partee, 139 Ala. 310, 35 South. 1016, 101 Am. St. Rep. 32; Quackenboss v. Globe & Rutgers Fire Ins. Co., 177 N. Y. 71, 69 N. E. 223; UNITED SURETY CO. v. MEENAN, 211 N. Y. 39, 105 N. E. 106, Wormser Cas. Corporations, 139. Contra, Morrison v. Wilder Gas Co., 91 Me. 492, 40 Atl. 542, 64 Am. St. Rep. 257.

[57] McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274.

[58] Mayor, etc., of City of Norwich v. Norfolk Ry. Co., 4 El. & Bl. 443.

[59] Ante, p. 171.

CHAPTER VI

POWERS AND LIABILITIES OF CORPORATIONS (Continued)

62. What Acts are Ultra Vires—A Corporation Can Exceed Its Powers.
63. Effect of Ultra Vires Act—In General.
65, 66. Ultra Vires Conveyances of Land or Transfers of Personalty.
67. Ultra Vires Contracts.
68. Illegal Contracts.

WHAT ACTS ARE ULTRA VIRES—A CORPORATION CAN EXCEED ITS POWERS

62. An act is said to be ultra vires when it is beyond the corporate powers. By the term "power," as applied to corporations, is meant authority or right to act. It is possible for a corporation to exceed its powers and do unauthorized acts, and out of such acts rights and liabilities may arise.

What Acts are Ultra Vires

An act which is beyond the powers conferred upon the corporation by its charter is said to be ultra vires.[1] The term "ultra vires," however, is frequently used in other senses. Thus it is sometimes used "to express that the act of the directors or officers is in excess of their authority as agents of the corporation,[2] or that the act of the majority of the stockholders is in violation of the rights of the minority,[3] or that the act has not been done in conformity with requirements of the charter.[4] * * * In its legitimate use, the expression should be applied only to such acts as are beyond the powers of the corporation itself." [5] The term is also sometimes used to express that the act is illegal on other grounds than

[1] Some courts have drawn a distinction between an act totally beyond the corporate powers and an act merely beyond the corporate powers for some purposes. Thus see MONUMENT NAT. BANK v. GLOBE WORKS, 101 Mass. 57, 3 Am. Rep. 322, Wormser Cas. Corporations, 158.

[2] Post, pp. 471, 472.

[3] Post, pp. 560–572.

[4] Ante, p. 197.

[5] Camden & A. R. Co. v. May's Landing & E. H. C. R. Co., 48 N. J. Law, 530, 7 Atl. 523, per Depue, J. See, also, National Home Bldg. & Loan Ass'n v. Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245; Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 12 Ga. App. 818, 79 S. E. 45; Crowder State Bank v. Ætna Powder Co., 41 Okl. 394, 138 Pac. 392.

because the act is beyond the corporate powers.[6] The use of the expression should be confined, however, to acts which are beyond the powers conferred upon the corporation by its charter.[7]

A Corporation Can Exceed its Powers

When it is said that a corporation has such "powers" only as are expressly or impliedly conferred upon it by the Legislature which created it, is not meant that it is unable to do any act in excess of the powers conferred, but simply that it has no authority or right to do such an act. It can, in fact, exceed its powers, and rights and liabilities may arise out of its unauthorized or "ultra vires" acts. In this respect it is like a natural person. Like a natural person, it can do wrong.[8] If it were otherwise, it could not become liable for a tort, nor could it be prosecuted for a misdemeanor, such as the maintenance of a nuisance; and it is perfectly well settled, as we shall see, that it may be civilly liable for a tort,[9] and criminally responsible for misdemeanor.[10] Nor could it ever become liable to forfeiture of its charter for a violation thereof.[11] So, as we shall see, a corporation may, under some circumstances, incur liability by reason of a contract entered into in excess of its powers.[12] "Corporations, like natural persons, have power and capacity to do wrong. They may, in their dealings and contracts, break over the restraints imposed upon them by their charters; and when they do so their exemption from liability cannot be claimed on the mere ground that they have no attributes or faculties which render it possible for them thus to act." [13]

This point was discussed in Bissell v. Michigan Southern & N. I. R. Cos.[14] It was contended in that case that if the proper officers of a corporation enter into a contract or transaction which is not within the authority of the corporation, the transaction cannot be considered as in any sense that of the corporation, but is, in legal contemplation, that of the officers personally; in other words, that a corporation cannot exceed its powers, and that for

[6] Post, p. 236.

[7] Camden & A. R. Co. v. May's Landing & E. H. C. R. Co., supra, per Depue, J.

[8] See Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176.

[9] Post, p. 242.

[10] Post, p. 249.

[11] Post, p. 299.

[12] Post, p. 210; Bissell v. Michigan Southern & N. I. R. Cos., 22 N. Y. 259; Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. (N. Y.) 31.

[13] Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412.

[14] 22 N. Y. 259.

this reason it cannot, under any conceivable circumstances, be held liable on an ultra vires contract or transaction, the officers alone being liable. Comstock, C. J., in repudiating this reasoning, said: "In this view these artificial existences are cast in so perfect a mold that transgression and wrong become impossible. The acts and dealings of a corporation, done and transacted in its name and behalf by its board of directors, vested with all its powers, are, unless justified by its charter, according to this reasoning, the acts and dealings of the individuals engaged in them, and for which they alone are responsible. But such, I apprehend, is not the nature of these bodies. Like natural persons, they can overleap the legal and moral restraints imposed upon them; in other words, they are capable of doing wrong. To say that a corporation has no right to do unauthorized acts is only to put forth a very plain truism; but to say that such bodies have no power or capacity to err is to impute to them an excellence which does not belong to any created existences with which we are acquainted. The distinction between power and right is no more to be lost sight of in respect to artificial than in respect to natural persons." In another case, where a similar contention was made, it was said by Sutherland, J., in refuting the doctrine: "This would be a most convenient distinction for corporations to establish—that every violation of their charter, or assumption of unauthorized power on the part of their officers, although with the full approbation of their directors, is to be considered the act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established." [15]

EFFECT OF ULTRA VIRES ACT

63. If a corporation performs or threatens to perform an act which is ultra vires, but not otherwise unlawful—

(a) The state may, when the act is done, maintain proceedings against it to forfeit its charter for misuser, and perhaps to enjoin it when the act is threatened. A stranger under no circumstances, has any standing to object.

(b) A stockholder or member may, where the act is threatened, maintain a bill in equity to enjoin the corporation from performing it. He may sue to enjoin performance of an ultra vires contract which the corporation has already en-

[15] Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. (N. Y.) 31.

tered into, provided it is not binding on the corporation under the rules hereafter shown.

(c) As to the effect of an ultra vires conveyance to or by a corporation, and as to the circumstances under which an action may be maintained on an ultra vires contract, the authorities, as will be seen, are conflicting.

There is much conflict in the cases as to the effect of a corporation's ultra vires acts and contracts, and as to the circumstances under which they may give rise to actions. It is not possible to state general rules that will apply in all the states. There are some rules which are universally recognized, while as to others there is a direct conflict. On some points there are decisions by the same court which cannot well be reconciled. All that can be done in a work of this character is to group the decisions as far as possible, and show the different positions the courts have taken.

All the authorities agree that where a corporation enters into an ultra vires contract, or performs an ultra vires act, though the contract or act is only unlawful because it is unauthorized, the state may, if the act is sufficiently flagrant to justify it, maintain proceedings directly against the corporation to enforce a forfeiture of its charter for the misuser of power; and the state may, perhaps, enjoin such an act when threatened. A stranger, under no circumstances, has any standing to object. This question will be fully considered hereafter.[16]

The authorities also agree that, under certain conditions, a bill in equity may be maintained by a stockholder or member against the corporation to enjoin it from entering into an ultra vires contract, or from performing a threatened ultra vires act; and such a bill may also be maintained to prevent it from performing an ultra vires contract,[17] unless the contract is enforceable against it, under the doctrines which we shall presently explain, notwithstanding its ultra vires character. The fact that a stockholder is not injured by an ultra vires contract of the corporation, to which all the other stockholders have consented, does not prevent him from maintaining a suit to enjoin its performance.[18]

As to the effect of an ultra vires conveyance to or by a corporation, as between the parties, and as to whether an action may be maintained by or against a corporation under an ultra vires contract, the authorities are conflicting, as we shall see in the following sections.

[16] Post, p. 301.

[17] Post, p. 482.

[18] Byrne v. Schuyler Electric Mfg. Co., 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304.

SAME—ULTRA VIRES CONVEYANCES OF LAND, OR TRANSFERS OF PERSONALTY

65. An ultra vires conveyance of land to or by a corporation, whether it has the power to take and convey or not, is not void, but only voidable, and vests title in the grantee. The same rule applies to transfers of personal property.

66. When the title to property which it has no authority to hold has not vested in the corporation, the courts will not aid it to acquire the title.

Real Property

Where a corporation, having the power to acquire and hold land for certain purposes only, takes a conveyance of land for a purpose not authorized, or takes more land than it is authorized to hold, the conveyance is not absolutely void. The state may proceed directly against it for exceeding the powers conferred upon it, but the question is solely between it and the state.[19] Neither the grantor nor any other private individual can attack the conveyance in a suit by or against the corporation to recover the land. So long as the state remains inactive, no one can complain; for, as was said in a California case, it would lead to infinite embarrassments if in suits by corporations to recover possession of their property inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity.[20] So, too, where a corporation is incompetent

[19] It seems that, in the absence of statute, the land is not subject to forfeiture to the state, but that its remedy in a proper case is to proceed against the corporation to forfeit its charter. See 8 Harv. L. R. 15; Com. v. New York, L. E. & W. R. Co., 132 Pa. 591, 19 Atl. 291, 7 L. R. A. 634; Lancaster v. Amsterdam Improv. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; FAYETTE LAND CO. v. LOUISVILLE & N. R. CO., 93 Va. 274, 24 S. E. 1016, Wormser Cas. Corporations, 100.

[20] Natoma Water & Min. Co. v. Clarkin, 14 Cal. 544. And see LEAZURE v. HILLEGAS, 7 Serg. & R. (Pa.) 313, Wormser Cas. Corporations, 143; Ayers v. Banking Co., L. R. 3 P. C. 548; Hough v. Cook County Land Co., 73 Ill. 23, 24 Am. Rep. 230; Barnes v. Suddard, 117 Ill. 237, 7 N. E. 477; Banks v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706; Bone v. President, etc., Delaware & H. Canal Co. (Pa.) 5 Atl. 751; FAYETTE LAND CO. v. LOUISVILLE & N. R. CO., 93 Va. 274, 24 S. E. 1016, Wormser Cas. Corporations, 100; Barrow v. National & C. Turnpike Co., 9 Humph. (Tenn.) 304; Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 595; Gilbert v. Hole, 2 S. D. 164, 49 N. W. 1; American Mortg. Co. of Scotland v. Tennille, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529; Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 8 South. 706, 24 Am. St. Rep. 931; Cooney v. A. Booth Packing Co., 169 Ill.

by its charter to take title to real estate, by the better authority, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted by the state for that purpose. "This rule, while recognizing the authority of the government to which the corporation is amenable, has the salutary effect of assuring the security of titles and of avoiding the injurious consequences which would otherwise result." [21]

Devises and Bequests

In many states there are statutes forbidding corporations holding property in excess of a certain amount. If a corporation owns property equal to the amount allowed by a statute and a devise or bequest is thereafter made to it, a question arises as to the status of the property so devised or bequeathed. Is the gift void or voidable? Who may question the corporation's right to take the property? There are two distinct views. Maine, Massachusetts, Maryland, and the federal courts regard the bequest or devise as valid, unless the state interferes.[22] New York, Texas, Rhode Island, and

370, 48 N. E. 406; Chicago & A. R. Co. v. Keegan, 185 Ill. 70, 56 N. E. 1088; Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co., 60 Ohio St. 96, 53 N. E. 711, 64 L. R. A. 395; Miller v. Flemingsburg & Fox Springs Turnpike Co., 109 Ky. 475, 59 S. W. 512; Hagerstown Mfg., Min. & Land Imp. Co. of Washington County v. Keedy, 91 Md. 430, 46 Atl. 965; Rogers v. Nashville, C. & St. L. Ry. Co., 91 Fed. 299, 33 C. C. A. 517; Louisville School Board v. King, 32 Ky. Law Rep. 687, 107 S. W. 247, 15 L. R. A. (N. S.) 379; Hayden v. Hayden, 241 Ill. 183, 89 N. E. 347; Milton v. Crawford, 65 Wash. 145, 118 Pac. 32.

[21] Kerfoot v. Farmers' & Merchants' Bank, 218 U. S. 281, 31 Sup. Ct. 14, 54 L. Ed. 1042, per Hughes, J. See, also, Carlow v. C. Aultman & Co., 28 Neb. 672, 44 N. W. 873; Fisk v. Patton, 7 Utah, 399, 27 Pac. 1; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; Benton v. City of Elizabeth, 61 N. J. Law, 411, 39 Atl. 683; Burden v. Burden, 159 N. Y. 287, 54 N. E. 17; Nantasket Beach Steamboat Co. v. Shea, 182 Mass. 487, 65 N. E. 57; Advance Thresher Co. v. Rockafellow, 16 S. D. 462, 93 N. W. 652; Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801; Puget Sound Nat. Bank of Seattle v. Fisher, 52 Wash. 246, 100 Pac. 724, 17 Ann. Cas. 526; De Witt County Nat. Bank v. Mickleberry, 244 Ill. 77, 91 N. E. 86, 135 Am. St. Rep. 304; Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 121 S. W. 232. But see Hayward v. Davidson, 41 Ind. 212; Carroll v. City of East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; State ex rel. Winston v. Hudson Land Co., 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430; Occum Co. v. A. & W. Sprague Mfg. Co., 34 Conn. 529 (semble); Walker v. Taylor, 252 Ill. 424, 96 N. E. 1055.

[22] Hanson v. Little Sisters of the Poor of Baltimore, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; Hamsher v. Hamsher, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556; Congregational Church Bldg. Soc. v. Everett, 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. Rep. 308; Farrington v. Putnam, 90 Me. 405, 37

several other jurisdictions [23] regard the corporation as incapacitated to take or hold under the will, and the devise or bequest is therefore considered void. The heirs of the deceased in such jurisdictions may question the validity of the gift. As it is almost everywhere conceded that where a corporation takes and holds property by conveyance, or by executed gift inter vivos, contrary to its charter rights, no one but the state can complain, it would seem more logical to hold that only the state may interfere where the gift is by devise or bequest, and that "restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons." [24] The contrary result reached by the New York courts is due chiefly to the relics of the mortmain doctrine still prevailing in that state.[25]

Executory Transactions

In Case v. Kelly [26] a clear distinction was made by the Supreme Court of the United States between cases in which the title to land,

Atl. 652, 38 L. R. A. 339; In re Stickney's Will, 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. Rep. 308; Brigham v. Peter Bent Brigham Hospital (C. C.) 126 Fed. 796, affirmed 134 Fed. 513, 67 C. C. A. 393; Hubbard v. Worcester Art Museum, 194 Mass. 280, 80 N. E. 490, 9 L. R. A. (N. S.) 689, 10 Ann. Cas. 1025; Hubbard v. Worcester Art Museum (C. C.) 179 Fed. 406; Evangelical Baptist Benevolent & Missionary Soc. v. City of Boston, 204 Mass. 28, 90 N. E. 572; Mansfield v. Neff, 43 Utah, 258, 134 Pac. 1160.

[23] Starkweather v. American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; Wood v. Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; Cromie's Heirs v. Institution of Mercy of New York, 3 Bush (Ky.) 365; Chamberlain v. Chamberlain, 43 N. Y. 424; In re McGraw's Estate, 45 Hun (N. Y.) 354, affirmed 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387; House of Mercy of New York v. Davidson, 90 Tex. 529, 39 S. W. 924; Davidson College, Trustees of, v. Chamber's Executors, 56 N. C. (3 Jones, Eq.) 253. In the North Carolina case last cited, a distinction was drawn between a devise and a bequest. Battle, J., said: "The devisee takes it (realty) at once by force of the will, and his title becomes complete immediately upon the death of the devisor. But the case of a legacy is well known to be different. * * * The legatee has no legal title to the legacy until the executor shall give his assent to it. * * * It needs the aid of a court, then, to enable the plaintiffs to recover this legacy which they claim."

[24] Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401.

[25] In re McGraw's Estate, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387, Peckham, J., in delivering the opinion of the court, said: "We have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise."

[26] 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513. See, also, South & N. A. R. Co. v. Highland Ave. & B. R. Co., 119 Ala. 105, 24 South. 114; Kohlruss v. Zackery, 139 Ga. 625, 77 S. E. 812, 46 L. R. A. (N. S.) 72. A corporation desired its president to purchase certain lands which it then occupied under

which a corporation has no power to hold, has vested in it, and cases in which the title has not vested in it, and the corporation seeks the aid of the court to acquire title; and it was held that in the latter case the court should not aid the corporation. In the case at bar, land had been donated to a railroad company for purposes not authorized by its charter, and conveyed to officers of the company. A receiver of the company brought suit to charge them as trustees for the company, and to recover the land. It was held that the suit could not be maintained. "We need not stop here," said the court, "to inquire whether this company can hold title to lands which it is impliedly forbidden by its charter to do, because the case before us is not one in which the title to the lands in question has ever been vested in the company, or attempted to be so vested. The company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law, and obtain a title which it has no power to hold. We think the questions are very different ones, and that, while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law, and enabling the company to do that which the law forbids."

Personal Property

The rules above stated apply also to ultra vires transfers of personal property and assignments of choses in action to or by a corporation. If a corporation purchases or sells personal property, and possession is delivered, third persons cannot dispute the title under the transfer, and contend that the property remains in the

a lease. Under its charter it was not authorized to acquire the lands in question. The president bought the lands in his own name and refused to convey them to the corporation. Suit was brought in equity by the corporation to have its president declared a constructive trustee, and to vest the title to the lands in the plaintiff. Held that, where the corporation has not yet acquired the property, a court of equity will not lend its aid to enforce a conveyance to the corporation of that which by its charter it is not permitted to hold, and such a defense is available to an interested individual. PRAIRIE SLOUGH FISHING & HUNTING CLUB v. KESSLER, 252 Mo. 424, 159 S. W. 1080, Wormser Cas. Corporations, 146. One who has entered into a contract to sell land to a corporation, which has made improvements thereon, cannot refuse to perform on the ground that it had not authority to purchase. Coleridge Creamery Co. v. Jenkins, 66 Neb. 129, 92 N. W. 123.

seller, on the ground that the corporation had no power to take and hold or to transfer the same. Nor can the purchaser of property from a corporation defend an action on a note given to the corporation for the price, on the ground that the corporation had no power to hold the property.[27] The same is true where a corporation purchases a note, in excess of its powers. The note is valid, and the maker, when sued thereon by the corporation, cannot defeat the action by alleging that the purchase was ultra vires.[28]

SAME—ULTRA VIRES CONTRACTS

67. On the question whether, and under what circumstances, an action will lie on an ultra vires contract, the authorities are in direct conflict, and there is much confusion in the cases. The different positions which have been taken by the courts may be stated thus:

(a) Some of the courts, notably the federal courts, hold that a contract by a corporation which is objectionable only because it is ultra vires or unauthorized is on that ground alone unlawful and void, as being beyond the powers conferred upon it, and that, as a rule, no action can be maintained upon it. But

(1) If the contract has been fully executed on both sides, the courts in all jurisdictions will not interfere at the instance of either party to undo what has been done.

(2) If the contract is executory on both sides, neither party can maintain an action upon it; and this is true of practically all jurisdictions.

[27] See Ryers v. South Australian Banking Co., L. R. 3 P. C. 548; Edwards v. Fairbanks, 27 La. Ann. 449; 2 Mor. Corp. § 712; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 53 Hun, 52, 5 N. Y. Supp. 937; Rutland & B. R. Co. v. Proctor, 29 Vt. 93; John V. Farwell Co. v. Wolf, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, 37 L. R. A. 138, 65 Am. St. Rep. 22; Parish v. Wheeler, 22 N. Y. 494; Morris v. Hall, 41 Ala. 510; Bank v. Bank of Victoria, L. R. 3 Pr. Coun. App. Cas. 526; State Ins. Co. of Des Moines v. Farmers' Mut. Ins. Co., 65 Neb. 34, 90 N. W. 997; Peru Plow & Implement Co. v. Harker, 144 Fed. 673, 75 C. C. A. 475 (executed assignment of a cause of action); Southern Lumber Co. v. Holt, 129 La. 273, 55 South. 986; Barron v. McKinnon, 196 Fed. 933, 116 C. C. A. 483; Prenatt v. Messenger Printing Co., 241 Pa. 267, 88 Atl. 439.

[28] National Pemberton Bank v. Porter, 125 Mass. 333, 28 Am. Rep. 235; Merchants' Nat. Bank v. Hanson, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5; Baker v. Northwestern Guaranty Loan Co., 36 Minn. 185, 30 N. W. 464; St. Paul Gaslight Co. v. Village of Sandstone, 73 Minn. 226, 75 N. W. 1050.

(3) Where the contract has been executed on one side, and either party has received benefits under the contract in the form of money, property, or services, an action quasi ex contractu or suit for an accounting may be maintained to recover therefor. This is sometimes called the strict or federal rule.

(4) Where the contract is not clearly ultra vires, but is so only because of facts or circumstances of which the other party has neither actual nor constructive notice, an action on the contract may be maintained by the other party against the corporation.

(5) A negotiable instrument executed or indorsed by a corporation is good as against it in the hands of a holder for value and without notice, unless the corporation clearly had no power at all to execute or indorse such instruments.

(6) A transaction, or contract, if severable, may be valid in part, though in part it is ultra vires.

(7) If a corporation borrows money without authority, but applies it to the payment of valid debts, so that its liabilities are not increased, the lender, or holders of obligations or securities issued for the loan, will be subrogated in equity to the rights of the creditors of the corporation whose debts have been so paid.

(b) Most courts, notably including New York, hold that the contracts of a corporation, which are objectionable only because they are ultra vires, are not so far illegal that no action can be maintained upon them, and that the plea of ultra vires should not prevail, whether interposed for or against the corporation, when it would be inequitable and unjust to allow it; thus where the party seeking to enforce the contract has performed it on his part, the other party is prevented from setting up the defense of ultra vires.

(c) An ultra vires contract cannot be made binding upon the corporation by the assent or ratification of all the shareholders; but some courts hold otherwise, where the rights of the corporate creditors are not concerned.

The Doctrine that an Ultra Vires Contract is Void

According to the doctrine of general capacities, which prevails in the English courts, a corporation has the same power to contract as a natural person, except so far as it may be restricted by its charter, subject to the qualification, however, that when a corpo-

ration is created for a particular purpose the act creating it impliedly prohibits it from exercising any power which the act does not expressly or impliedly authorize.[29] And under this doctrine the courts have refused to enforce prohibited contracts. According to the doctrine of special capacities, which is commonly asserted by the American courts, a corporation has such powers, and such powers only, as are expressly or impliedly conferred by its charter.[30] If this doctrine were logically applied, it would follow that a contract which is beyond the powers conferred upon a corporation—that is, which is ultra vires—is void and of no legal effect. Perhaps no court has applied this doctrine with perfect consistency, but it prevails in the main in the Supreme Court of the United States and in some of the other jurisdictions.[31]

A contract of a corporation which is ultra vires in the proper sense," said Mr. Justice Gray in a leading case,[32] "that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities, which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

"The reasons," said Mr. Justice Gray, in another case,[33] "why

[29] East Anglian Rys. Co. v. Eastern Counties Ry. Co., 11 C. B. 775; Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653.

[30] Ante, p. 144.

[31] Infra, notes 32–38.

[32] CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, Wormser Cas. Corporations, 153. See, also, National Car Advertising Co. v. Louisville & N. R. Co., 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010.

[33] Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157. See, also, Union P. R. Co. v. Chicago, R. I. &

a corporation is not liable upon a contract ultra vires—that is to say, beyond the powers conferred upon it by the Legislature, and varying from the objects of its creation, as declared in the law of its organization—are: (1) The interests of the public that the corporation shall not transcend the powers granted; (2) the interest of the stockholders that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock; (3) the obligation of every one entering into a contract with a corporation to take notice of the legal limits of its powers."

In many jurisdictions, as we shall see, the strict rule of ultra vires is so far relaxed that an action may be maintained on an ultra vires contract, if one party has performed and it would be unjust to allow the plea.[34] But, where the doctrine is applied strictly, the fact that the other party has incurred expenses or sustained losses, or even fully performed on his part, on the faith of the corporation's ultra vires promise, cannot render the corporation liable on the contract itself.[35] And, conversely, performance by the corpora-

P. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; McCormick v. Market Nat. Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; California Nat. Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; De La Vergne Refrigerating Mach. Co. v. German Sav. Inst., 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 65; Anglo-American Land, Mortgage & Agency Co. v. Lombard, 132 Fed. 721, 68 C. C. A. 89; Barron v. McKinnon, 196 Fed. 933, 116 C. C. A. 483; Gaston & Ayres v. J. I. Cambell Co., 104 Tex. 576, 140 S. W. 770, 141 S. W. 515 (semble).

[34] Post, p. 223.

[35] Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Pearce v. Madison & I. R. Co., 21 How. (U. S.) 441, 16 L. Ed. 184; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950; DOWNING v. MT. WASHINGTON ROAD CO., 40 N. H. 230, Wormser Cas. Corporations, 96; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781; Straus v. Eagle Ins. Co. of Cincinnati, 5 Ohio St. 59; CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, Wormser Cas. Corporations, 153; Miller v. American Mut. Acc. Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765; Bacon v. Mississippi Ins. Co., 31 Miss. 116; Chewacla Lime Works v. Dismukes, 87 Ala. 344, 6 South. 122, 5 L. R. A. 100; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Albert v. Savings Bank of Baltimore, 1 Md. Ch. 407; Abbott v. Baltimore & R. Steam Packet Co., 1 Md. Ch. 542; National Home Bldg. & Loan Ass'n v. Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245; Best Brewing Co. v. Klassen, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26; Metropolitan Stock Exchange v. Lyndonville Nat. Bank, 76 Vt. 303, 57 Atl. 101; Converse v. Emerson, Talcott & Co., 242 Ill. 619, 90 N. E. 269; Westerlund v. Black Bear Min. Co., 203 Fed. 599, 121 C. C. A. 627; Crowder State Bank v. Ætna Powder Co., 41 Okl. 394, 138 Pac. 392 (semble). Thus, where two railroad companies, in excess of their powers, consolidated, and as a consolidated company purchased property in excess

tion will not render the other party liable.[36] We are speaking here only of cases in which the action is brought directly on the contract. Actions quasi ex contractu in disaffirmance of the contract may be maintained.[37] Not only is the defense of ultra vires available to the corporation in an action by the other party on the contract, but it is also available to the other party in an action by the corporation. The contract, being wholly null and void, cannot be made the foundation of an action by either party,[38] unless the case falls within one of the exceptions hereinafter mentioned.[39]

Same—Executed and Executory Contracts

If an ultra vires contract has been fully executed on both sides, the rule prevails everywhere that neither party can maintain an action at law or a suit in equity to recover what he or it has parted with. Thus one who has sold, received payment for, and conveyed land to a corporation cannot sue to rescind the conveyance on

of their powers, and gave notes therefor, it was held that an indorsee of the notes, who had notice of the circumstances under which they were given, could not maintain an action against the corporations thereon. Pearce v. Madison & I. R. Co., supra. So where a corporation purchased and received property which it was not authorized to purchase or receive, it was held that an action would not lie against it for the price. DOWNING v. MT. WASHINGTON ROAD CO., supra. And where a railroad company and a manufacturing company joined in an ultra vires subscription to contribute to defray the expenses of a festival, and the festival was held, and the expenses paid by the committee, it was held that the committee could not maintain an action on the subscription. Davis v. Old Colony R. Co., supra. A national bank, which purchased and held stock in another national bank, being without power so to do, although it has received dividends on the stock, may plead that the transaction was ultra vires in a suit by the receiver of the second bank after its insolvency to enforce the stockholders' liability under an assessment made by the comptroller of the currency. First Nat. Bank v. Hawkins, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007. But it might be noted that the national bank cases deal with quasi public corporations. And see First Nat. Bank v. Converse, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. Ed. 537. See cases cited notes 45, 48, infra.

[36] Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 541, 27 Atl. 525, 35 Am. St. Rep. 385; Buckeye Marble & Freestone Co. v. Harvey, 92 Tenn. 116, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71; United States Brewing Co. v. Dolese Shepard Co., 259 Ill. 274, 102 N. E. 753, 47 L. R. A. (N. S.) 898.

[37] Post, p. 220.

[38] DOWNING v. MT. WASHINGTON ROAD CO., 40 N. H. 230, Wormser Cas. Corporations, 96; CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, Wormser Cas. Corporations, 153; United States Brewing Co. v. Dolese Shepard Co., 259 Ill. 274, 102 N. E. 753, 47 L. R. A. (N. S.) 898.

[39] Post, pp. 214–223.

the ground that the corporation had no power to purchase. Nor under the same circumstances could the corporation rescind and recover back what it had paid.[40] "When the contract is fully executed, where whatever was contracted to be done on either hand has been done, * * * the law will not interfere, at the instance of either party, to undo what was originally unlawful, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other." [41]

So long as an ultra vires contract is wholly executory on both sides, nearly all courts agree that no action can be maintained upon it.[42] And even if the contract has been partly performed on one or both sides, as a rule, no action can be maintained to enforce it, either to recover damages for its breach or for specific performance,[43] although the rule is subject to exception in some jurisdictions.[44] Thus no action can be maintained upon an ultra vires lease, notwithstanding that the lease has been partly performed,

[40] Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 8 South. 706, 24 Am. St. Rep. 931; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448; Savings & Trust Co., of Cleveland, Ohio, v. Bear Valley Ir. Co. (C. C.) 112 Fed. 693; Graton & Knight Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 Pac. 879; Doubleday, Page & Co. v. Shumaker, 60 Misc. Rep. 227, 113 N. Y. Supp. 83; Metropolitan Trust Co. v. McKinnon, 172 Fed. 846, 97 C. C. A. 194; Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co. (D. C.) 197 Fed. 347 (semble). When a corporation subscribes for stock in another corporation, and the contract is fully executed, the defense of ultra vires cannot be maintained in an action to recover dividends. Bigbee & W. R. Packet Co. v. Moore, 121 Ala. 379, 25 South. 602. Although a contract of partnership entered into by a corporation with natural persons may be ultra vires, and not enforceable while executory, nevertheless, after it has been executed, and the corporation has embarked its funds in, and supplied goods to, the firm, such funds and goods cannot be exempted from liability for the partnership debts, or withdrawn by the corporation after insolvency of the partnership, and to the prejudice of its creditors. Wallerstein v. Ervin, 112 Fed. 124, 50 C. C. A. 129. Where an insurance company received bank stock, certificates of deposit, and cash in payment of a deposit in an insolvent bank, it was not entitled to repudiate the transaction, after it was executed, on the ground that the acquisition of the stock was ultra vires. Fidelity Ins. Co. v. German Sav. Bank, 127 Iowa, 591, 103 N. W. 958.

[41] Long v. Georgia Pac. Ry. Co., supra. See, also, City of Santa Cruz v. Wykes, 202 Fed. 357, 120 C. C. A. 485.

[42] Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; Jemison v. Citizens' Sav. Bank of Jefferson, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. Rep. 482; Bosshardt & Wilson Co. v. Crescent Oil Co., 171 Pa. 109, 32 Atl. 1120; McNulta v. Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; Nebraska Shirt Co. v. Horton, 3 Neb. (Unof.) 888, 93 N. W. 225; Vermont Farm Machinery Co. v. De Sota Co-op. Creamery Co., 145 Iowa, 491, 122 N. W. 930; United States Fidelity & Guaranty Co. v. Town of Dothan, 174 Ala. 480, 56 South. 953.

[43] Infra, p. 216. [44] Post, pp. 228, 233.

and the remedy, if any, must be sought in action quasi ex contractu,[45] except in jurisdictions where the strict rule of ultra vires is relaxed.[46]

In a leading case in the Supreme Court of the United States,[47] where a railroad company had leased its railroad for a term of years, reserving an option to terminate the lease at any time, and covenanted to submit to arbitration the ascertainment of the loss or damage to the lessee by reason of such termination, and to abide by the award, it was held that no action could be maintained by the lessee on the covenant. "What is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action; damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its nonperformance. As to this it is not an executed contract." And in subsequent cases in the same court it has been uniformly held that no action can be maintained on an ultra vires lease to recover rent accrued during the occupation by the lessee, although the lessee remained in undisturbed possession of the premises.[48] Yet the federal courts are not consistent in their application of the doctrine that an ultra vires contract is void; for, while they have declared that an ultra vires lease is void and that it is the duty of the corporation to rescind it,[49] they have enjoined the lessor from re-entering before expira-

[45] Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950; CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, Wormser Cas. Corporations, 153; Pullman's Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; McCormick v. Market Nat. Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; Brunswick Gaslight Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385.

[46] Camden & A. R. Co. v. May's Landing, etc., R. Co., 48 N. J. Law, 530, 7 Atl. 523; City of Corpus Christi v. Central Wharf & Warehouse Co., 8 Tex. Civ. App. 94, 27 S. W. 803; Bath Gaslight Co. v. Claffy, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664; infra, p. 223.

[47] Thomas v. West Jersey R. Co., supra.

[48] See Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; and cases cited note 45, supra.

[49] Thomas v. West Jersey R. Co., supra.

tion of the lease,[50] and have refused to assist the lessor to recover possession.[51]

Same—Ignorance of Ultra Vires Character of Transaction

Every person dealing with a corporation is charged with notice of the limitations of its powers.[52] "Every corporation necessarily carries its charter wherever it goes; for that is the law of its existence. * * * Every person who deals with it anywhere is bound to take notice of the provisions which have been made in its charter." [53] Thus it has been held that if a corporation, not being authorized by its charter, enters into a contract of guaranty or suretyship, this is clearly in excess of its powers, and that the other party is chargeable with knowledge of this fact, and cannot hold it liable.[54]

Even in those jurisdictions where the courts hold ultra vires contracts unlawful and void, however, they make an exception to the rule where the party dealing with the corporation did not know, and is not chargeable with knowledge of, the ultra vires nature of the contract into which he entered. The cases are virtually agreed that, if the officers of a corporation make a contract with a man in regard to matters apparently within the powers of the corporation, but which, upon proof of extrinsic facts, of which he had no notice, and of which he is not chargeable with notice, is shown to have been ultra vires, the corporation may be held liable, unless it may and does avoid liability by taking timely steps to prevent loss or damage to the other party.[55] Thus, if a corporation empowered

[50] Atlantic & Pacific Telegraph Co. v. Union Pacific R. Co. (C. C.) 1 Fed. 745, 1 McCrary, 188.

[51] St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748. This was upon the ground that the lease was illegal, and the parties were in pari delicto; but this is inconsistent with a recovery under an ultra vires contract quasi ex contractu, which is allowed by the same court. See Logan County Nat. Bank v. Townsend, 139 U. S. 67, 11 Sup. Ct. 497, 35 L. Ed. 107; Pullman's Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108.

[52] Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Lucas v. White Line Transfer Co., 70 Iowa, 542, 30 N. W. 771, 59 Am. Rep. 449; CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, Wormser Cas. Corporations, 153; McCormick v. Market Nat. Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; Spence v. Mobile & M. R. Co., 79 Ala. 576; Memphis Grain & Package Elevator Co. v. Memphis & C. R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798; Kraniger v. People's Bldg. Soc., 60 Minn. 94, 61 N. W. 904; Senour Mfg. Co. v. Church Paint & Mfg. Co., 81 Minn. 294, 84 N. W. 109; Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co., 251 Mo. 553, 158 S. W. 359.

[53] Relfe v. Runelle, 103 U. S. 222, 26 L. Ed. 337.

[54] Lucas v. White Line Transfer Co., supra.

[55] Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Lucas v.

to build and operate a certain line of railroad should purchase rails for the purpose of building another line, or for the purpose of speculating in them, without the knowledge of the vendor, the corporation could be held on the contract.[56] So, if a corporation, which is limited by its charter as to the amount of indebtedness it may incur, should purchase property, and in doing so exceed that amount, the seller, being ignorant of the amount of the company's indebtedness at the time of the purchase, could hold it on the contract.[57]

It is held, however, that where a corporation is created, and its powers conferred by a public act, a man who enters into a contract with it, which is clearly in excess of its powers as shown by the act, cannot enforce the contract, for he is chargeable with knowledge of public laws, and therefore of the powers of the corporation.[58]

Same—Negotiable Bills and Notes—Bonds

A negotiable bill or note accepted, made, or indorsed by a corporation, in excess of the powers conferred upon it by its charter, stands, of course, upon exactly the same footing as other contracts, as between the original parties. Different questions arise in cases where the instrument has passed into the hands of one who claims

White Line Transfer Co., 70 Iowa, 542, 30 N. W. 771, 59 Am. Rep. 449; Bissell v. Michigan Southern & N. I. R. Co., 22 N. Y. 259, per Comstock, C. J.; Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. 501; Colorado Springs Co. v. American Pub. Co., 97 Fed. 843, 38 C. C. A. 433; McQuaig v. Gulf Naval Stores Co., 56 Fla. 505, 47 South. 2, 131 Am. St. Rep. 160; J. P. MORGAN & CO. v. HALL & LYON CO., 34 R. I. 273, 83 Atl. 113, Wormser Cas. Corporations, 114; Luther Lumber Co. v. Sheldahl Sav. Bank, 22 Wyo. 302, 139 Pac. 433. "When the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of ultra vires does not apply." MONUMENT NAT. BANK v. GLOBE WORKS, 101 Mass. 57, 3 Am. Rep. 322, Wormser Cas. Corporations, 158. Where a corporation, having power to borrow money for the purposes of its business, borrowed for another purpose, in the absence of knowledge by the lender of the improper purpose, the misapplication of the money did not invalidate the loan. In re David Payne & Co., Limited [1904] 2 Ch. 608. Where a corporation was authorized to lend on bond and mortgage for one year, but lent on note and mortgage for two years, it could maintain an action thereon. Germantown Farmers' Mut. Ins. Co. v. Dhein, 43 Wis. 420, 28 Am. Rep. 549.

[56] Dictum in Lucas v. White Line Transfer Co., supra. See, also, Brewer & Hofmann Brewing Co. v. Boddie, 181 Ill. 622, 55 N. E. 49; McKell v. Chesapeake & O. R. Co., 186 Fed. 39, 108 C. C. A. 141.

[57] Humphrey v. Patrons' Mercantile Ass'n, 50 Iowa, 607; Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285. Compare H. Scherer & Co. v. Everest, 168 Fed. 822, 94 C. C. A. 346.

[58] Lucas v. White Line Transfer Co., 70 Iowa, 542, 30 N. W. 771, 59 Am. Rep. 449.

to be a bona fide holder for value. If the execution or indorsement of a negotiable instrument by a corporation is obviously foreign to the purposes of its charter, such an instrument is void into whosoever's hands it may come, for every person is chargeable with notice of its ultra vires character; but it was correctly held in a federal case,[80] where the T. Corporation, a company which had power in the conduct of its business to make and indorse commercial paper, made accommodation notes payable to D., and D. negotiated them to X., the plaintiff, who took them without any knowledge that they were issued originally as accommodation paper and paid value for them, that "where a corporation which has the power to issue negotiable paper puts forth accommodation paper beyond its power, it is estopped from denying that the latter was lawfully issued for value for the purpose of defeating the claim of a bona fide holder of such paper before maturity." And the T. Company was accordingly held liable.[80]

If the purchaser had notice in fact, or if the circumstances were such as to put him on inquiry, and charge him with notice, of the ultra vires character of the transaction, he cannot recover, unless under rules hereafter shown the original holder could recover.[81]

As we have seen, the bonds issued by a corporation, and the coupons attached thereto, will be regarded as negotiable instruments, and as subject to the rules of law relating to such instruments, if it appears from the form in which they were issued, and the mode of giving them circulation, that they were intended to have this char-

[80] H. Scherer & Co. v. Everest, 168 Fed. 822, 94 C. C. A. 346.

[80] See Norton, Bills & N. (3d Ed.) 222–226; MONUMENT NAT. BANK v. GLOBE WORKS, 101 Mass. 57, 3 Am. Rep. 322, Wormser Cas. Corporations, 158; National Park Bank v. German-American Mut. Warehouse & Security Co., 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; National Bank of Republic v. Young, 41 N. J. Eq. 531, 7 Atl. 488; Ex parte Estabrook, Fed. Cas. No. 4,534; Ridgway v. Farmers' Bank of Bucks County, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681; Southern Loan Co. v. Morris, 2 Pa. 175, 44 Am. Dec. 188; McIntire v. Preston, 5 Gilman (Ill.) 48, 48 Am. Dec. 321; Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285; Jacobs Pharmacy Co. v. Southern Banking & Trust Co., 97 Ga. 573, 25 S. E. 171; Marshall Nat. Bank v. O'Neal, 11 Tex. Civ. App. 640, 34 S. W. 344.

[81] National Park Bank v. German-American Mut. Warehouse & Security Co., supra. In this case a corporation without authority indorsed promissory notes for the accommodation of the maker, who himself had them discounted. It was held that the fact that the maker had them discounted for his own benefit, being unexplained, was notice to the discounter that the indorsement was not in the usual course of business, but merely for the accommodation of the maker, and that the discounter, therefore, could not hold the corporation liable. And see Price v. Pine Mountain Iron & Coal Co., 32 S. W. 267, 17 Ky. Law Rep. 865.

acter. And they will be subject to the rules protecting bona fide purchasers of negotiable instruments.[62]

Same—Severable Transaction

A contract or transaction by a corporation, if severable, may be valid in so far as it is within the powers of the corporation, though in part it is ultra vires.[63] Thus, if a railroad company, having implied authority to issue bonds in order to raise money for its business, but without authority to execute a mortgage on its property, issues bonds secured by a mortgage, the invalidity of the mortgage cannot be set up to defeat a recovery on the bonds.[64] So where a railroad or other corporation has express authority to mortgage its property, a mortgage executed by it, covering both its property and its franchise, will not be avoided as to the property by the fact that there was no authority to mortgage the franchise.[65]

Same—Actions Quasi ex Contractu—Suit in Equity for Accounting

If a corporation has received money or property or the benefit of services under an ultra vires contract, the courts are virtually agreed that it may be compelled to refund the value of that which it has actually received in an action quasi ex contractu, or, in a proper case, in a suit for an accounting.[66] Thus, where a manufactur-

[62] Ante, p. 171, and cases there cited.

[63] When a divisible part of a contract is ultra vires, but is not malum in se or malum prohibitum, the remainder may be enforced, unless it appears from a consideration of the whole agreement that it would not have been made independently of the part which is void. Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

[64] Philadelphia & S. R. Co. v. Lewis, 33 Pa. 33, 75 Am. Dec. 574. And see Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157; Illinois Trust & Savings Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197.

[65] Gloninger v. Pittsburgh & C. R. Co., 139 Pa. 13, 21 Atl. 211.

[66] Day v. Spiral Springs Buggy Co., 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Morville v. American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40; White v. President, etc., of Franklin Bank, 22 Pick. (Mass.) 181; New Castle Northern R. Co. v. Simpson (C. C.) 23 Fed. 214; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; Nashua & L. R. Corp. v. Boston & L. R. Corp., 164 Mass. 222, 41 N. E. 268, 49 Am. St. Rep. 454; Anthony v. Household S. M. Co., 16 R. I. 571, 18 Atl. 176, 5 L. R. A. 575; Moore v. Swanton Tanning Co., 60 Vt. 459, 15 Atl. 114; Manchester & L. R. R. v. Concord R. R., 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582; Slater Woollen Co. v. Lamb, 143 Mass. 420, 9 N. E. 823; Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 541, 27 Atl. 525, 35 Am. St. Rep. 385; Leigh v. American Brake Beam Co., 205 Ill. 147, 68 N. E. 713; Emmerling v. First Nat. Bank, 97 Fed. 739, 38 C. C. A. 399; CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, Wormser Cas.

ing company purchased materials for the purpose of selling them again on speculation, it was held that the seller, after delivering part and repudiating the contract, could recover the value of the materials delivered. "It is to be observed," said the court, "that the contract, though void in law, involved no element of criminality, and nothing of an immoral nature. The case is not, therefore, one in which the law will leave the parties without redress for the consequences of criminal or immoral action. The plaintiff has a right to sell her manufacture, and to be paid for it; the defendant has received something of value from her, and there is manifest equity in its being required to make payment, notwithstanding it exceeded its powers in the purchase." [67] Or if the other party to the ultra vires contract has received benefits from the corporation under the contract, the corporation may recover back the reasonable value of such benefits in quasi contract. Thus in United States Brewing Co. v. Dolese & Shepard Co.[68] the brewing corporation made an ultra vires contract by which it took a lease of real property and agreed to construct and maintain thereon a boarding house and saloon. The lease provided that, if the district within which the premises were located became a prohibition district, so that it should be necessary to suspend the saloon business, the lessor would pay the brewing company the cost price of the improvements. The brewing company erected the boarding house and saloon. Subsequently the district became prohibition territory, and the brewing company brought suit on the contract for the cost

Corporations, 153; Pullman's Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; Ely v. Oakland Circuit Judge, 162 Mich. 466, 125 N. W. 375, 127 N. W. 769; State Life Ins. Co. v. Nelson, 46 Ind. App. 137, 92 N. E. 2; United States Brewing Co. v. Dolese & Shepard Co., 259 Ill. 274, 102 N. E. 753, 47 L. R. A. (N. S.) 898. "A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., supra.

[67] Day v. Spiral Springs Buggy Co., supra. See, also, Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery Co., 126 Fed. 712, 61 C. C. A. 630.

[68] 259 Ill. 274, 102 N. E. 753, 47 L. R. A. (N. S.) 898. See, also, Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781.

price of the improvements, and it also inserted in its declaration the common counts. It was held that the contract was ultra vires, because the maintenance of a boarding house is not within the implied powers of a brewing corporation. But the court said that, as the contract was neither immoral nor against public policy, a recovery on the common counts for the reasonable value of the building erected would be permitted.

Same—Relief in Equity against Ultra Vires Contract

Where a corporation has received the consideration for an ultra vires contract, and then comes into a court of equity asking to have the contract declared void, and to be restored to the rights which it parted with, the relief will not be granted unless the corporation restores the consideration which it has received. In Atlantic & Pacific Tel. Co. v. Union Pac. Ry. Co.[69] a railroad company, authorized also to construct and operate a telegraph line, leased the telegraph line to another without authority, and received the consideration. It afterwards brought suit in equity to set the lease aside, and recover possession of the property. Judge McCrary held that the relief would not be granted unless it returned the consideration which it had received.

Same—Borrowing Money—Subrogation of Lender

In equity, if a corporation borrows money without authority, but applies it in whole or in part, directly or indirectly, to the payment of valid debts, the lender will not lose the money thus applied, but will be subrogated to the rights of the creditors of the corporation thus paid, and to that extent may enforce his claim against the corporation. And if for such loan the corporation, without authority, issues debentures or bonds, the holders of them will occupy the same position as the lender.[70] This doctrine depends on the fact that liabilities of the company are not increased, and it is not to be applied where the money borrowed does not go to pay valid debts of the company.[71] But it is applicable as well where the money is applied to the payment of debts accruing subsequent to the borrowing as when it is applied to debts then existing.[72] "The test is, has the transaction really added to the liabili-

[69] 1 McCrary (C. C.) 188, 1 Fed. 745. And see Jenson v. Toltec Ranch Co., 174 Fed. 86, 98 C. C. A. 60.

[70] In re Cork & Y. Ry. Co., 4 Ch. App. 748. See, also, In re National Permanent Benefit Building Soc., 5 Ch. App. 309; Wenlock v. River Dee Co., 19 Q. B. Div. 155; 10 App. Cas. 354. Cf. In re Wrexham, etc., L. R. [1899] 1 Ch. 440.

[71] In re National Permanent Benefit Building Soc., supra; In re Wrexham, etc., R. Co. supra.

[72] Wenlock v. River Dee Co., supra.

ties of the company? If the amount of the company's liabilities remains, in substance, unchanged, but there is merely for the convenience of payment a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the principle of equity that those who pay legitimate demands, which they are bound in some way or other to meet, and have had the benefit of other people's money, advanced to them for that purpose, shall not retain that benefit, so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity; and if the result is that by the transaction which assumes the shape of an advance or loan, nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing." [73]

The Doctrine Allowing a Recovery on an Ultra Vires Contract

In New York, New Jersey, Pennsylvania, Michigan, Indiana, Minnesota, and many other states, the doctrine that the ultra vires contracts of a corporation are so far contrary to the public policy and unlawful that they cannot form the foundation of an action except as heretofore shown, is to a large extent abandoned. And the doctrine in these states is, to use the language of the New York court in a leading case, that "the plea of ultra vires should not, as a general rule, prevail, whether it is interposed for or against the corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong." [74] This is the better doctrine, and is supported by the great weight of decision in this country. Want of authority, as was pointed out by Comstock, C. J., in

[73] Per Lord Selborne in Blackburn Building Soc. v. Cunliffe, 22 Ch. Div. 61, 71.

[74] Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Kadish v. Garden City Equitable Loan & Bldg. Ass'n, 151 Ill. 531, 38 N. E. 236, 42 Am. St. Rep. 256; Portland Lumbering & Mfg. Co. v. City of East Portland, 18 Or. 21, 22 Pac. 536, 6 L. R. A. 290; Lewis v. American Savings & Loan Ass'n, 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559; Bullen v. Milwaukee Trading Co., 109 Wis. 41, 85 N. W. 115; International Trust Co. v. Davis & Farnum Mfg. Co., 70 N. H. 118, 46 Atl. 1054; Bear River Valley Orchard Co. v. Hanley, 15 Utah, 506, 50 Pac. 611; Usher v. New York Cent. & H. R. R. Co., 76 App. Div. 422, 78 N. Y. Supp. 508, affirmed 179 N. Y. 544, 71 N. E. 1141; Hunt v. Hauser Malting Co., 90 Minn. 282, 96 N. W. 85; Id., 95 Minn. 206, 103 N. W. 1032; Meholin v. Carlson, 17 Idaho, 742, 107 Pac. 755, 134 Am. St. Rep. 286; National Surety Co. v. Hall-Miller Decorating Co., 61 South. 700, 104 Miss. 626, 46 L. R. A. (N. S.) 325; BLACKWOOD v. LANSING CHAMBER OF COMMERCE, 178 Mich. 321, 144 N. W. 823, Wormser Cas. Corporations, 160; Seamless Pressed Steel & Mfg. Co. v. Monroe, 57 Ind. App. 136, 106 N. E. 538; and cases cited in the following notes.

a New York case, may render a contract void; but mere want of authority, without more, does not render a contract illegal, so that it can under no circumstances give rise to an action. Contracts are illegal either in respect to the consideration or the promise. Where both of these are lawful and right, the maxim "Ex turpi causa non oritur actio," can have no application.

A promise by a corporation, therefore, founded on a lawful consideration, and to do that which in itself is lawful to be done, although not within the powers granted by its charter, and therefore ultra vires, is not illegal,[75] and there is no good reason why it should not be held that causes of action may arise out of it. "A transgression of this nature is a simple excess of power (using that word to express the rules of action prescribed in their charters, and by which they ought to regulate their conduct), but is not tainted with illegality, so as to avoid the contract or dealing on that ground. This proposition, it seems hardly necessary to repeat, is applied only to transactions which involve or contemplate no violation of the code of private or criminal law, but, on the contrary, are innocent and lawful in themselves." [76]

[75] Per Comstock, C. J., in Bissell v. Michigan Southern & N. I. R. Co., 22 N. Y. 259. Compare the opinion of Selden, J., in this case. See, also, American Nat. Bank v. National Wall Paper Co., 77 Fed. 85, 23 C. C. A. 33; Seeber v. Commercial Nat. Bank (C. C.) 77 Fed. 957. A corporation which has leased to another its property for a consideration of which it has received the benefit cannot, in an action to restrain it from taking possession of the property for an alleged breach of the covenants of the lease, set up as a defense that the execution of the lease was ultra vires as to the parties to it. Pittsburg, J., E. & E. R. Co. v. Altoona & B. C. R. Co., 196 Pa. 452, 46 Atl. 431. See article by I. Maurice Wormser, 24 Yale Law Journal, 177.

[76] Per Comstock, C. J., in Bissell v. Michigan Southern & N. I. R. Co., supra. It was further said: "The words 'ultra vires' and 'illegality' represent totally different and distinct ideas. It is true that a contract may have both of these defects, but it may also have one without the other. For example, a bank has no authority to engage in benevolent enterprises. A subscription, made by authority of the board of directors, and under the corporate seal, for the building of a church or college, or an almshouse, would be clearly ultra vires, but it would not be illegal. If every corporation should expressly assent to such an application of the funds, it would still be ultra vires, but no wrong would be committed, and no public interest violated. So a manufacturing corporation may purchase ground for a schoolhouse or a place of worship for the intellectual, religious, and moral improvement of its operatives; it may buy tracts and books of instruction for distribution among them. Such dealings are outside of the charter; but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So a church corporation may deal in exchange. This, although ultra vires, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no state policy in restraint of that business."

In accordance with this view, it is held in most states that, if a contract entered into by a corporation is objectionable merely because it is in excess of the powers conferred upon the corporation by its charter, not being otherwise contrary to law, and it has been so far performed or acted upon by one of the parties that it would be inequitable to hold the contract void, the other party cannot defeat an action brought on the contract itself by setting up the defense that it was ultra vires.[77] Thus it has been held that if a

[77] Bissell v. Michigan Southern & N. Q. R. Co., 22 N. Y. 259; Parish v. Wheeler, 22 N. Y. 494; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am.Rep. 504; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448; Day v. Spiral Springs Buggy Co., 57 Mich. 151, 23 N. W. 628, 58 Am. Rep. 352; Carson City Sav. Bank v. Carson City Elevator Co., 90 Mich. 550, 51 N. W. 641, 30 Am. St. Rep. 454; Camden & A. R. Co. v. May's Landing, etc., R. Co., 48 N. J. Law, 530, 7 Atl. 523; Chicago & A. Ry. Co. v. Derkes, 103 Ind. 520, 3 N. E. 239; Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412; City of Corpus Christi v. Central Wharf & Warehouse Co., 8 Tex. Civ. App. 94, 27 S. W. 803; Steger v. Davis, 8 Tex. Civ. App. 23, 27 S. W. 1068; Wright v. Pipe Line Co., 101 Pa. 204, 47 Am. Rep. 701; Seymour v. Chicago Guaranty Fund Life Soc., 54 Minn. 147, 55 N. W. 907; Manchester & L. R. R. v. Concord R. R. Co., 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582; Union Hardware Co. v. Plume & Atwood Mfg. Co., 58 Conn. 219, 20 Atl. 455; International Trust Co. v. Davis & Farnum Mfg. Co., 70 N. H. 118, 46 Atl. 1054; Flint & Walling Mfg. Co. v. Kerr-Murray Mfg. Co., 24 Ind. App. 350, 56 N. E. 858; Alexandria, A. & Ft. S. R. Co. v. Johnson, 58 Kan. 175, 48 Pac. 847; Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211, 94 N. W. 74; Board of Trustees of Charlotte Tp. v. Piedmont Realty Co., 134 N. C. 41, 46 S. E. 723; Arkadelphia Lumber Co. v. Posey, 74 Ark. 377, 85 S. W. 1127; First Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79; Vought v. Eastern Bldg. & Loan Ass'n, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761; Bowers v. Ocean Accident & Guarantee Corp., 110 App. Div. 691, 97 N. Y. Supp. 485, affirmed 187 N. Y. 561, 80 N. E. 1105; Darknell v. Cœur D'Alene & St. J. Transp. Co., 18 Idaho, 61, 108 Pac. 536; Kanneberg v. Evangelical Creed Congregation, 146 Wis. 610, 131 N. W. 353, 39 L. R. A. (N. S.) 138, Ann. Cas. 1913C, 376; Lancaster v. Southern Life Ins. Co., 89 S. C. 179, 71 S. E. 864; Roane v. Union Pac. Life Ins. Co., 67 Or. 264, 135 Pac. 892; Hanna v. Chicago, R. I. & P. R. Co., 89 Kan. 503, 132 Pac. 154; BLACKWOOD v. LANSING CHAMBER OF COMMERCE, 178 Mich. 321, 144 N. W. 823, Wormser Cas. Corporations, 160; Seamless Pressed Steel & Mfg. Co. v. Monroe, 57 Ind. App. 136, 106 N. E. 538. The earlier Illinois cases have been supposed to be in accordance with this doctrine. See Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; Darst v. Gale, 83 Ill. 137; Eckman v. Chicago, B. & Q. R. Co., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750. But in National Home Bldg. & Loan Ass'n v. Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245, it was held that the rule estopping a corporation from raising the question of ultra vires where it has received the benefit of the contract does not apply where the contract is ultra vires in the sense that it is without the scope of the powers of the corporation. See, also, Best Brewing Co. v. Klassen, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26; Leigh v. American Brake Beam Co., 205 Ill. 147, 68 N. E. 713;

corporation enters into an ultra vires contract to purchase goods, and the goods are delivered to it, so that it receives the benefit of the contract, the other party may maintain an action on the contract itself for the price agreed upon.[78] So it has been held that, if the price has been paid under an ultra vires contract for the purchase of goods, an action may be maintained on the contract for failure to deliver the goods. So, if a corporation borrows money for an unauthorized purpose, or purchases the stock of another corporation, and gives its note or other obligation therefor, it cannot set up the ultra vires character of the contract to defeat an action thereon.[79] And the same rule applies where a corporation lends money or furnishes other consideration under an ultra vires contract, and takes the other party's note therefor. The other party cannot set up the ultra vires character of the contract to defeat an action by the corporation.[80]

On the same principle it has been held that if a corporation engages in the business of an innkeeper, it cannot escape an innkeeper's liability to a guest, as for property lost, by setting up that the business was not authorized by its charter.[81] So where a street railway company agreed to pay a certain sum if the state board of agriculture would hold the state fair at a certain place, it was held that the company could not set up the defense of ultra vires to defeat liability on its contract, after the fair was held at the place agreed upon, and it had the benefit therefrom in its increased traffic.[82] So where a fire insurance company which had issued a policy of insurance against loss of crops caused by hail, and received the premium, sought to escape liability for a loss on the ground that it had no power to insure against loss by hail, the court held that

Steele v. Fraternal Tribunes, 215 Ill. 190, 74 N. E. 121, 106 Am. St. Rep. 160. But the ultra vires contract may be disaffirmed, and a recovery allowed under the common counts in accordance with the federal rule. Leigh v. American Brake Beam Co., supra; United States Brewing Co. v. Dolese & Shepard Co., 259 Ill. 274, 102 N. E. 753, 47 L. R. A. (N. S.) 898.

[78] Wright v. Pipe Line Co., 101 Pa. 204, 47 Am. Rep. 701; Dewey v. Toledo, A. A. & N. M. Ry. Co., 91 Mich. 351, 51 N. W. 1063; Towers Excelsior & Ginnery Co. v. Inman, 96 Ga. 506, 23 S. E. 418; and other cases in note 77, supra.

[79] Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; Watts Mercantile Co. v. Buchanan, 92 Miss. 540, 46 South. 66.

[80] Steam Nav. Co. v. Weed, 17 Barb. (N. Y.) 378; Logan v. Texas Building & Loan Ass'n, 8 Tex. Civ. App. 490, 28 S. W. 141; Gorrell v. Home Life Ins. Co. of New York, 11 C. C. A. 240, 63 Fed. 371; Poock v. Lafayette Bldg. Ass'n, 71 Ind. 357; Pancoast v. Travelers Ins. Co., 79 Ind. 172.

[81] Magee v. Pacific Imp. Co., 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199.

[82] State Board of Agriculture v. Citizens' St. Ry. Co., 47 Ind. 407, 17 Am. Rep. 702.

the defense should not be allowed.[83] So, where a corporation has entered into a partnership, and the other partner has fully performed, it must account.[84] So where an incorporated Chamber of Commerce contracted for the holding of a Chautauqua meeting, and the contract was carried out by the other party thereto, in view of the fact that there was nothing against public policy in promoting a Chautauqua, the defense of ultra vires was not allowed to prevail.[85] And where a corporation contracted to pay plaintiff a commission for securing a factory site for it, and this site he later actually acquired, although the contract was in excess of the charter powers of the defendant, it was held that, since it had received a benefit under the contract, it could not set up ultra vires as a defense when sued thereon.[86]

Same—Action Maintainable by the Corporation

According to this doctrine, as shown by the illustrations referred to in the preceding paragraph, the right of action is not limited to the other party to the contract, but the corporation may maintain an action where it has performed its part of the contract. "It is very well settled," said the New York court in a leading case, "that a corporation cannot avail itself of the defense of ultra vires when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. * * * The same rule holds e converso. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation." [87]

[83] Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134. In an action by a member of a building association on his matured certificate, it was no defense that defendant was unauthorized by the statute under which it was organized to make a contract to pay a fixed sum thereon at maturity of the certificate. Vought v. Eastern Bldg. & Loan Ass'n, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761.

[84] Boyd v. American Carbon-Black Co., 182 Pa. 206, 37 Atl. 937.

[85] BLACKWOOD v. LANSING CHAMBER OF COMMERCE, 178 Mich. 321, 144 N. W. 823, Wormser Cas. Corporations, 160.

[86] Seamless Pressed Steel & Mfg. Co. v. Monroe, 57 Ind. App. 136, 106 N. E. 538.

[87] Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504. See, also, BATH GASLIGHT CO. v. CLAFFY, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664, Wormser Cas. Corporations, 162; Bond v. Terrell Cotton & Woolen Mfg. Co., 82 Tex. 309, 18 S. W. 691; Eckman v. Chicago, B. & Q. R. Co., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750; Mutual Trust Co. v. Stern, 235 Pa. 202, 83 Atl. 614.

Same—Necessity for Performance by the Plaintiff

The courts which hold this doctrine require that there shall have been some performance on the part of the plaintiff which will render it unjust and inequitable to permit the defendant to set up the ultra vires character of the contract in defense.[88] They will not, save in a few jurisdictions, lend their aid to enforce an ultra vires contract that is wholly executory.[89] And the fact that the contract has been partly performed on one or both sides does not always require enforcement as to the residue. It will not be enforced unless its enforcement is necessary to do justice. Thus, where a corporation empowered to purchase material for manufacturing purposes purchased a quantity of material for the purpose of selling it again on speculation, the seller knowing of its purpose, it was held that the contract was void; that either party could repudiate it after part performance by both parties, and on repudiation of it by the seller, and in a suit by him to recover the value of the material already delivered, the corporation could not recover damages for his failure to perform the residue.[90]

Same—The Ground of This Doctrine

This doctrine is generally said to rest upon an equitable estoppel. "We are aware that the courts have been very slow to concede that a defendant, setting up as a defense the ultra vires of a contract, where said contract was clearly not authorized, should be held liable on the contract, since this would appear to sustain the enforcement of an unauthorized contract, and therefore the cases show that whenever the courts would avoid this seeming inconsistency by resting the recovery upon some other ground they have done so. This has often led to equal inconsistency in other directions. The true ground would seem to be that of equitable estoppel, whereby the defendant is not permitted to rely upon or show the invalidity of the contract. In such case, the contract is assumed by the court to be valid; the party seeking to avoid it not being permitted to attack its character in this respect." [91] The use of the

[88] BLACKWOOD v. LANSING CHAMBER OF COMMERCE, 178 Mich. 321, 144 N. W. 823, Wormser Cas. Corporations, 160.

[89] Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; Bosshardt & Wilson Co. v. Crescent Oil Co., 171 Pa. 109, 32 Atl. 1120; Vermont Farm Machinery Co. v. De Sota Co-operative Creamery Co., 145 Iowa, 491, 122 N. W. 930 (semble).

[90] Day v. Spiral Springs Buggy Co., 57 Mich. 151, 23 N. W. 628, 58 Am. Rep. 352. See also Marshalltown Stone Co. v. Des Moines Brick Mfg. Co., 149 Iowa, 141, 126 N. W. 190.

[91] Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134. See, also, BLACKWOOD v. LANSING CHAMBER OF COMMERCE, 178 Mich. 321, 144 N. W. 823, Wormser Cas. Corporations, 160; Kellogg-

term "estoppel," however, is open to criticism.[92] A person dealing with a corporation is charged with notice of the limitations of its powers,[93] and it is not easy to raise an estoppel in his favor.[94] It is still more difficult to raise an estoppel in favor of the corporation, which cannot have been misled by the other party to the ultra vires contract in respect to its own powers.[95]

The reasons by which the courts have been influenced, however, are obvious. It was said by Chief Justice Comstock: Commercial manufacturing, and trading corporations "are brought into relation with almost every member of the community, and I think it greatly to be desired that in laying down the rules of law which are to govern in such relations, we should avoid a system of destructive technicalities. Those rules should be founded in the principles of justice which are recognized in other and analogous dealings among men." [96] It would be carrying the doctrine concerning ultra vires contracts to an unwarranted extent, said the Indiana court,

Mackay Co. v. Havre Hotel Co., 199 Fed. 727, 118 C. C. A. 165 (in the last cited case a federal court seems to apply the doctrine of estoppel to deny the ultra vires contract).

[92] See 9 Harv. L. R. 269; 14 Harv. L. R. 337.

[93] Ante, p. 217. But see Denver Fire Ins. Co. v. McClelland, supra, where Stone, J., observes that "this constructive notice is of a very vague and shadowy character." See, also, Bissell v. Michigan Southern & N. Q. R. Co., 22 N. Y. 259, where Comstock, J., observes that "a traveler from New York to the Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations," in order to satisfy himself that the railroad companies are not operating their railroads in an ultra vires manner.

[94] But in Voris v. Star City Bldg. & Loan Assn., 20 Ind. App. 630, 50 N. E. 779, it is said: "One who deals with a corporation is presumed to know the powers and limitations of its authority, and hence is estopped to plead its want of authority."

[95] In Harris v. Independence Gas Co., 76 Kan. 750, 92 Pac. 1123, 13 L. R. A. (N. S.) 1171, in speaking of the cases which allow enforcement of the ultra vires contract where it is executed by one party, it was said: "These cases have been criticised for the use they make of the word 'estoppel' as descriptive of the principle upon which they are based. It is argued that as a corporation must know the terms of its own charter, and as one dealing with it is charged with like knowledge, neither party to an ultra vires contract can be misled in that respect, and therefore there must always be lacking an essential element of what could with technical accuracy be called estoppel. This, however, is a mere question of terminology. The requirement that one shall be consistent in conduct—shall not occupy contradictory positions—shall not retain the advantages of a transaction and reject its burdens—is often spoken of as a form of estoppel. The term is convenient, and, if inaccurate, is not misleading. This rule of estoppel affords a good working hypothesis to accomplish just results."

[96] Per Comstock, C. J., in Bissell v. Michigan Southern & N. Q. R. Co., 22 N. Y. 259.

"to hold that a corporation might obtain the money of another, and, with the fruits of the contract in its treasury, interpose the defense of ultra vires; or, having used the money with the consent or acquiescence of its stockholders, ask that the lender be restrained from collecting it back, on the ground that the money was obtained in violation of the charter of the corporation. Like natural persons, corporations must be held to the observance of the recognized principles of common honesty and good faith, and these principles render the doctrine of ultra vires unavailing when its application would accomplish an unjust end, or result in the perpetration of a legal fraud. After a corporation has received the fruits which grow out of the performance of an act ultra vires, and the mischief has all been accomplished, it comes with an ill grace then to assert its want of power to do the act or make the contract, in order to escape the performance of an obligation it has assumed." [97] "There are few rules," said Chief Justice Gilfillan, "better settled or more strongly supported by authorities, with fewer exceptions, in this country, than that when a contract by a private corporation, which is otherwise unobjectionable, has been performed on one side, the party which has received and retained the benefits of such performance shall not be permitted to evade performance on the ground that the contract was in excess of the purpose for which the corporation was created. The rule may not be strictly logical, but it prevents a great deal of injustice." [98] It is not necessary that the promisee in the ultra vires contract receive the benefits and fruits of the contract in order that the promisor may enforce it. It is sufficient, under well-known principles of contract law, if the promisee has acted on the faith of the promise to his disadvantage or detriment.[99]

[97] Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412. "The rule requiring the observance of good faith and fair dealing is as applicable to corporations as to individuals. Neither can involve others in onerous engagements, and, with the consideration of the contract in their possession, disavow their acts, to the damage and discomfiture of others, unless it clearly appears that there was an absolute want of capacity to make the contract." Louisville, N. A. & C. Ry. Co. v. Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674. And see Field v. Eastern Bldg. & Loan Ass'n, 117 Iowa, 185, 90 N. W. 717; Vermont Farm Machinery Co. v. De Sota Co-operative Creamery Co., 145 Iowa, 491, 122 N. W. 930; Latulippe v. New England Investment Co., 77 N. H. 31, 86 Atl. 361; Hanna v. Chicago, R. I. & P. R. Co., 89 Kan. 503, 132 Pac. 154; Seamless Pressed Steel & Mfg. Co. v. Monroe, 57 Ind. App. 136, 106 N. E. 538.

[98] Seymour v. Chicago Guaranty Fund Life Soc., 54 Minn. 147, 55 N. W. 907.

[99] Kanneberg v. Evangelical Creed Congregation, 146 Wis. 610, 131 N. W. 353, 39 L. R. A. (N. S.) 138, Ann. Cas. 1913C, 376. See, contra, Marshalltown Stone Co. v. Des Moines Brick Mfg. Co., 149 Iowa, 141, 126 N. W. 190, where,

In Appleton v. Citizens' Cent. Nat. Bank,[1] the same result was reached in the New York court and in the federal court. The Cooper Exchange Bank, which the plaintiff, Appleton, represented in the capacity of receiver, loaned one Samuels $12,000, the repayment of which was guaranteed by the defendant, the Citizens' Central Bank. Samuels was indebted at the time to the defendant, the Central Bank, in the sum of $10,000, and the defendant had guaranteed the loan made by the Cooper Bank to Samuels in consideration of Samuels' promise to pay the defendant out of the $12,000, the debt of $10,000 owing to it. This Samuels did, and then failed to repay the Cooper Bank the loan: Whereupon, the plaintiff, Appleton, as receiver for the Cooper Bank, sued the Central Bank on its guaranty. The defense of ultra vires was pleaded. The receiver, Appleton, disclaimed any intention to hold the defendant beyond the amount actually received by it. Cullen, C. J., in delivering the opinion of the New York court in plaintiff's favor, said: "The law which obtains in this state and in several other jurisdictions is that, where one party has received the full benefit of an ultra vires contract, it cannot plead the invalidity of the contract to defeat an action upon it by the other party.[2] A contrary rule prevails in the Supreme Court of the United States. There it is held that the execution of an ultra vires contract by one party cannot confer upon it validity or authorize the other party to sue on its obligations,[3] but at the same time it is also held that a party cannot retain money or property received by it under an ultra vires contract when it refuses to perform that contract.[4] * * * In this case, as the plaintiff disclaims any right to recover beyond the amount actually received by the defendant, the result is exactly the same, whether we adopt one rule or the other." Upon appeal

the corporation not having received any benefit from the performance of the ultra vires contract by the other party, it was not estopped to plead that the contract was in excess of its corporate powers. W. C. Bowman Lumber Co. v. Pierson (Tex. Civ. App.) 139 S. W. 618 (semble). See, also, Visalia Gas & Electric Light Co. v. Sims, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105; Deaton Grocery Co. v. International Harvester Co. of America, 47 Tex. Civ. App. 267, 105 S. W. 556.

[1] APPLETON v. CITIZENS' CENT. NAT. BANK OF NEW YORK, 190 N. Y. 417, 83 N. E. 470, 32 L. R. A. (N. S.) 543, Wormser Cas. Corporations, 169; CITIZENS' CENTRAL NAT. BANK OF NEW YORK v. APPLETON, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443, Wormser Cas. Corporations, 172.

[2] BATH GASLIGHT CO. v. CLAFFY, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664, Wormser Cas. Corporations, 162.

[3] CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, Wormser Cas. Corporations, 153.

[4] Logan County Nat. Bank v. Townsend, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107.

to the Supreme Court of the United States, plaintiff's judgment was again affirmed; Harlan, J., saying: "Whatever may be said as to the validity of the written guaranty, now alleged to be illegal the judgment can be supported as based wholly on the implied contract which made it the duty of the Central Bank, under the facts disclosed, to account to the Cooper Exchange Bank for the money obtained from the latter in execution of the agreement made by the former with the borrower."

In dealing with ultra vires contracts it might have been possible for the courts to adhere to the doctrine that an ultra vires contract is void because of the corporation's inherent limitations, or, in the language of Mr. Justice Gray, that an ultra vires contract is "unlawful and void * * * because the corporation, by the law of its creation, is incapable of making it." [5] Such is the doctrine, indeed, declared by the federal courts, although, as we have seen, they have not always found it possible to adhere to it.[6] Again, it might have been possible to treat ultra vires contracts as illegal, on the ground that a corporation is prohibited from exercising any power which its charter does not expressly or impliedly authorize; but this view has not commended itself to the courts.[7] On the other hand, it might have been possible to hold that lack of authorization is not equivalent either to incapacity or to statutory prohibition rendering the contract illegal, and that consequently a corporation has the same power to contract as a natural person, subject only to the right of the state to maintain proceedings directly against the corporation to enforce a forfeiture of its charter for misuser of its powers.[8] In this view, all corporate contracts, including executory contracts, in the absence of objections by stockholders and creditors, would be enforced, unless they were unlawful in the sense that contracts between individuals may be unlawful. But

[5] CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, Wormser Cas. Corporations, 153.

[6] Ante, p. 216.

[7] "The term 'illegal,' which is frequently used to describe a contract made by a corporation in excess of its corporate powers, in most cases means simply that the contract is unauthorized, or one which the corporation had no legal capacity to make. Such a contract may be illegal in the true and proper sense, but it may also be one involving no moral turpitude and offending against no express statute. The inexact and misleading use of the word 'illegal,' as applied to contracts of corporations ultra vires only, has been frequently alluded to." BATH GASLIGHT CO. v. CLAFFY, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664, Wormser Cas. Corporations, 162. And see article by L. Maurice Wormser, 24 Yale Law Journal, 177 et seq.

[8] See article, The Unauthorized or Prohibited Exercise of Corporate Power, by George Wharton Pepper, 9 Harv. L. R. 255.

only the Kansas court has committed itself to this doctrine, and, while the tendency of the courts is to enforce ultra vires contracts which have been performed by one side when the enforcement will advance justice,[9] almost all courts refuse to enforce ultra vires contracts which are purely executory.[10] This apparent inconsistency is no doubt to be explained by the views of public policy generally entertained by the courts. They deem it unsafe to rely upon the power of the state to enforce a forfeiture of the charter as the sole means of protecting the interest of the public in keeping a corporation within the limits which its charter imposes upon it, and for this reason they refuse, as a rule, to enforce ultra vires contracts; but, if the contract has been fully performed on one side, this consideration is outweighed by other considerations of public policy based upon the demands of justice.[11]

Same—Specific Performance

It has been held that a court of equity will not compel specific performance of an ultra vires contract, even though it may have been partly performed by the complainant. In a Michigan case, a bank had entered into an ultra vires contract to purchase land from a third person, and sell it to the defendant. After the land had been purchased by the bank, the defendant refused to carry out the contract, and the bank brought suit in equity for specific performance. The court held that the relief could not be granted, as it could not, consistently with equitable principles, assist the bank to carry into execution a contract to violate its charter, and that the purchase of the property by the bank after the contract was made could make no difference. "Equity," it was said, "will aid no one in doing that which is unlawful." [12]

[9] Ante, p. 223. [10] Ante, p. 215.

[11] See 9 Harv. L. R. 255; 18 Harv. L. R. 461; 19 Harv. L. R. 608. "We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void, but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent, and that its recovery may be enforced by action on the covenant. Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts, and to permit a lessee of a corporation to escape the payment of rent by pleading the incapacity of the corporation to make the lease, although he has had the undisturbed enjoyment of the property, would be, we think, most inequitable and unjust." BATH GASLIGHT CO. v. CLAFFY, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664, Wormser Cas. Corporations, 162.

[12] Bank of Michigan, President, etc., of, v. Niles, Walk. Ch. (Mich.) 99; Id., 1 Doug. (Mich.) 401, 41 Am. Dec. 575. And see Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513; PRAIRIE SLOUGH FISHING & HUNTING CLUB v. KESSLER, 252 Mo. 424, 159 S. W. 1080, Wormser Cas. Corporations, 146.

Progressive Kansas Doctrine

In Harris v. Independence Gas Co.,[18] suit was brought against the Independence Company to cancel part of an executory contract for the lease of oil fields. The contract was admittedly ultra vires, but its cancellation was not allowed. Mason, J., discussed the so-called estoppel doctrine whereby a recovery is allowed upon the ultra vires contract in cases where the contract has been executed by one party. He then said: "It might seem reasonable that a system which attempts not only to protect a party to an ultra vires contract from actual loss; but, where equity requires it, to insure to him the actual fruits of his bargain, ought for the sake of completeness and symmetry to enable him to insist upon the performance even of a purely executory contract. It certainly seems against conscience that one who has entered into a contract in the expectation of deriving a profit from it may upon discovering the probability of loss repudiate it and escape responsibility by raising the question of want of corporate capacity. Parties to a contract who deal with each other upon the assumption that one of them is a corporation are ordinarily precluded from questioning the validity of its organization." It was then pointed out that the question whether a corporation has power under its charter to engage in a particular business is so like the question whether a body has capacity to act as a corporation at all as to afford good ground for arguing that whatever circumstances prevent a party other than the state from questioning corporate existence, should likewise prevent a party other than the state from questioning corporate capacity to contract. In conclusion, it was said: "The doctrine that only the state can challenge the validity of acts done under color of a corporate charter, if accepted, must necessarily protect an executory contract from collateral attack equally with one that has been executed. The court is convinced of the soundness of the view that in the absence of special circumstances affecting the matter neither party to even an executory contract should be allowed to defeat its enforcement by the plea of ultra vires. The doctrine is logical in theory, simple in application, and just in result."

The basis of the decision is not upon the ground of equitable estoppel, but upon grounds of public policy. Few courts have gone this far, for it will mean, if this view gains ground, that the question of want of corporate power, just like the question of legality of corporate organization, may only be raised by the sovereign state. And if the state is satisfied with the interpretation of the charter adopted by the corporation, and manifests its acqui-

[18] 76 Kan. 750, 92 Pac. 1123, 13 L. R. A. (N. S.) 1171.

escence by not prosecuting the corporation, and if no question of public policy is involved, no reason is apparent why a third party, one who has actually dealt with the corporation, should be allowed to raise the issue of corporate capacity. The logic of the Kansas case is undeniable, and though courts have not as yet followed it, the tendency of enlightened modern jurists is unmistakably towards it.

Assent of Shareholders

If the doctrine of ultra vires is strictly applied, it must follow that an ultra vires contract, being void, cannot be rendered binding upon the corporation by the assent or ratification of all the shareholders.[14] The contract cannot be ratified by either party, because it could not have been authorized by either.[15] "It is unnecessary to consider the effect of dissentient shareholders," it has been said, "for, if the company is a corporation only for a limited purpose and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render liable their corporate funds."[16] On the other hand, a stockholder may be precluded from obtaining relief against an ultra vires transaction if he has assented to it, or by his acquiescence in it, and to that extent he is estopped from objecting to it.[17] "A corporation may do acts which affect the public to its harm, inasmuch as they are per se illegal or are malum prohibitum," said Folger, J., in a leading case.[18] "Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interests of stockholders. They may be good by the assent of the stockholders, so that strangers to the stockholders, dealing in good faith with the corporation, will be protected in reliance on those acts." And in accordance with this view some courts, discarding the view that a corporation cannot do any act in excess of its express or implied powers, have held that in a case where the rights of the state or of the public are not otherwise involved, and where the rights of creditors are not con-

[14] Steiner v. Steiner Land & Lumber Co., 120 Ala. 128, 26 South. 494.

[15] CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, Wormser Cas. Corporations, 153. And see East Anglian Rys. Co. v. Eastern Counties Ry. Co., 11 C. B. 775; Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950; Germania Safety Vault & Trust Co. v. Boynton, 19 C. C. A. 118, 71 Fed. 797; First Nat. Bank v. Hawkins, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1107.

[16] Per Jarvis, C. J., in East Anglian Ry. Co. v. Eastern Counties Ry. Co., supra.

[17] Post, p. 502.

[18] Kent v. Quicksilver Min. Co., 78 N. Y. 159.

cerned, as where none exist, and all the stockholders have assented, a plea on the part of the corporation that a contract is ultra vires cannot be sustained.[19] Thus it has been held that, while accommodation paper given by a corporation is not valid as against corporate creditors or dissenting stockholders, a corporation cannot be heard to plead that an accommodation note given with the consent of all the stockholders, the corporate creditors not being injured, was ultra vires.[20]

ILLEGAL CONTRACTS

68. Contracts of a corporation may be illegal on other grounds than because they are ultra vires; that is, unlawful in the sense in which a contract by an individual may be unlawful. A contract which is illegal in this sense is subject to the same rules that govern illegal contracts by individuals. Generally, no action can grow out of it.

Contracts of corporations may not only be ultra vires, but like the contracts of an individual, they may, on other grounds, be illegal in the sense of the maxim, "Ex turpi causa non oritur actio." In the absence of express statutory provision to the contrary, a corporation can make no contract which would be illegal if it were made by an individual. Thus a contract by a corporation, like a contract by an individual, is illegal if it contemplates the publication of a libel, or a fraud upon third persons, or the doing of an act which is prohibited by statute under a penalty, or if it is contrary to public policy, as in the case of wagering contracts, contracts in restraint of trade, etc. A corporation authorized by its charter to engage in the business of manufacturing and selling an article or product, and to own the property necessary for that purpose, has no right to buy up the business and property of all the other persons and companies engaged in the business, for the purpose of obtaining a monopoly; and, if it does so, quo warranto proceedings may be maintained by the state to oust it from the exercise of its

[19] Breslin v. Fries-Breslin Co., 70 N. J. Law, 274, 58 Atl. 313; Perkins v. Trinity Realty Co., 69 N. J. Eq. 723, 61 Atl. 167, affirmed 71 N. J. Eq. 304, 71 Atl. 1135; Cole v. Cole Realty Co., 169 Mich. 347, 135 N. W. 329 (semble). See Taylor, Corp. §§ 269–274; Cook, Corp. § 3. And see cases in following note.

[20] Martin v. Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 25 N. E. 303; Perkins v. Trinity Realty Co., supra; Murphy v. Arkansas & L. Land & Improvement Co. (C. C.) 97 Fed. 723; Solomon Solar Salt Co. v. Barber, 58 Kan. 419, 49 Pac. 524; Moore v. Charles E. Morrell Co., 27 Misc. Rep. 235, 58 N. Y. Supp. 430. But see, contra, Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 12 Ga. App. 818, 79 S. E. 45.

franchise.[21] The principles of law which apply to illegal contracts are substantially the same where the contract is by a corporation as where it is by an individual. The student, therefore, must refer in this connection to works on the general law of contracts.[22] There are a few questions that are peculiar to corporations.

Even in those jurisdictions where the ultra vires contracts of a corporation are not regarded as illegal in the sense that no action can be maintained upon them, unless there is an express prohibition in the charter or in some statute, there are some exceptions. An ultra vires contract that is not expressly prohibited will nevertheless be declared illegal if it is in its nature and effect clearly contrary to public policy.[23] Thus it has been held in New York that a contract by which a bank, organized under the laws of the state, subscribes for or agrees to purchase stock in a railroad company, and so to be a stockholder therein, and subject to liability as such, is not merely ultra vires, but is illegal, though not expressly prohibited. "The spirit of the law," it was said, "as well as a sound public policy, forbid these institutions from risking the moneys intrusted to their care in doubtful speculations or enterprises."[24]

Contracts Disabling Corporations from Performing Duties to the Public

A railroad, steamboat, gas, water, or other like corporation can make no contract which will interfere with its performance of the duties which it owes to the public. Such a contract is not merely ultra vires. It is illegal, and absolutely void, as being contrary to public policy. It is a well-settled principle "that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."[25]

[21] Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; post, p. 301. See, also, Dunbar v. American Telephone & Telegraph Co., 224 Ill. 9, 79 N. E. 423, 115 Am. St. Rep. 132, 8 Ann. Cas. 57; State ex rel. Hadley v. Bankers' Trust Co., 138 S. W. 669, 157 Mo. App. 557.

[22] See Clark, Cont. (2d Ed.) 321–342.

[23] President, etc., of Village of Kilbourn City v. Southern Wisconsin Power Co., 149 Wis. 168, 135 N. W. 499.

[24] Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14.

[25] Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950. And see York

Effect of Express Prohibition in Charter

If the charter of a corporation, instead of merely not authorizing a certain contract, expressly prohibits it, the contract stands upon a different footing from one that is merely ultra vires. As a rule, it is illegal and void, and no action can be maintained upon it, or grow out of it. The maxim, "Ex turpi causa non oritur actio," applies.[26] In White v. President, etc., of Franklin Bank [27] the defendant had taken a deposit for a certain time, and promised to repay it at the expiration of that time, in violation of a statute declaring that no bank should make or issue any note, bill, check, draft, acceptance, certificate, or contract, in any form whatever, for the payment of money, at any future day certain. It was held that the transaction was illegal and void, because expressly prohibited by statute, and that no action could be maintained on the contract.

If the charter of a corporation, including statutes applicable to it, merely prohibits certain contracts, and does not declare that conveyances in violation of the prohibition shall be void, and the purpose of the statute does not show an intention on the part of the Legislature to make them void, they are binding; and objection on the ground that they were prohibited can only be raised by the state in a direct proceeding against the corporation to forfeit its charter.[28] The National Banking Act impliedly prohibits national banks from lending money on real estate. In National Bank v. Matthews [29] a loan was made by a national bank on a note secured by a deed of trust on real estate, and a maker of the note and

& M. Line R. Co. v. Winans, 17 How. (U. S.) 31, 15 L. Ed. 27; Atlantic & Pacific Telegraph Co. v. Union Pac. Ry. Co. (C. C.) 1 McCrary, 188, 1 Fed. 745, Black v. Delaware & R. Canal Co., 22 N. J. Eq. 130. In Thomas v. Railroad Co., supra, one railroad company had leased its road to another, and the transaction was held illegal as against public policy. In Atlantic & Pacific Telegraph Co. v. Union Pac. Ry. Co., supra, a railroad company, authorized to also construct and operate a telegraph line, leased the telegraph line to another corporation, and the lease was held illegal and void. In Visalia Gas & Electric Light Co. v. Sims, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105, a contract by which a corporation organized to operate gas and electric light works leased them to another was held ultra vires, and void as against public policy.

[26] Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333; White v. President, etc., of Franklin Bank, 22 Pick. (Mass.) 181; Mutual Guaranty Fire Ins. Co. v. Barker, 107 Iowa, 143, 77 N. W. 868, 70 Am. St. Rep. 149.

[27] 22 Pick. (Mass.) 181.

[28] Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; National Bank of Genesee v. Whitney, 103 U. S. 99, 26 L. Ed. 443; Kerfoot v. Farmers' & Merchants' Bank, 218 U. S. 281, 31 Sup. Ct. 14, 54 L. Ed. 1042; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Butterworth & Lowe v. Kritzer Mill. Co., 115 Mich. 1, 72 N. W. 990.

[29] 98 U. S. 621, 25 L. Ed. 188.

grantor in the deed filed a bill in equity to enjoin a sale under the deed to satisfy the note. The Supreme Court of the United States, assuming the transaction to be within the prohibition, held that the statute, in prohibiting such a contract, did not make it void, and that the state only could object to the excess of power in a proceeding to forfeit the bank's charter. "We cannot believe," said the court, "it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact should occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress. This has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government." [80] So where a bank charter prohibited directors or other officers of the bank from borrowing money from the bank under penalty of fine and imprisonment, and an officer borrowed money from the bank in violation thereof, it was held that the claim of the bank to recover the loan was enforceable.[81] So, where the charter or a statute limits the amount of indebtedness which a corporation may incur, it has been held that a debt contracted in excess of the amount is not void, although there are decisions to the contrary.[82]

[80] Mr. Justice Miller dissented, holding that it was the intention of congress to make such contracts void. The case was adhered to and followed in National Bank of Genesee v. Whitney, supra.

[81] Lester v. Howard Bank, 33 Md. 558, 3 Am. Rep. 211.

[82] Beach v. Wakefield, 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197; Sioux City Terminal R. & W. Co. v. Trust Co. of N. A. (Iowa Statute) 173 U. S. 99, 19 Sup. Ct. 341, 43 L. Ed. 628; Sherman Center Town Co. v. Morris, 43 Kan. 282, 23 Pac. 569, 19 Am. St. Rep. 134. Contra, Bell & Coggeshall Co. v. Kentucky Glass Works Co., 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180. Where the articles of defendant corporation provided that the highest indebtedness it should at any time incur was $1,000, and its secretary, with authority to borrow, executed its note and borrowed from plaintiff $1,500 which the secretary embezzled, and defendant received no benefit, plaintiff could not recover the $1,500, because it was in excess of the corporate powers, of which plaintiff was chargeable with notice; but as he was not guilty of bad faith, and the contract was not in violation of any positive law, and did not involve moral turpitude or any consideration of public policy, the transaction was void only as to the excess, and he might recover to the amount of $1,000, as for money loaned. Kraniger v. People's Bldg. Soc., 60 Minn. 94, 61 N. W. 904.

"If a statute expressly forbids a corporation to make a certain contract, the contract is void, even though not expressly declared to be so, and is incapable of ratification; and that the contract is void, as unlawful, may be pleaded by any one to an action founded directly and exclusively on the con-

Effect of Illegality—Actions in Disaffirmance of Illegal Contract

It is a well-settled doctrine of the law of contracts, that where money has been paid by one party to another under a contract that is illegal as involving moral turpitude, both parties being particeps criminis, no action can be maintained to recover it back. The same is true generally where the contract is illegal because prohibited by statute, or because contrary to public policy. The rules of law governing these cases may be thus stated:

In no case can an action be sustained to enforce the illegal agreement itself.[33] And, as a general rule, where an illegal agreement has been executed in whole or in part by the payment of money, or the transfer of property, or rendition of services, the court will not lend its aid to enable the party, even in disaffirmance of the contract, to recover back the money, or to recover the value of the goods or services.[34] The latter rule is subject to some exceptions.[35]

In some cases, where the contract is merely malum prohibitum, a locus pœnitentiæ remains, and while the prohibited promise is unperformed money or goods delivered in consideration of it may be recovered. This exception is not at all peculiar to contracts of corporations.[36]

tract, unless (1) the statute expressly states what the consequences of violating it shall be, and those consequences are other than that the contract is void; or (2) the statutory prohibition was evidently imposed for the protection of a certain class of persons who alone may take advantage of it; or (3) to adjudge the contract void and incapable of forming the basis of a right of action would clearly frustrate the evident purposes of the prohibition itself." Taylor, Priv. Corps. (5th Ed.) § 297.

[33] Clark, Cont. (2d Ed.) 336. See Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302; Chicago, I. & L. R. Co. v. Southern Indiana R. Co. (Ind. App.) 70 N. E. 843.

[34] Clark, Cont. (2d Ed.) 336.

[35] In New York it is held that where a corporation discounts commercial paper without authority it may recover the money loaned, though the securities are void. "It is no doubt the general rule of law," said the court in such a case, "that no right of action can spring out of an illegal contract. And the rule that an illegal contract cannot be enforced applies as well to contracts malum prohibitum as to contracts malum in se. But it does not necessarily follow that all the consequences attending a contract which is contrary to public morals, or founded on an immoral consideration, attend and affect a contract malum prohibitum merely. The law in the former case will not undertake to relieve the parties from the position in which they have placed themselves, or to adjust the equities between them. But in the latter case, while the law will not enforce the prohibited contract, it will take notice of the circumstances, and, if justice and equity require a restoration of money or property received by either party thereunder, it will, and in many cases has, given relief." Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531. See, also, Knowlton v. Congress & E. Spring Co., 57 N. Y. 518. Contra, Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347.

[36] Clark, Cont. (2d Ed.) 338.

Again, where the contract is only illegal because prohibited by statute, and the parties are not in pari delicto, the one who is less guilty may disaffirm the contract, and recover what he has parted with. Such is the case where the party asking relief was induced to enter into the contract under the influence of fraud or duress.[37] So it is, also, where the statutory prohibition was intended for the protection of the party asking relief.[38] As illustrating this principle may be mentioned cases in which banks or other corporations are prohibited from issuing notes, bills, or other securities. It is held by some courts in these and similar cases that the prohibition is intended to protect the public against the prohibited securities, that the corporation is the only offender, and that the persons who receive them may recover the money paid for them, not being in pari delicto. "The corporation issuing the bills contrary to law and against penal sanction is deemed more guilty than the members of the community who receive them, whenever the receiving of them is not expressly prohibited. The latter are regarded as the persons intended to be protected by the law; and if they have not themselves violated an express law in receiving the bills, the principles of justice require that they should be able to recover the money received by the bank for them." [39]

Most courts hold that where the direct object of a contract is innocent in itself, but the intention of one of the parties is unlawful—as where goods are bought or money borrowed to be used for an unlawful purpose, which is not malum in se—the fact that the other party knows of the unlawful purpose does not render the agreement illegal, so as to prevent his maintaining an action thereon, unless it is made part of the contract that the money or goods shall be used for such purpose, or unless he has done something in aid or furtherance of the unlawful design beyond merely entering into the contract.[40] And this principle has been applied to contracts with a corporation, where the corporation intended to use the money or goods obtained by it under the contract for an illegal purpose.[41]

[37] Clark, Cont. (2d Ed.) 340.

[38] Clark, Cont. (2d Ed.) 341. Thomas v. Richmond, 12 Wall. (U. S.) 349, 20 L. Ed. 453; White v. President, etc., of Franklin Bank, 22 Pick. (Mass.) 181; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132 (compare Chesebrough v. Conover, 140 N. Y. 382, 35 N. E. 633); Oneida Bank v. Ontario Bank, 21 N. Y. 490.

[39] Thomas v. Richmond, supra.

[40] Clark, Cont. (2d Ed.) 327-332, where the cases are collected, and the conflict in the decisions of the different states is pointed out.

[41] Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132. And see Curtis v. Leavitt, 15 N. Y. 9.

CHAPTER VII

POWERS AND LIABILITIES OF CORPORATIONS (Continued)

69. Liability for Torts.
70–72. Responsibility for Crime—Contempt of Court.

LIABILITY FOR TORTS

69. A private corporation is liable for the torts of its servants and agents committed in the course of their employment, to the same extent as a natural person would be. And it may be liable for wrongs involving a mental element, as malicious wrongs, fraud, libel, and the like.

At one time it was doubted whether a corporation could be sued for a tort, but it is now settled that it may be liable for torts to the same extent as a natural person would be under the same circumstances. It is said that a corporation has no power to do an act not authorized by its charter, and, as we have seen, this is true in a sense; but it is not meant by this that it cannot do wrong.[1] The word "power" is used in the sense of "authority." A corporation has no right to exceed the powers conferred upon it, but it has the capacity to do so; and if, in doing so, it commits a tort, it is as fully liable as a natural person would be under similar circumstances.[2] "Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of ultra vires has no application." [3]

[1] Ante, p. 202; post, p. 249.

[2] Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675; Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439; New York, L. E. & W. R. Co. v. Haring, 47 N. J. Law, 137, 54 Am. Rep. 123; Philadelphia, W. & B. R. Co. v. Quigley, 21 How. (U. S.) 202, 16 L. Ed. 73; Yarborough v. Bank, 16 East, 6; Hutchinson v. Western & A. R. Co., 6 Heisk. (Tenn.) 634; Maund v. Canal Co., 4 Man. & G. 452; Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Eastern Counties Ry. Co. v. Broom, 6 Exch. 314; Green v. Omnibus Co., 7 C. B. (N. S.) 290; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467; Werner v. Hearst, 177 N. Y. 63, 69 N. E. 221; Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845; Mersey Docks & Harbour Board Trustees v. Gibbs, L. R. 1 H. L. 93; Citizens' Life Ass. Co. v. Brown, L. R. [1904] App. Cas. 423.

[3] Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008; First Nat. Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750; Burke v. State, 64 Misc. Rep. 558, 119 N. Y. Supp. 1089; First Nat. Bank of Decatur

The maintenance of a ferry by an educational corporation is ultra vires. The corporation is nevertheless liable for injuries to a passenger being transported thereon for hire, caused by the negligence of the employé in charge.[4] As we shall see in a subsequent chapter, some courts do not hold a corporation liable for torts of employés in ultra vires transactions;[5] this is, however, the view of the minority.

The Court of Appeals of New York recently repudiated the idea that a corporation was relieved from liability for malpractice in carrying on the practice of dentistry in one of its departments merely because "it was beyond the corporate powers of the defendant to engage in the business."[6] It is submitted that this decision is supported, not only by the weight of the decided cases, but by every dictate of justice and sound reason. The interests of the community demand that corporations be held liable for all wrongs committed by them, irrespective of any question of ultra vires.

A corporation, being impersonal, cannot personally commit a tort. It can act only through an agent, but for torts committed by its agents and servants it is liable in the same manner as a natural person is liable for the torts of his agents and servants. "Wherever they can competently do or order any act to be done on their behalf, * * * they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others."[7] The tort must, of course, be within the general scope of authority of the agent at fault; otherwise, the corporate principal is not liable.[8] Thus a corporation may be liable in trover for the conversion of goods;[9] in trespass quare clausum fregit;[10] in trespass de bonis

v. Henry, 159 Ala. 367, 49 South. 97. But see Gunn v. Central R. R. Co., 74 Ga. 509; Bathe v. Decatur County Agriculture Soc., 73 Iowa, 11, 34 N. W. 484, 5 Am. St. Rep. 651.

[4] Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467. And see Chamberlain v. Southern California Edison Co., 167 Cal. 500, 140 Pac. 25.

[5] Post, p. 661.

[6] Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429. See, also, Bissell v. Michigan Southern & N. Q. R. Co., 22 N. Y. 258; Fishkill Sav. Inst. v. National Bank of Fishkill, 80 N. Y. 162, 36 Am. Rep. 595; Chesapeake & O. R. Co. v. Howard, 178 U. S. 153, 20 Sup. Ct. 880, 44 L. Ed. 1015.

[7] Yarborough v. Bank, 16 East, 6.

[8] Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Wells Fargo & Co. Express v. Sobel, 59 Tex. Civ. App. 62, 125 S. W. 925.

[9] Yarborough v. Bank, supra; Beach v. Fulton Bank, 7 Cow. (N. Y.) 485. Trespass for mesne profits. McCready v. Guardians of Poor of City of Philadelphia, 9 Serg. & R. (Pa.) 94, 11 Am. Dec. 667.

[10] Maund v. Canal Co., 4 Man. & G. 452.

asportatis;[11] in trespass for assault and battery, false imprisonment, etc.;[12] in case for obstructing, diverting, or polluting a water course;[13] and for nuisances generally.[14]

Liability in tort will also attach to a corporation for the negligence of its servants or agents in omitting to perform a duty resting upon the corporation.[15] And it may be liable for negligence in the performance of acts by its servants or agents. Thus it may be liable for negligence in the custody or use of a vicious dog, or other animate instrumentality, or of powder, poison, or other inanimate instrumentality. A railroad company is liable in tort for negligence in the running or management of its trains, or for keeping its premises in an unsafe condition. And any other private corporation which keeps its premises in an unsafe condition will be liable for injuries caused thereby.[16]

It has been contended that, since a corporation is merely an artificial being, without mind or soul, it cannot commit a tort involving a mental operation, and that it cannot, therefore, be liable for malicious wrongs, or wrongs involving a specific intent, such as libel, malicious prosecution, or fraud.[17] And, in the early days of the common law, such sophistry met with a measure of judicial approval. It is now well settled, however, that the mental attitude of its agents, like their acts, may be imputed to a corporation, and that a corporation may be guilty of malice in contemplation

[11] Maund v. Canal Co., supra.

[12] Eastern Counties Ry. Co. v. Broom, 6 Exch. 314; New York, L. E. & W. R. Co. v. Haring, 47 N. J. Law, 137, 54 Am. Rep. 123; Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571; Moore v. Fitchburg R. Corp., 4 Gray (Mass.) 465, 64 Am. Dec. 83; Krulevitz v. Eastern R. R. Co., 140 Mass. 573, 5 N. E. 500; Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146; Id., 3 N. M. (Johns.) 109, 2 Pac. 369; Southern Exp. Co. v. Platten, 93 Fed. 936, 36 C. C. A. 46; St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. 353; Medlin Milling Co. v. Boutwell (Tex. Civ. App.) 122 S. W. 442.

[13] Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675.

[14] Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739.

[15] Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467; Riddle v. Proprietors of Merrimack River Locks and Canals, 7 Mass. 169, 5 Am. Dec. 35; Mersey Docks & Harbour Board Trustees v. Gibbs, L. R. 1 H. L. 93; Hutchinson v. Western & A. R. Co., 6 Heisk. (Tenn.) 634; Townsend v. Susquehannah Turnpike Co., 6 Johns. (N. Y.) 90; Hooker v. New Haven & N. Co., 14 Conn. 146, 36 Am. Dec. 477; Werner v. Hearst, 177 N. Y. 63, 69 N. E. 221.

[16] See cases cited above.

[17] Childs v. Bank of Missouri, 17 Mo. 213.

of law.[18] Corporations, therefore, have been held liable for a libel published by their agents;[19] for a malicious criminal prosecution;[20] for a malicious and vexatious attachment;[21] and for con-

[18] 1 Jagg. Torts, 168; Green v. Omnibus Co., 7 C. B. (N. S.) 290; Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439; Merrills v. Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682; Vance v. Erie Ry. Co., 32 N. J. Law, 334, 90 Am. Dec. 665; Hypes v. Southern R. Co., 82 S. C. 315, 64 S. E. 395, 21 L. R. A. (N. S.) 873, 17 Ann. Cas. 620. See Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97.

[19] Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. Ed. 73; Bacon v. Michigan Cent. R. Co., 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372; Behre v. National Cash Register Co., 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320; Washington Gaslight Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543; Citizens' Life Ass. Co. v. Brown, L. R. [1904] App. Cas. 423; Hypes v. Southern R. Co., 82 S. C. 315, 64 S. E. 395, 21 L. R. A. (N. S.) 873, 17 Ann. Cas. 620. It has been said that one cannot commit slander by deputy, and hence that a corporation cannot commit slander. See 1 Jagg. Torts, 170; Eichner v. Bowery Bank, 24 App. Div. 63, 48 N. Y. Supp. 978. But it would clearly seem that a corporation is liable for slander, provided authorization or ratification can be shown. Gilbert v. Crystal Fountain Lodge, 80 Ga. 284, 4 S. E. 905, 12 Am. St. Rep. 255; Waters-Pierce Oil Co. v. Bridwell, 103 Ark. 345, 147 S. W. 64, Ann. Cas. 1914B, 837; Empire Cream Sep. Co. v. De Laval Dairy Supply Co., 75 N. J. Law, 207, 67 Atl. 711. And the decision in Eichner v. Bowery Bank, supra, has been expressly overruled in New York. See KHARAS v. BARRON C. COLLIER, INC., 171 App. Div. 388, 157 N. Y. Supp. 410, Wormser Cas. Corporations, 174. Where a corporation authorized its state agent to make a settlement with a subagent, it was not liable to the latter for slanderous statements made by the former pending the settlement, in the absence of evidence that the corporation expressly or impliedly authorized the statements or ratified them. Redditt v. Singer Mfg. Co., 124 N. C. 100, 32 S. E. 392. And see Kane v. Boston Mut. Life Ins. Co., 200 Mass. 265, 86 N. E. 302; Behre v. National Cash Register Co., 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320; Sun Life Assur. Co. of Canada v. Bailey, 101 Va. 443, 44 S. E. 692; International Text-Book Co. v. Heartt, 136 Fed. 129, 69 C. C. A. 127. The president of a corporation and the corporation can be sued in slander for damages caused by slanderous utterances by the president within the scope of his authority. Nunnamaker v. Smith, 96 S. C. 294, 80 S. E. 465. And it has been held that a corporation is liable for a slander uttered by its agent, while acting within the scope of his employment and in the actual performance of the duties thereof touching the matter in question, though the slander was not uttered with knowledge of the corporation or with its approval, and though it did not ratify the act of the agent. Rivers v. Yazoo & M. R. Co., 90 Miss. 196, 43 South. 471, 9 L. R. A. (N. S.) 931. And see, accord, Fensky v. Maryland Casualty Co., 264 Mo. 154, 174 S. W. 416.

[20] Turner v. Phœnix Ins. Co., 55 Mich. 236, 21 N. W. 326; Krulevitz v. Eastern R. R. Co., 140 Mass. 573, 5 N. E. 500; Reed v. Home Sav. Bank, 130 Mass. 445, 39 Am. Rep. 468; Copley v. Grover & Baker Sewing-Mach. Co., 2 Woods, 494, Fed. Cas. No. 3,213; Vance v. Erie Ry. Co., 32 N. J. Law,

[21] Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439; Western News Co. v. Wilmarth, 33 Kan. 510, 6 Pac. 786.

spiracy;[22] and corporations have repeatedly been held liable for false representations made by their agents. The rule is well settled that, in cases of fraud, a corporation will be liable whenever an individual would be held liable.[23]

In Green v. London General Omnibus Co.[24]—a leading English case—the plaintiff was the proprietor of an omnibus line engaged in the carriage of passengers, and the defendant was a corporation and the proprietor of a rival line. The declaration sought to recover damages for acts alleged to have been wrongfully and maliciously done by the defendant for the purpose of obstructing, and which did obstruct, the plaintiff in his business; such as the intentional driving of the defendant's vehicles against those of the plaintiff. The defendant demurred on the ground that a corporation could not be guilty of a willful and intentional wrong; but the court held that the declaration was good. In Goodspeed v. East Haddam Bank[25]—a leading case in this country—the action was brought against a bank for maliciously prosecuting a vexatious suit, and it was held that the action could be maintained.[26]

334, 90 Am. Dec. 665; Cornford v. Carlton Bank, L. R. [1899] 1 Q. B. 392, L. R. [1900] 1 Q. B. 22; Hibbard, Spencer, Bartlett & Co. v. Ryan, 46 Ill. App. 313; Willard v. Holmes, Booth & Haydens, 142 N. Y. 492, 37 N. E. 480; Grorud v. Lossl, 48 Mont. 274, 136 Pac. 1069; Farmers' Mut. Fire Ins. Co. v. Stewart, 167 Ind. 544, 79 N. E. 490.

[22] Buffalo Lubricating Oil Co. v. Standard Oil Co., 106 N. Y. 669, 12 N. E. 826; Hindman v. First Nat. Bank, 98 Fed. 562, 39 C. C. A. 1, 48 L. R. A. 210; Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845; West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895; Aberthaw Const. Co. v. Cameron, 194 Mass. 208, 80 N. E. 478, 120 Am. St. Rep. 542; Rogers v. Vicksburg, S. & P. R. Co., 194 Fed. 65, 114 C. C. A. 85, writ of certiorari denied, 225 U. S. 713, 32 Sup. Ct. 841, 56 L. Ed. 1269.

[23] Barwick v. Bank, L. R. 2 Exch. 259; Nevada Bank of San Francisco v. Portland Nat. Bank (C. C.) 59 Fed. 338; Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712; Shaw v. Mining Co., 13 Q. B. Div. 103; Tome v. Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540; Hindman v. First Nat. Bank, 98 Fed. 562, 39 C. C. A. 1, 48 L. R. A. 210; Wright v. Stewart (C. C.) 130 Fed. 905, affirmed Stewart v. Wright, 147 Fed. 321, 77 C. C. A. 499; McFarland v. Carlsbad Hot Springs Sanatorium Co., 68 Or. 530, 137 Pac. 209, Ann. Cas. 1915C, 555. A corporation is liable in an action at law for deceit to the same extent as is a natural person. Gunderson v. Havana-Clyde Min. Co., 22 N. D. 329, 133 N. W. 554.

[24] 7 C. B. (N. S.) 290.

[25] 22 Conn. 530, 58 Am. Dec. 439.

[26] It was said by Church, C. J., in this case: "The claim is that, as a corporation is ideal only, it cannot act from malice, and therefore cannot commence and prosecute a malicious or vexatious suit. This syllogism or reason-

Exemplary Damages

A corporation may not only be held liable for actual damages resulting from a malicious wrong, but it may also, like a natural person, be held liable for exemplary damages. Thus, a newspaper publishing company may be held in punitive damages for recklessly publishing an article, received from one of its reporters, without any investigation as to its truth or falsity whatever.[27] A corporation, however, can act only through an agent, and the same disagreement exists in respect to the liability of corporations as in respect to the liability of individual principals and masters, where the wrongful act was not authorized, ratified, or participated in by them.[28] Many cases hold that a corporation cannot be held liable for exemplary damages by reason of wanton, oppressive, or malicious conduct on the part of its servant or agent, unless the corporation, by its managing officers, has authorized, ratified, or participated in the wrong, or is otherwise chargeable with gross misconduct in the matter.[29] Other cases hold that a corporation

ing might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance every day. And if they can have any motive, they can have a bad one; they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned by the bank in the usual modes of its action, and still to claim that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application." See, also, KHARAS v. BARRON C. COLLIER, INC., 171 App. Div. 388, 157 N. Y. Supp. 410, Wormser Cas. Corporations, 174.

[27] Sutphin v. New York Times Co., 138 App. Div. 487, 122 N. Y. Supp. 833; Times Pub. Co. v. Carlisle, 94 Fed. 762, 36 C. C. A. 475.

[28] See Tiffany, Ag. 275.

[29] Cleghorn v. New York Cent. & H. R. R. Co., 56 N. Y. 44, 15 Am. Rep. 375; Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; Hagan v. Providence & W. R. Co., 3 R. I. 88, 62 Am. Dec. 377; Maisenbacker v. Society Concordia, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; Warner v. Southern Pac. Co., 113 Cal. 105, 45 Pac. 187, 54 Am. St. Rep. 327; Bingham v. Lipman, Wolfe & Co., 40 Or. 363, 67 Pac. 98; Haver v. Central R. Co. of New Jersey, 64 N. J. Law, 312, 45 Atl. 593. "Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite. It must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains

may be held liable for exemplary damages by reason of such conduct on the part of its servant or agent irrespective of such authorization, ratification, participation, or misconduct on the part of the managing officers.[80]

Where defendant corporation maintained a storehouse adjoining plaintiff's property, and its president, treasurer, and manager, after notice, willfully permitted snow and ice to collect on the roof and slide therefrom onto plaintiff's house, the corporation was held liable for punitive damages.[81]

Authority of Servant or Agent

A corporation is liable for the acts of its servants and agents, including their wrongful acts, on the same principles, and to the same extent only, as a natural person is liable for the acts of his servant or agent. If a corporation expressly authorizes its servant or agent to do a particular act, there can be no question as to its liability. Thus, if a majority of the directors and stockholders should by vote direct an agent to enter unlawfully upon the land of another, the corporation would clearly be liable in trespass. So, also, where a ratification can be spelled out, which is a question of

one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified." Per Church, C. J., in Cleghorn v. New York Cent. & H. R. R. Co., supra. But see, as to libel cases, Samuels v. Evening Mail Ass'n, 9 Hun (N. Y.) 288, 294, reversed on dissenting opinion 75 N. Y. 604; HOBOKEN PRINTING & PUBLISHING CO. v. KAHN, 59 N. J. Law, 218, 35 Atl. 1053, 59 Am. St. Rep. 585, Wormser Cas. Corporations, 177.

[80] Baltimore & O. R. Co. v. Barger, 80 Md. 23, 30 Atl. 560, 26 L. R. A. 220, 45 Am. St. Rep. 319; HOBOKEN PRINTING & PUBLISHING CO. v. KAHN, 59 N. J. Law, 218, 35 Atl. 1053, 59 Am. St. Rep. 585, Wormser Cas. Corporations, 177 (libel); Goddard v. Grand Trunk Ry. of Canada, 57 Me. 202, 2 Am. Rep. 39; Atlantic & G. W. Ry. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571; Aygarn v. Rogers Grain Co., 141 Ill. App. 402. In NOWACK v. METROPOLITAN ST. RY. CO., 166 N. Y. 433, 60 N. E. 32, 54 L. R. A. 592, 82 Am. St. Rep. 691, Wormser Cas. Corporations, 369, a street railway corporation sought to exclude, as not binding upon it, evidence that its investigator offered to bribe a witness to testify falsely; but it was held, four judges to three, that the evidence was admissible.

[81] Bishop v. Readsboro Chair Mfg. Co., 85 Vt. 141, 81 Atl. 454, 36 L. R. A. (N. S.) 1171, Ann. Cas. 1914B, 1163. See, also, Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S. W. 264; Lowe v. Yolo County Consol. Water Co., 157 Cal. 503, 108 Pac. 297. But see Great Western R. Co. v. Drorbaugh, 24 Colo. App. 188, 134 Pac. 168.

fact for the jury on all the evidence. Difficulties arise in those cases where the authority of the agent is to be implied. It is the general rule that a corporation, like a natural person, is liable for any act of its servant or agent that is committed in the conduct of its business, and in the course of his employment. "To fix the liability of a corporation for the tortious act of one of its employés, done in obedience to the commands of its officers, the act must be connected with the transaction of the business for which the company was incorporated. If the directors should order an agent to take a person out of his house and beat him, the corporation could not be held for the assault and battery; * * * but if the directors of a corporation, having power to hold lands, order an agent to enter on lands and take possession of them for the legitimate uses of the company, his entry, if unlawful, will be the trespass of the corporation." [32] This rule will be further considered in treating of the liability of a corporation for the acts of its agents.[33]

RESPONSIBILITY FOR CRIME—CONTEMPT OF COURT

70. A corporation may be criminally responsible for omission to perform a duty imposed upon it by law, or for nonfeasance.

71. In most states it is held that it may be criminally responsible for some acts of misfeasance, such as maintaining a nuisance. But, according to the weight of authority, it cannot commit a crime which involves a mental operation, nor crimes involving an element of personal violence.

72. A corporation may be punished for contempt of court.

Nonfeasance

Though there is dictum in some of the old cases to the contrary, it is now perfectly well settled that a corporation may be indicted for omission to perform a duty to the public imposed upon it by law, and, though it cannot be imprisoned, it may be fined, and deprived of its charter.[34] Thus a railroad company may be indicted

[32] Brokaw v. New Jersey R. Co. & Transp. Co., 32 N. J. Law, 328, 90 Am. Dec. 659, per Depue, J., at page 332.

[33] Post, p. 656. And see Savannah Electric Co. v. Wheeler, 128 Ga. 550, 58 S. E. 38, 10 L. R. A. (N. S.) 1176.

[34] Clark, Cr. Law (2d Ed.) 76; Reg. v. Railway Co., 3 Q. B. 223; New York & G. L. R. Co. v. State, 50 N. J. Law, 303, 13 Atl. 1, affirmed 53 N. J. Law, 244, 23 Atl. 168; Southern Ry. Co. v. State, 125 Ga. 287, 54 S. E. 160, 114 Am. St. Rep. 203, 5 Ann. Cas. 411. In Anon., 12 Mod. 559, Case 935, it was

and fined for failure to comply with a statute requiring it to keep a bridge in repair across a cut where its road crosses a public highway.[35]

Misfeasance

It was held in some early decisions that a corporation cannot be indicted for misfeasance,—that it "can neither commit a crime or misdemeanor by any positive or affirmative act, nor incite others to do so."[36] Thus, in the case from which this quotation is taken, it was held in Maine that a corporation could not be indicted for maintaining a nuisance by obstructing a navigable river, though the obstruction was directed by a majority of the stockholders; but that the indictment should have been against the individuals.[37]

The great weight of modern authority, however, is against this position, and to the effect that an indictment will lie against a corporation for misfeasance as well as for nonfeasance,[38] provided the offense involves no mental element, nor element of personal violence. Thus corporations have repeatedly been held liable for nuisance by obstructing a navigable river, or other public highway.[39]

said by Lord Holt that "a corporation is not indictable, but the particular members of it are." But it does not appear what the indictment was for. And the United States Supreme Court has disapproved this. New York Central & H. R. R. Co. v. U. S., 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613.

[35] New York & G. L. R. Co. v. State, supra.

[36] State v. Great Works Mill. & Mfg. Co., 20 Me. 41, 37 Am. Dec. 38; Com. v. President, etc., of Swift Run Gap Turnpike Co., 2 Va. Cas. 362; State v. President, etc., of Ohio & M. R. Co., 23 Ind. 362 (since changed by statute in Indiana. See State v. Baltimore, O. & C. R. Co., 120 Ind. 298, 22 N. E. 307). Cf. Paragon Paper Co. v. State, 19 Ind. App. 314, 49 N. E. 600.

[37] State v. Great Works Mill. & Mfg. Co., supra.

[38] Clark, Cr. Law (2d Ed.) 77, 79; Reg. v. Great North of England Ry. Co., 2 Cox, Cr. Cas. 70; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339; State v. Passaic County Agr. Soc., 54 N. J. Law, 260, 23 Atl. 680; Com. v. Pulaski County Agricultural & Mechanical Ass'n, 92 Ky. 197, 17 S. W. 442; United States v. Alaska Packers' Ass'n, 1 Alaska, 217. A corporation may be indicted for misfeasance and for the doing of acts prohibited by statute. State v. Belle Springs Creamery Co., 83 Kan. 389, 111 Pac. 474.

[39] Reg. v. Great North of England Ry. Co., supra; Com. v. Proprietors of New Bedford Bridge, supra; Louisville & N. R. Co. v. State, 3 Head (Tenn.) 523, 75 Am. Dec. 778; State v. Louisville & N. R. Co., 91 Tenn. 445, 19 S. W. 229; St. Louis, A. & T. Ry. Co. v. State, 52 Ark. 51, 11 S. W. 1035; State v. Chicago, M. & St. P. R. Co., 77 Iowa, 442, 42 N. W. 365, 4 L. R. A. 298; State v. Roanoke Railroad & Lumber Co., 109 N. C. 860, 13 S. E. 719; State v. Monongahela River R. Co., 37 W. Va. 108, 16 S. E. 519; Chicago & E. I. R. Co. v. People, 44 Ill. App. 632; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570; Northern Cent. R. Co. v. Com., 90 Pa. 305; Pittsburgh & Allegheny Bridge Co. v. Com. (Pa.) 8 Atl. 217; Palatka & I. R. R. Co. v.

And an indictment has been sustained against a corporation for nuisance in keeping a disorderly house,[40] and for permitting gaming on its premises.[41] "Corporations" said the Massachusetts court, "cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony, of perjury, or offenses against the person. But beyond this there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them." [42] And in recent decisions corporations have been held criminally responsible for giving unlawful rebates to shippers in violation of the Elkins Act,[43] for illegally advertising to carry on the practise of medicine,[44] and for manslaughter, resulting from a failure to supply an adequate number of life preservers on an excursion vessel.[45] It will be noted, however, that these offenses consisted merely in doing or omitting to do certain acts prohibited, and that guilty knowl-

State, 23 Fla. 546, 3 South. 158, 11 Am. St. Rep. 395; Savannah, F. & W. Ry. Co. v. State, 23 Fla. 579, 3 South. 204; State v. Warren R. Co., 29 N. J. Law, 353; State v. Central R. Co. of New Jersey, 32 N. J. Law, 220; State v. White, 96 Mo. App. 34, 69 S. W. 684. In the last cited case, the corporation was held liable for unlawfully and knowingly obstructing a public highway.

[40] State v. Passaic County Agr. Soc., 54 N. J. Law, 260, 23 Atl. 680. See, also, People v. Borden's Condensed Milk Co., 165 App. Div. 711, 151 N. Y. Supp. 547, convicting a corporation of maintaining a public nuisance.

[41] Com. v. Pulaski County Agricultural & Mechanical Ass'n, 92 Ky. 197, 17 S. W. 442. A corporation may be punished criminally for peddling through the medium of an unlicensed agent. Standard Oil Co. v. Com., 55 S. W. 8, 21 Ky. Law Rep. 1339. And see Crall & Ostrander v. Com., 103 Va. 855, 49 S. E. 638. Under a statute subjecting "any person" to penalties for having in his possession unauthorized copies of a copyrighted publication, corporations are included, and possession by an agent is the possession of the corporation. Falk v. Curtis Pub. Co. (C. C.) 98 Fed. 989. A corporation may be indicted under the United States statutes for carrying on business as a wholesale or retail liquor dealer without paying the license fee required by law. United States v. Ames Mercantile Co., 2 Alaska, 74.

[42] Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339.

[43] Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. 1913, §§ 8597–8599); New York Cent. & H. R. R. Co. v. U. S., 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613. Cf. John Gund Brewing Co. v. U. S., 204 Fed. 17, 122 C. C. A. 331, modified 206 Fed. 386, 124 C. C. A. 268.

[44] People v. John H. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697.

[45] U. S. v. Van Schaick (C. C.) 134 Fed. 592. Cf. People v. Rochester Ry. & Light Co., 195 N. Y. 102, 88 N. E. 22, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837; COM. v. ILLINOIS CENT. R. CO., 152 Ky. 320, 153 S. W. 459, 45 L. R. A. (N. S.) 344, Wormser Cas. Corporations, 180.

edge and wicked intent were not a necessary factor in the statutory offense. Or as said by the Supreme Court of the United States in the recent case convicting a railroad company of illegal rebating:[46] "It is true that there are some crimes which in their nature cannot be committed by corporations. But there is a large class of offenses, of which rebating under the federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not so, many offenses might go unpunished and acts be committed in violation of law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy."

Offenses Involving Mental Element or Personal Violence

We have seen that a corporation may be held liable in tort for malicious wrongs, such as libel and malicious prosecution, and for fraud, the malice or evil intent of its agent being imputed to it; and that it may also be held liable in a civil action for assault and battery; and that exemplary or punitive damages may be recovered in proper cases.[47] There is a strong tendency in some jurisdictions to extend this doctrine so as to include criminal prosecutions, and this has become especially noticeable of recent years. Dr. Wharton says that there is no good reason why the same acts for which corporations are subject to civil suit may not equally be the basis of criminal proceedings, when they result in injury to the public at large.[48] And it has been said in a New Jersey case, after

[46] New York Cent. & H. R. R. Co. v. U. S., supra. And see article by Geo. F. Canfield, "Corporate Responsibility for Crime," 14 Columbia Law Rev. 469, et seq.

[47] Ante, p. 247.

[48] 1 Whart. Cr. Law, § 87. A corporation may be indicted for libel. State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663; Brennan v. Tracy, 2 Mo. App. 543; PEOPLE v. STAR CO., 135 App. Div. 517, 120 N. Y. Supp. 498, Wormser Cas. Corporations, 187. In the last cited case Justice Scott said: "The defendant's chief contention, and the only one requiring extended consideration, is that being a corporation, and having neither soul, conscience, mind, nor feeling, it is incapable of entertaining a mischievous and malicious intent, which is an essential element in criminal libel." After discussing the progressive development of the law as to corporate criminal liability, Justice Scott overruled this contention, saying: "We find no difficulty, therefore, in holding that a corporation may be indicted for and convicted of the crime of criminal libel, the evil intent of its agents who write and print the libel being attributable to it."

adverting to the fact that a corporation is civilly liable for malicious wrongs: "It is difficult, therefore, to see how a corporation may be amenable to civil suit for libel and malicious prosecution and private nuisance, and be mulcted in exemplary damages, and at the same time not be indictable for like offenses where the injury falls upon the public. That malice and evil intent may be imputed to corporations has been repeatedly adjudged." [49]

There are few cases thus far in which a corporation has been held liable criminally for malicious wrongs, or for wrongs involving a specific evil intent, or for wrongs involving the element of personal violence. On the contrary, the weight of actual authority, as far as it goes, is against any such doctrine.[50]

But there are a number of recent decisions holding that a corporate entity may be held criminally liable for an offense involving as a necessary element guilty knowledge or criminal intent, as, for example, a conspiracy unlawfully to restrain freedom of trade,[51] knowingly and fraudulently concealing corporate property from a trustee in bankruptcy in violation of the Bankruptcy Act,[52] knowingly depositing obscene newspapers in the United States mail,[53]

[49] State v. Passaic County Agri. Soc., 54 N. J. Law, 260, 23 Atl. 680. See, also, Telegram Newspaper Co. v. Com., 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280. A corporation may be guilty of a crime when the only intention required is an intention to do the prohibited act, and therefore a corporation may be subject to a fine for intentionally violating the eight-hour law. United States v. John Kelso Co. (D. C.) 86 Fed. 304. In the last cited case appears the following dictum: "Of course, there are certain crimes of which a corporation cannot be guilty, as, for instance, bigamy, perjury, rape, murder, and other offenses, which will readily suggest themselves to the mind. Crimes like these just mentioned can only be committed by natural persons, and statutes in relation thereto are for this reason never construed as referring to corporations." And see Grant Bros. Const. Co. v. U. S., 13 Ariz. 388, 114 Pac. 955.

[50] See Clark, Cr. Law (2d Ed.) 79; Orr v. Bank of United States, 1 Ohio, 36, 13 Am. Dec. 588; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339; State v. Morris & E. R. R. Co., 23 N. J. Law, 360. See article by Geo. F. Canfield, 14 Columbia Law Rev. 469, adopting this view. But a contrary position is maintained in an editorial note in 14 Columbia Law Rev. 241.

[51] U. S. v. MacAndrews & Forbes Co. (C. C.) 149 Fed. 823; State v. Eastern Coal Co., 29 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817, 17 Ann. Cas. 96. So a corporation may be convicted for conspiracy feloniously to carry liquor into Indian territory. Joplin Mercantile Co. v. U. S., 213 Fed. 926, 131 C. C. A. 160.

[52] Act Cong. July 1, 1898, c. 541, 30 Stat. 544; Kaufman v. U. S., 212 Fed. 613, 129 C. C. A. 149, per Rogers, J.; Cohen v. U. S., 157 Fed. 651, 85 C. C. A. 113.

[53] U. S. v. New York Herald Co. (C. C.) 159 Fed. 296, per Hough, J.

willfully and unlawfully destroying property of a landlord,[54] knowingly obstructing the highway,[55] criminal libel,[56] and grand larceny.[57] As said by Judge Hough in the first cited case:[58] "It seems to me as easy and logical to ascribe to a corporation an evil mind as it is to impute to it a sense of contractual obligation. There is an obvious physical difficulty in rendering a corporation amenable to corporal punishment, but there is no more intellectual difficulty in considering it capable of homicide or larceny than in thinking of it as devising a plan to obtain usurious interest. The limitation of power does not depend upon the difficulty of imputing evil intent, but upon the impossibility of visiting upon corporations the punishments usually prescribed for greater crimes. The same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature, because it cannot make a creature capable of violating the law, does not, in my opinion, bear discussion."

Of course, where a statute prescribes both fine and imprisonment, it is not applicable to a corporation, because a corporation cannot be imprisoned.[59] So it was adjudged in England recently that a corporation is not to be held a rogue or vagabond and liable to punishment by imprisonment and whipping.[60] But the New York Court of Appeals has stated that it has "no doubt that a definition of certain forms of manslaughter might have been formulated which would be applicable to a corporation and make it criminally liable for various acts of misfeasance and nonfeasance when resulting in death."[61] The Court of Appeals decided, however, that under the present New York Penal Code, § 179, defining homicide as the killing of one human being by the act, procurement or omission of "another," a corporation may not be indicted for manslaughter, since the word "another" means another human being, and does not

[54] State v. Rowland Lumber Co., 153 N. C. 610, 69 S. E. 58.

[55] State v. White, 96 Mo. App. 34, 69 S. W. 684.

[56] PEOPLE v. STAR CO., 135 App. Div. 517, 120 N. Y. Supp. 498, Wormser Cas. Corporations, 187.

[57] People v. Tyson & Co., 50 N. Y. Law J., Jan. 13, 1914, N. Y. Times, Jan. 6, 1914, opinion per Deuel, Magistrate.

[58] U. S. v. MacAndrews & Forbes Co., supra.

[59] U. S. v. Braun & Fitts (D. C.) 158 Fed. 456; Kaufman v. U. S., supra.

[60] Hawke v. E. Hulton & Co., L. R. [1909] 2 K. B. 93. And see Commonwealth v. New York Cent. & H. R. R. Co., 206 Mass. 417, 92 N. E. 766, 19 Ann. Cas. 529.

[61] People v. Rochester Ry. & Light Co., 195 N. Y. 102, 88 N. E. 22, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837, affirming 129 App. Div. 843, 114 N. Y. Supp. 755, affirming 59 Misc. Rep. 347, 112 N. Y. Supp. 362.

include a corporation.[62] And a somewhat similar holding was made in a recent Kentucky case.[63]

The undoubted tendency of the recent decisions in many state jurisdictions, and especially in the federal courts, is "to subject corporations, as nearly as may be, to the same pains and penalties imposed upon individuals." To fine a corporation or to revoke its charter is oftentimes a very positive deterrent to crime. And it is frequently highly desirable to consider guilt corporate, as well as personal. Thus far, however, the actual decisions, as distinguished from mere dicta, hesitate to go to the extent of holding corporations liable for crimes involving guilty knowledge and a "black heart," though, as we have seen, a few progressive courts have already fearlessly so held.

Contempt of Court

A corporation may be guilty of a contempt of court by reason of acts or omissions of its officers, as where they violate an injunction. And in such a case it is well settled that the court has the same power to punish it by a fine, as it would have in the case of a natural person.[64]

[62] People v. Rochester Ry. & Light Co., supra.

[63] COM. v. ILLINOIS CENT. R. CO., 152 Ky. 320, 153 S. W. 459, 45 L. R. A. (N. S.) 344, Wormser Cas. Corporations, 180.

[64] People v. Albany & V. R. Co., 12 Abb. Prac. (N. Y.) 171; Golden Gate Consolidated H. Min. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628; Mayor, etc., of New York v. New York & S. I. Ferry Co., 64 N. Y. 624; U. S. v. Memphis & L. R. R. Co. (C. C.) 6 Fed. 237; Telegram Newspaper Co. v. Com., 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280; Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1001, 110 Am. St Rep. 248. In the last cited case the court said: "While a corporation cannot be attached or imprisoned, it may nevertheless be guilty of contempt in disobeying or violating an order or decree of court, as it may be guilty of a tort or of a crime and it may be fined therefor and its property sequestered."

CHAPTER VIII

THE CORPORATION AND THE STATE

73–74. Power of the State over Corporations—Charter as a Contract.
75. Police Power of the State.
76. Power of Eminent Domain.
77. Reservation of Power to Repeal or Amend Charter.
78. Offer of Amendment—Power of Majority.
79–81. Taxation of Corporations.

POWER OF THE STATE OVER CORPORATIONS—CHARTER AS A CONTRACT

73. The right of visitation involves the privilege of superintending and regulating corporations to see that they are complying with and observing the rules and regulations governing their corporate existence.

The charter of a private corporation involves a contractual obligation within the meaning of the constitutional declaration that no state shall pass any law impairing the obligation of contracts, and it cannot be impaired by repeal or amendment contrary to its terms.

(a) There is a contract between the corporation and the state, and between the stockholders and the state, which cannot be so impaired.

(b) There is also a contract between the corporators and the corporation, which cannot be impaired.

(c) But repeal or amendment of a charter is not unconstitutional as impairing the obligation of contracts between the corporation and third persons.

74. The constitutional provision referred to does not prevent legislation affecting the charter of a corporation under the following circumstances:

(a) It does not prevent the state from passing laws in the valid exercise of its police power.

(b) It does not prevent the state from taking the property and franchises of a corporation for public use, under the power of eminent domain, if due compensation is made.

(c) It does not prevent the repeal, alteration, or amendment of a charter, if the power to repeal, alter or amend was reserved by the state in granting the charter.

"At common law the right of visitation was exercised by the king as to civil corporations and as to eleemosynary ones by the founder or donor. In the United States the Legislature is the visitor of all corporations created by it, where there is no individual founder or donor, and may direct judicial proceedings against such corporations for such abuses or neglects as would at common law cause forfeiture of their charters." [1] Familiar instances of modern visitation are found in the regulation of public service corporations by state commissions and in the supervision of national banking corporations by the federal Comptroller of the Currency. It has been held that the courts have no visitatorial power over a joint-stock company, as it is not a legal entity.[2] The federal government has no general visitatorial power, of course, over state corporations; but in so far as a state-created corporation engages in interstate or foreign commerce it thereby subjects itself to the power of Congress to regulate such commerce and to this extent comes under federal powers of visitation and control, since "the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it (the corporation) by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress." [3]

Theoretically, the British Parliament, with respect to its power to enact laws, is omnipotent. There is no written constitution imposing restraints upon it. And, among other unlimited powers, it has the power to repeal or alter charters of corporations, as it may see fit. The power is not often exercised, it is true, but it exists, and at certain periods of English history it has been arbitrarily exercised. Parliament, if it should choose, could grant a charter, and then, after the corporators have invested their money in the enterprise, repeal it, however great the loss might be. In this country the power of the Legislature is not supreme, but is restricted in very many respects by constitutional provisions. In the Constitution of the United States it is declared that "no state shall

[1] Guthrie v. Harkness, 199 U. S. 148, 157, 158, 26 Sup. Ct. 40, 50 L. Ed. 130, 4 Ann. Cas. 433. "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." Per Baxter, J., in First Nat. Bank v. Hughes (C. C.) 6 Fed. 737. See, also, Matter of Greene, 153 App. Div. 8, 138 N. Y. Supp. 95.

[2] State ex rel. Railroad and Warehouse Commission v. United States Exp. Co., 81 Minn. 87, 83 N. W. 465, 50 L. R. A. 667, 83 Am. St. Rep. 366.

[3] Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652.

pass any law impairing the obligation of contracts." [4] And it is now settled beyond any controversy that the charter of a private corporation is a contract, within the meaning of the Constitution.[5] In the Dartmouth College Case,[6] a charter had been granted by the king of England to the trustees of Dartmouth College, a charity founded by private persons. Nearly forty years afterwards the Legislature of New Hampshire undertook to alter this charter in material respects. The New Hampshire court sustained the act, but the decision was reversed by the Supreme Court of the United States, on the ground that the charter was a contract within the meaning of the Constitution, and that the acts in question, in materially altering it, without the consent of the corporation, impaired its obligation, and were void. On strict principle, the decision is open to serious criticism as a corporate charter is not so much a contract as it is a privilege, a franchise, conferred by the state upon a group of natural persons authorizing them thereafter to act as a legal unit. A corporate charter is in reality no more of a contract than is any other franchise. The law, however, is settled, beyond room for dispute, that a corporation's charter is a contract between the state and the corporation, between the corporation and the stockholders, and between the stockholders and the state.[7]

The constitutional prohibition against acts impairing the obligation of contracts applies only in the case of private corporations. The charters of public corporations may be repealed or amended by the Legislature at pleasure. As we have seen, however, colleges, hospitals, asylums, and other charitable institutions, founded by private means, are private corporations, and within the protec-

[4] Const. U. S. art. 1, § 10.

[5] TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, Wormser Cas. Corporations, 189; Hazen v. Union Bank of Tennessee, 1 Sneed (Tenn.) 115; Zimmer v. State, 30 Ark. 677; Downing v. Indiana State Board of Agriculture, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664; Ruggles v. People, 91 Ill. 256; Illinois Cent. R. Co. v. People, 95 Ill. 313; State ex rel. Haeussler v. Greer, 78 Mo. 188; Hamilton v. Keith, 5 Bush (Ky.) 458; Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; Ives v. South Buffalo R. Co., 201 N. Y. 271, at page 320, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156; Northern Pac. R. Co. v. Minnesota, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, and cases hereafter cited and referred to. For adverse views, see Mechanics' & Traders' Branch of State Bank v. Debolt, 1 Ohio St. 591; Bank of Toledo v. City of Toledo, 1 Ohio St. 622; Skelly v. Jefferson Branch Bank of Ohio, 9 Ohio St. 606; Dow v. Northern R. Co., 67 N. H. 1, 36 Atl. 510; 6 Harv. L. R. 161, 213; 8 Harv. L. R. 295.

[6] Supra.

[7] Garey v. St. Joe Min. Co., 32 Utah, 497, 91 Pac. 369, 12 L. R. A. (N. S.) 554; Board of Improvement of Sewer Dist. No. 2 of Ft. Smith v. Sisters of Mercy, 86 Ark. 109, 109 S. W. 1165.

tion of the constitution, though they may have been founded for the benefit of the public.[8]

If the legislature, without having reserved the right to do so, repeals the charter of a corporation outright, there can be no question but that the repeal is unconstitutional and void. Difficult questions, however, arise where the charter is not repealed, but merely altered or amended. The rule in such cases is that, if the Legislature alters the charter of a corporation in any material respect, it impairs the obligation thereof, unless the alteration or amendment is authorized under the rules hereafter shown. In the Dartmouth College Case,[9] the charter of the corporation vested the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, in the trustees appointed by the charter, and the charter expressly stipulated that the corporation, thus constituted, should continue forever, and that the number of trustees should forever consist of twelve, and no more. The acts of the Legislature of New Hampshire increased the number of trustees to twenty-one, gave the appointment of the additional members to the executive of the state, and created a board of overseers, to consist of twenty-five persons, of whom twenty-one were to be appointed by the executive of the state, with the power to inspect and control the acts of the trustees. It was held that this was a material alteration of the charter, and that the acts therefore were void.[10]

Alteration of a charter, where the power has not been reserved, is unconstitutional if it impairs the contracts between the corporation and the stockholders or members. Thus, where the charter of a corporation is not subject to alteration, amendment, or repeal, the Legislature cannot change or interfere with the mode of voting at corporate meetings, as by allowing cumulative voting.[11] Nor

[8] TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD, supra; Downing v. Indiana State Board of Agriculture, supra; Cary Library v. Bliss, supra; ante, p. 30.

[9] Supra.

[10] See, also, Downing v. Indiana State Board of Agriculture, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664; Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; Central Trust Co. v. Citizens' St. R. Co. of Indianapolis (C. C.) 82 Fed. 1; Ball v. Rutland R. Co. (C. C.) 93 Fed. 513. In Zimmer v. State, 30 Ark. 677, by the terms of an irrepealable charter, the corporation was authorized to form a union or consolidate with another corporation; and its officers, agents, and servants were exempted from military and road duty, and from jury service. It was held that it could not be deprived of any of these privileges and exemptions by subsequent legislation.

[11] State ex rel. Haeussler v. Greer, 78 Mo. 188; Hays v. Com. ex rel.

can it authorize a majority of the stockholders or members to accept amendments of the charter, or to engage in enterprises not authorized by the charter, without the consent of the minority,[12] or to consolidate with another corporation, and transfer the corporate property to it.[13] Nor can a charter be altered by requiring a less amount of capital stock, so as to make previous subscribers liable as shareholders before the amount of stock required at the the time of their subscription is subscribed.[14] Such alterations and amendments as these are unconstitutional, not as impairing the implied contract between the corporation and the state, but as impairing the contract between the corporation and the dissenting members by compelling them to embark in an enterprise different from that agreed upon.[15] But one consenting to an amendment is concluded thereby, and cannot afterward raise the objection that the amendment was a radical change from the original charter.[16]

As we have seen in a former chapter, it is a settled rule for the construction of charters that in case of ambiguity and doubt they are to be construed most strictly in favor of the public and against the corporation. And this rule is important in connection with the subject now under discussion.[17]

The state, in granting a charter to a private corporation, does not impliedly stipulate that it will not afterwards create a similar corporation to compete with the former, or pass any other valid law, which will have the effect of rendering the first charter valueless. So long as it does not impair the obligation of its contract with the first corporation, as embodied in the charter, it may pass any valid law it may see fit, though the effect of such law may be to render

McCutcheon, 82 Pa. 518. See, also, In re Election of Directors of Newark Library Ass'n, 64 N. J. Law, 217, 43 Atl. 435; Tucker v. Russell (C. C.) 82 Fed. 263. Compare New Haven & D. R. Co. v. Chapman, 38 Conn. 56.

[12] Zabriskie v. Hackensack & N. Y. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; New Orleans, J. & G. N. R. Co. v. Harris, 27 Miss. 517; Black v. Delaware & R. Canal Co., 24 N. J. Eq. 455.

[13] Lauman v. Lebanon Val. R. Co., 30 Pa. 46, 72 Am. Dec. 685.

[14] Oldtown & L. R. Co. v. Veazie, 39 Me. 571. See, also, Evans v. Nellis (C. C.) 101 Fed. 920.

[15] Ireland v. Palestine B., N. P. & N. W. Turnpike Co., 19 Ohio St. 369; Bedford v. Eastern Bldg. & L. Ass'n., 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834. A mutual insurance company cannot transform itself into a joint-stock company against the will of a member who became such before passage of an amendment granting such power. Schwarzwaelder v. German Mut. Fire Ins. Co., 59 N. J. Eq. 589, 44 Atl. 769.

[16] Casanas v. Audubon Hotel Co., Limited, 124 La. 786, 50 South. 714.

[17] See Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773, 938; ante, p. 147.

the charter practically worthless. In Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge,[18] the state of Massachusetts had chartered the plaintiff to build a bridge across the Charles river, and to take tolls for the use thereof. After the bridge had been built and maintained for a number of years, the state chartered the defendant corporation, and authorized it to build another bridge over the Charles river in close proximity to the plaintiff's bridge, and under the defendant's charter its bridge in the course of a few years became the property of the state, and a free bridge. It was held that the defendant's charter was valid, though its effect was to indirectly destroy the value of the plaintiff's charter, franchises, and property, since the state did not expressly bind itself not to authorize another bridge, and no such stipulation could be implied. And so the state may charter a railroad or turnpike company to run its road along the same route as a previously chartered railroad, turnpike, or canal company, provided no exclusive privileges have been in terms granted to the prior corporation.[19]

In the absence of constitutional limitations, however, the Legislature may grant an exclusive privilege to a private corporation,[20] and, if it does so in its charter, the grant constitutes a contract in the sense of the federal Constitution, and cannot be impaired by subsequent legislation.[21] Thus where a state created a corporation to construct a bridge, and the charter expressly stipulated that no other bridge should be built within a certain distance of it, a subsequent charter authorizing another corporation to construct a bridge within the prohibited distance was held unconstitutional.[22] The same rule applies where the Legislature charters a gas, or water, or electric lighting company, and grants it an exclusive privilege of supplying a city and its inhabitants with light or water.[23]

[18] 11 Pet. 420, 9 L. Ed. 773. And see In re Opening of Hamilton Avenue, 14 Barb. (N. Y.) 405; Skaneateles Waterworks Co. v. Village of Skaneateles, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687; Russell v. Sebastian, 233 U. S. 195, at page 205, 34 Sup. Ct. 517, 58 L. Ed. 912, Ann. Cas. 1914C, 1282.

[19] White River Turnpike Co. v. Vermont Cent. R. Co., 21 Vt. 590; Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374; President, etc., of Washington & B. Turnpike Road v. Baltimore & O. R. Co., 10 Gill & J. (Md.) 392.

[20] Ante, p. 37.

[21] New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516.

[22] The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137.

[23] New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co., supra; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525.

In some states the constitution now restricts the power of the Legislature to grant exclusive privileges.[24]

The repeal of a charter or dissolution of a corporation under statutory authority is not a violation of the federal Constitution as impairing the obligation of contracts made by the company with third persons.[25] Two reasons for so holding were given by the supreme court of the United States in Mumma v. Potomac Co.[26] In the first place, the obligation of the contracts of the company survives the dissolution, and the creditors may enforce their claims against any property belonging to the company which has not passed into the hands of bona fide purchasers, but is still held in trust for the company, or for the stockholders, at the time of its dissolution in any mode permitted by the local laws. In the second place, it was said, "independently of this view of the matter, it would be extremely difficult to maintain the doctrine contended for by the plaintiff in error upon general principles. A corporation, by the very terms and nature of its political existence, is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for willful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it perpetuity of existence contrary to public policy, and the nature and objects of its charter."

"There is a distinction between the obligation of a contract and the remedy for its enforcement. Whatever pertains merely to the remedy may be changed or modified, at the discretion of the Legislature, without impairing the obligation of the contract, provided the remedy be not wholly taken away, nor so hampered or reduced in effectiveness as to render the contract practically incapable of enforcement." [27] This principle applies to laws affecting existing corporations, the charters of which are not subject to alteration, amendment, or repeal by the Legislature. Thus a statute which prescribes a mode of service of judicial process upon a corporation,

[24] See ante, p. 37. Thus, in New York, the Legislature may not pass a private or local bill "granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever." The Legislature shall pass general laws providing for these cases. Const. N. Y. art. 3, § 18. To similar effect, see Const. N. J. art. 4, § 7, subd. 11.

[25] Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 8 L. Ed. 945; Thornton v. Marginal Freight Ry. Co., 123 Mass. 32; Read v. Frankfort Bank, 23 Me. 318.

[26] Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 8 L. Ed. 945.

[27] Black, Const. Law, 538.

different from that provided for in its charter, or which otherwise authorizes new remedies, is not void as impairing the obligation of a contract.[28]

POLICE POWER OF THE STATE

75. There is nothing in the federal or state Constitutions depriving the Legislatures of the power to pass any laws, in the exercise of the police power of the state, which may be necessary or proper for the protection of the public safety, health, comfort, morals, or the property of the citizens; and such laws are valid, though they may detract from the powers of existing corporations, or impose burdens upon them. The Legislature cannot divest itself of this power. Its exact limitations are uncertain and the realm of control thereunder is very broad.

In this country the Legislatures of the different states have the same unlimited power in regard to legislation as the British Parliament, except in so far as they may be restrained by the state or federal Constitution. They can pass any law affecting existing corporations, however much it may increase their burdens or restrict their powers, provided no constitutional provision is violated.[29] The constitutional provision against laws impairing the obligation of contracts does not prevent the Legislatures from regulating corporations, under the police power of the state, in the use of their franchises.[30] The Constitution was not intended to deprive the Legislatures of this power, and the Legislatures could not divest themselves of it if they would. "Whatever differences of opinion," it has been said, "may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfac-

[28] Cairo & F. R. Co. v. Hecht, 95 U. S. 168, 24 L. Ed. 423. See, also, Carey v. Giles, 9 Ga. 253; Chicago Life Ins. Co. v. Auditor of Public Accounts, 101 Ill. 82; Williamsport & H. Turnpike Co. v. Startzman, 86 Md. 363, 38 Atl. 777; Louisville & N. R. Co. v. Williams, 103 Ky. 375, 45 S. W. 229; post, p. 713.

[29] Thorpe v. Rutland & B. R. Co., 27 Vt. 140, 62 Am. Dec. 625.

[30] Thorpe v. Rutland & B. R. Co., 27 Vt. 140, 62 Am. Dec. 625; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Opinion of Justices, 9 Cush. (Mass.) 604; Galena & C. U. R. Co. v. Loomis, 13 Ill. 548, 56 Am. Dec. 471; Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. Ed. 1084; Eagle Ins. Co. of Cincinnati v. Ohio ex rel. Kinder, 153 U. S. 446, 14 Sup. Ct. 868, 38 L. Ed. 778; ATLANTIC COAST LINE v. CITY OF GOLDSBORO, 232 U. S. 548, at page 558, 34 Sup. Ct. 364, 58 L. Ed. 721, Wormser Cas. Corporations, 204.

tory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, 'Salus populi suprema lex;' and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power." [81] The limits of the police power are vague and uncertain. Recently, in upholding the constitutionality of an Oklahoma statute creating a state banking board directed to levy an assessment upon every state bank's average daily deposits in order to create a general guaranty fund for all depositors, Justice Holmes said: "It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides." [82] And in the same case, the learned justice also says: "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." [83] Thus, in the police power is found a fertile field of state control and one possible solution of the problem of corporate regulation.

It may be laid down as a general rule that the Legislature may control the action of corporations, prescribe their functions and duties, and impose restraints upon them, to the same extent as upon natural persons, in all matters coming within the general range of legislative authority; subject to the limitation of not impairing the obligation of contracts, provided the essential franchise is not taken away without compensation.[84] Under its police power, a state may

[81] Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989. And see Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71.

[82] Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487. And see Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560.

[83] Noble State Bank v. Haskell, supra.

[84] Thorpe v. Rutland & B. R. Co., 27 Vt. 140, 62 Am. Dec. 625; Ward v. Farwell, 97 Ill. 593.

subject persons to restraints and burdens in order to secure the general comfort, health, and prosperity of the people at large; and this power exends to corporations as well as to natural persons. Thus, if the state creates a corporation and authorizes it to erect a powder mill, or to maintain a burying ground, or a slaughterhouse, fertilizer manufactory, or tannery at a certain place, at a time when the place is remote from inhabitants, it may afterwards require the business to be suspended or removed, or secured from doing harm, at the sole expense of the corporation, if in process of time dwellings approach the locality, so as to render the further pursuit or maintenance of the business at that place destructive to the health or comfort of others.[85]

In Boston Beer Co. v. Massachusetts[86] a corporation had been chartered to manufacture and sell malt liquors. Afterwards the Legislature passed a prohibitory liquor law, and it was contended by the corporation that this law, if applicable to it, was void, as being an impairment of its contract with the state. The court held the law valid as to the corporation, on the ground that, though it was given by its charter the right to manufacture and sell malt liquors, the charter could not be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. "If the public safety or the public morals," it was said, "require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state." On similar reasoning, the New York Court of Appeals upheld recently the constitutionality of a statute requiring all persons and corporations operating steam surface railways to pay wages to employés semimonthly in cash.[87] Other illustrations are given below.[88]

[85] Thorpe v. Rutland & B. R. Co., supra; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Coates v. Mayor, etc., of New York, 7 Cow. (N. Y.) 585; Brick Presbyterian Church Corp. v. Mayor, etc., of New York, 5 Cow. (N. Y.) 538; Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71.

[86] Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989.

[87] New York Cent. & H. R. R. Co. v. Williams, 199 N. Y. 108, 92 N. E. 404, 35 L. R. A. (N. S.) 549, 139 Am. St. Rep. 850, per Bartlett, J. See, accord, Lawrence v. Rutland R. Co., 80 Vt. 370, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475. And see, generally, on the police power, Hall's Cases on Constitutional Law, pp. 318–534.

[88] The state cannot prohibit existing railroad companies from carrying

In the exercise of the police power the state cannot, in the case of a corporation, any more than in the case of a natural person, pass any law taking or destroying property which is actually in existence,

unobjectionable freight and passengers; but it may regulate them in the conduct of their business, so as to secure the safety of persons and property. It is perfectly competent, therefore, for the Legislature to prohibit them from carrying persons or live stock infected with contagious diseases, or to require them to stop at crossings, to maintain switchmen and watchmen, to provide a certain number of brakemen, to use proper rails and maintain a proper track, or to maintain fences and cattle guards along their road; and it may require them to bear the expense of such safeguards. Thorpe v. Rutland & B. R. Co., 27 Vt. 140, 62 Am. Dec. 625; Com. v. Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555; Nelson v. Vermont & C. R. Co., 26 Vt. 717, 62 Am. Dec. 614; Galena & C. U. R. Co. v. Loomis, 13 Ill. 548, 56 Am. Dec. 471; Horn v. Chicago, M. & St. P. Ry. Co., 38 Wis. 463; Ohio & M. R. Co. v. McClelland, 25 Ill. 140; Hegeman v. Western R. Corp., 16 Barb. (N. Y.) 353; Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948. It may make railroad companies liable for property destroyed by fire from locomotives. St. Louis & S. F. Ry. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; Atchison, T. & S. F. Ry. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909. And it may require a railroad company to stop at county seats to take on and let off passengers. Chicago & A. R. Co. v. People to Use of Pierson, 105 Ill. 657; Lake Shore & M. S. Ry. Co. v. Ohio ex rel. Lawrence, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702. And it may require a railroad company, at its own expense, to construct a bridge over a highway, even though it may not have reserved the power to amend or repeal its charter. People v. Boston & A. R. Co., 70 N. Y. 569; Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948. And it may prohibit railroad companies from crossing each other's tracks at grade. Pittsburg & C. R. Co. v. Southwest Pennsylvania Ry. Co., 77 Pa. 173. So a city ordinance may prohibit existing railroad companies from running steam engines on a certain street. Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 24 L. Ed. 734. The state, having chartered a bank with power to receive money on deposit, and pay away the same, and to discount bills of exchange, and make loans, could not afterwards make it unlawful for the bank to transfer by indorsement or otherwise any bill or note, etc., for this would be a violation of the charter, and not at all necessary as a police measure. Jemison v. Planters' & Merchants' Bank, 23 Ala. 168. But the state may bind existing savings banks, or other banks, by general laws relating to investments of deposits. Answer of the Justices to Inquiry of the Senate, 9 Cush. (Mass.) 604. And it has been held that it may pass a law making stockholders of existing corporations liable for the future debts of the corporation. Child v. Coffin, 17 Mass. 64; Gray v. Coffin, 9 Cush. (Mass.) 192; Stanley v. Stanley, 26 Me. 191. And it may reduce the rate of interest, or prohibit speculations in exchange, or depreciated paper, or the issuing of bills of a given denomination, etc. See Thorpe v. Rutland & B. R. Co., 27 Vt. 140, 62 Am. Dec. 625. The state has the same power to tax corporations as it has to tax individuals, provided it has not expressly surrendered the right in granting the charter, though the power clearly abridges the beneficial use of the franchise, and is capable of being so exercised as virtually to destroy it. Providence Bank v. Billings, 4 Pet. (U. S.) 514, 7 L. Ed. 939;

and in which the right of the owner has become vested, even though the law may be for the public good, unless it makes due compensation therefor. Thus, if the state were to charter a corporation unqualifiedly for the purpose of manufacturing and selling malt liquors, it could not afterwards pass a liquor law prohibiting the sale of liquors already manufactured by the corporation without making due compensation therefor, though it could prohibit further manufacture.[89]

post, p. 278. The right to have migratory fish pass in their accustomed course up and down rivers and streams is a public right, and may be regulated and protected by the legislature in such a manner as it may deem appropriate; and every grant of a right to maintain a mill dam across a stream where such fish are accustomed to pass is subject to the implied condition or limitation that a sufficient and reasonable way shall be allowed for the fish, unless cut off by express provision or obvious implication in the grant. Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247; Com. v. Essex Co., 13 Gray (Mass.) 239. The state may pass a law requiring existing corporations, like insurance companies, banks, etc., having extensive dealings with the public, to make periodical statements of their condition, and providing for compulsory liquidation of their business in case of insolvency; or make other provisions of this nature for the protection of the public. Such laws are valid police regulations. Attorney General v. North America Life Ins. Co., 82 N. Y. 172; Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. Ed. 1084; Eagle Ins. Co. v. Ohio ex rel. Kinder, 153 U. S. 446, 14 Sup. Ct. 868, 38 L. Ed. 778; Ward v. Farwell, 97 Ill. 593; Chicago Life Ins. Co. v. Auditor of Public Accounts, 101 Ill. 82; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; John Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 21 Sup. Ct. 535, 45 L. Ed. 755; Merchants' Life Ass'n v. Yoakum, 98 Fed. 251, 39 C. C. A. 56. Railroad companies may be made liable to laborers employed by contractors in constructing their roads. Branin v. Connecticut & P. R. R. Co., 31 Vt. 214. And a state may regulate the charges of railroad and warehouse companies, and other corporations engaged in a public employment affecting the public interest. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; Ruggles v. People, 91 Ill. 256; Illinois Cent. R. Co. v. People, 95 Ill. 313. But the regulation must be reasonable. Stone v. Farmers' Loan & Trust Co., supra; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. An act requiring railroad companies to keep for sale 1,000-mile tickets at specified rates less than the regular rates, to be used in the name of the purchaser, his wife and children, and valid for two years, where the maximum passenger rates had previously been established by the Legislature, was void, as not within the power to fix maximum rates, nor a proper regulation of the affairs of the company, but a taking of its property without due process of law. Lake Shore & M. S. Ry. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, reversing 114 Mich. 460, 72 N. W. 328. A state may regulate insurance rates, through a state official, under its police power. German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189.

[89] Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989. And see

So, the right of members to vote at corporate meetings for directors, and on other corporate matters, is a property right, and, if the mode of voting is prescribed by an irrepealable charter, it is protected by the constitutional prohibition against laws impairing the obligation of contracts, so that the state cannot interfere with it either by constitutional or legislative enactment. A law regulating the mode of voting at corporate elections cannot be called a police regulation.[40]

POWER OF EMINENT DOMAIN

76. The property of a corporation, including its franchises, may, like the property of an individual, be taken for public use under the power of eminent domain, on making due compensation therefor.

The power of the state to take private property for public use under the power of eminent domain, on making compensation to the owner, extends to the property and franchises of a corporation, as well as the property of individuals. "The property of corporations, including their franchises, may be taken for public use under the power of eminent domain, on making due compensation." [41] Thus, where the Legislature, under a reserved power, repealed the charter of a railroad company operating a railroad through the streets of a city, it was held that in chartering another corporation it had the power to authorize it to take the property of the old corporation, on making due compensation therefor.[42] In

Planters' Bank v. Sharp, 6 How. (U. S.) 301, 12 L. Ed. 447; State v. Lebanon & N. Turnpike Co. (Tenn. Ch. App.) 61 S. W. 1096. In Mugler v. Kansas, 123 U. S. 628, 8 Sup. Ct. 273, 31 L. Ed. 205, it was held within the police power of the state to destroy liquor used in maintaining a public nuisance in violation of the prohibition law of the state. But see Wynehamer v. People, 13 N. Y. 378.

[40] State ex rel. Haeussler v. Greer, 78 Mo. 188. And see, Lord v. Equitable Life Assur. Soc. of United States, 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420.

[41] Greenwood v. Union Freight R. Co., 105 U. S. 13, 26 L. Ed. 961. And see West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. Ed. 535; Eastern R. Co. v. Boston & M. R. R., 111 Mass. 125, 15 Am. Rep. 13; White River Turnpike Co. v. Vermont Cent. R. Co., 21 Vt. 590; Boston Water-Power Co. v. Boston & W. R. Corp., 23 Pick. (Mass.) 360; Central Bridge Corp. v. City of Lowell, 4 Gray (Mass.) 474; Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374; Black v. Delaware & R. Canal Co., 24 N. J. Eq. 455; Board of Trustees of Illinois & M. Canal v. Chicago & R. I. R. Co., 14 Ill. 314.

[42] Greenwood v. Union Freight R. Co., supra.

fact, "all private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property." [43]

Laws taking corporate property and franchises for public use, under the power of eminent domain, which cannot legally be done without making compensation, must be distinguished from laws regulating corporations in the use of their franchises and property, enacted either under the police power of the state, or under a power to alter or amend the charter reserved by the state in granting it. Police regulations, as we have seen, may impose burdens and expenses upon corporations for the public good, but this does not form ground for objection by the corporation.[44]

RESERVATION OF POWER TO REPEAL OR AMEND CHARTER

77. The state may, and generally does, reserve the power to repeal, alter or amend charters by a provision to that effect either in the charter itself, or act of incorporation, or in some general law, or in the constitution. This reservation, however, gives no right to confiscate property or to impair or take away vested rights.

The state may always, in granting a charter, incorporate such terms and conditions as it may see fit. Therefore it may reserve the power to alter, amend, or repeal the charter. And it may do so either by incorporating such a condition in the charter itself, or by a general law in force at the time the charter is granted, or by a provision contained in the state constitution. In the two latter cases no reference need necessarily be made in the charter to the general law or constitutional provision. If it is applicable, it becomes a part of the charter, and a term of the contract between the state and the corporators.[45] It is through use of the reserved power in

[43] U. S. v. Lynah, 188 U. S. 445, 465, 23 Sup. Ct. 344, 47 L. Ed. 539. And it is held that the condemnation of minority shares of stock in a railroad corporation is within the power of a state, if the public interest demands. Offield v. New York, N. H. & H. R. R. Co., 203 U. S. 372, 27 Sup. Ct. 72, 51 L. Ed. 231, affirming 78 Conn. 1, 60 Atl. 740.

[44] Ante, p. 263. See Com. v. Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555.

[45] Greenwood v. Union Freight R. Co., 105 U. S. 13, 26 L. Ed. 961; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Com. v. Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555; Parker v. Metropolitan R. Co., 109 Mass. 506; Miller v. New York, 15 Wall. (U. S.) 478, 21 L. Ed. 98; Jackson v. Walsh, 75 Md. 304, 23 Atl. 778; Story v. Jersey City & B. P. Plank Road

this way that the states have met the effect of the decision in the Dartmouth College Case and retained supervisory control over their corporate offspring. Where the state expressly reserves the power of alteration, amendment, or repeal, such reservation becomes a part of the contract between the state and the corporation, and is binding, not only upon the corporation, but also upon every individual stockholder.[46]

Where a general law provides, as in many states, that charters shall be subject to amendment, alteration, or repeal, "at the pleasure of the Legislature," the reason of a repeal or amendment and the motive of the Legislature are immaterial. "The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it." [47] Under a constitutional provision authorizing the Legislature to alter, amend, or repeal any charter of incorporation, whenever, in its opinion, it is for the public interest to do so, provided that no injustice be done to the stockholders, the Mississippi court held that the charter right of a building and loan association to charge usurious interest could be taken away, since every usury law being of public interest, such a change was not an "injustice" to the stockholders.[48]

As shown in a previous chapter, an amendment, like the original charter, must be accepted, to have any effect. Though the Legislature may have reserved the power to alter, amend, or repeal a charter of a private corporation, and though, under this reservation of power, it can repeal the charter without regard to the consent or nonconsent of the corporation, and may impose an amendment as a condition of the corporation's continuing to exercise its franchises, it cannot, without its consent, compel it to continue under the charter as amended. The amendment must be accepted, or it has no binding force. As was said by the Massachusetts

Co., 16 N. J. Eq. 13, 84 Am. Dec. 134; State v. Commissioner of Railroad Taxation, 37 N. J. Law, 228; Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co., 8 Del. Ch. 468, 46 Atl. 12; Webster v. Susquehanna Pole Line Co., 112 Md. 416, 76 Atl. 254, 21 Ann. Cas. 357; People ex rel. Roosevelt Hospital v. Raymond, 194 N. Y. 189, 87 N. E. 90; Lawrence v. Rutland R. Co., 80 Vt. 370, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475. Where the power is reserved by a general law, a charter thus subjected thereto is not affected by a subsequent repeal of the law. Watson Seminary v. Pike County Court, 149 Mo. 57, 50 S. W. 880, 45 L. R. A. 675.

[46] Garey v. St. Joe Min. Co., 32 Utah, 497, 91 Pac. 369, 12 L. R. A. (N. S.) 554.

[47] Greenwood v. Union Freight R. Co., supra; Com. v. Eastern R. Co., supra. And see Lothrop v. Stedman, 42 Conn. 584, Fed. Cas. No. 8,519.

[48] Mississippi Building & Loan Ass'n v. McElveen, 100 Miss. 16, 56 South. 187.

court, "that a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities." [49] Of course, a corporation cannot conduct its operations in defiance of the state; and, if it does not accept an authorized amendment of its charter, it must discontinue its operations as a corporate body.[50] And, as we have seen, if a corporation continues to act as such after an authorized amendment, it may be regarded as having accepted the amendment.[51] The corporation may only accept or reject the amendment in its entirety.[52]

The state, under a reservation of power to repeal, alter, or amend a charter, may exercise such power, and to almost any extent, to carry into effect the original purposes of the grant, and to protect the rights of the public and the corporators, or to promote the due administration of the affairs of the corporation; but it cannot impair or destroy vested rights under such a reservation of power.[53]

[49] Ellis v. Marshall, 2 Mass. 269, 3 Am. Dec. 49; St. John v. Iowa Business Men's, etc., Ass'n, 136 Iowa, 448, 113 N. W. 863, 15 L. R. A. (N. S.) 503. See Yeaton v. Bank of Old Dominion, 21 Grat. (Va.) 593. In this case it is said: "Every amendment or modification of a charter of incorporation is nothing more than a new contract, which is not binding upon the corporate body until accepted by them." See ante, p. 55, and cases there cited.

[50] Yeaton v. Bank of Old Dominion, supra.

[51] Ante, p. 55, and cases there cited.

[52] See Perkins v. Coffin, 84 Conn. 275, 79 Atl. 1070, Ann. Cas. 1912C, 1188.

[53] See dissenting opinions of Strong, Bradley, and Field, JJ., in the Sinking Fund Cases, 99 U. S. 700, 727, 25 L. Ed. 496, 504. And see Sage v. Dillard, 15 B. Mon. (Ky.) 340; Garey v. St. Joe Min. Co., 32 Utah, 497, 91 Pac. 369, 12 L. R. A. (N. S.) 554. An act declaring that all charters and grants of or to corporations or amendments thereof, shall be subject to amendment or repeal, applies to extensions of pre-existing charters. Deposit Bank of Owensboro v. Daviess County, 102 Ky. 174, 39 S. W. 1030, 44 L. R. A. 825; Northern Bank of Kentucky v. Stone (C. C.) 88 Fed. 413. The Legislature cannot impair the right to redeem from a mortgage. Ashuelot R. Co. v. Elliot, 58 N. H. 451. Nor can it prevent distribution of the assets of a corporation, whose charter it has repealed, among those who are entitled to them. Lothrop v. Stedman, 42 Conn. 584, Fed. Cas. No. 8,519. "The reserved right to repeal, alter, or amend does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice, by depriving of the equal protection of the laws or the constitutional guaranties against the taking of property without due process of law." Per White, J., in Stearns v. Minnesota ex rel. Marr, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. Ed. 162. See, also, Louisville Water Co. v. Clark, 143 U. S. 1, 12 Sup. Ct. 346, 36 L. Ed. 55; St. Louis & I. M. Ry. Co. v. Paul, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746; Lake Shore & M. C. Ry. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858; Looker v. Maynard ex rel. Dusenbury, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79; POLK v. MUTUAL RESERVE FUND LIFE ASS'N OF NEW YORK, 207 U. S. 310, 28 Sup. Ct. 65, 52 L. Ed. 222, Wormser Cas. Corporations, 213. A general power, given

In a case in which the Legislature prescribed the rate of fare to be charged by an existing railroad company, whose charter was subject to alteration, amendment, or repeal, Mr. Justice Swayne said: "It is urged that the franchise here in question was properly held by a vested right, and that its sanctity as such could not be thus invaded. The answer is, 'Consensus facit jus.' It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the General Assembly. There is, therefore, no ground for just complaint against the state. Where an act of incorporation is repealed, few questions of difficulty can arise. Equity takes charge of all the property and effects which survive the dissolution, and administers them as a trust fund, primarily for the benefit of creditors. If anything is left, it goes to the stockholders. Even the executory contracts of the defunct corporation are not extinguished. The power of alteration and amendment is not without limit. The alterations must be reasonable. They must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases." [54] The court then held that the regu-

a railroad by its charter, to consolidate with, purchase, lease, or acquire the stock of other roads, may, while it remains unexecuted, be limited by the legislature, under the reserved power to amend the charter without impairing any vested rights, to cases where the other roads are not parallel or competing. Pearsall v. Great Northern Ry. Co., 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838. In Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849, the same result was reached, where there was no reserved power to amend the charter; the decision resting upon the police power. In POLK v. MUTUAL RESERVE FUND LIFE ASS'N, supra, it was held that where there is a reserve power, a law permitting mutual life associations to reincorporate as regular life insurance companies is not unconstitutional as impairing the obligation of the contracts existing between such associations and their policy holders, or as depriving such policy holders of their property without due process of law.

[54] Shields v. Ohio, 95 U. S. 319, 24 L. Ed. 357. In another case it was said: "A power reserved to the Legislature to alter, amend, or repeal a charter, authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the Legislature may deem necessary to secure either that object or any public right." Close v. Glenwood Cemetery, 107 U. S. 466, 2 Sup. Ct. 267, 27 L. Ed. 408. And see State ex rel. v. Neff, 52 Ohio St. 375, 40 N. E. 720, 28 L. R. A. 409; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; Dow v. Northern R. Co., 67 N. H. 1, 36 Atl. 510; Rochester & C. Turnpike Road Co. v. Joel, 41

lation in question did not take away a vested right, but was a legitimate exercise of the reserved power of alteration.

In other words, while the state cannot confiscate the property of a corporation or its shareholders, or deprive it of vested property rights; yet it is under the fiat of the state that the corporation comes into existence "and the power which creates may thereafter change or destroy." [55] Hence, though the state cannot confiscate the corporate property or that of the stockholders, it may change or destroy the corporation itself if it is deemed expedient to do so, under its reserved powers.[56] It has been held that a stockholder's vested property rights of which he cannot be deprived under the reserved power to amend are not affected in contemplation of law by the number of directors, and an injunction to restrain the corporation from reducing its number of directors from twelve to six was denied.[57] But the voting rights of stockholders are emphatically a property right and cannot be impaired or undermined, for this would deprive the stockholders of an essential and vital attribute.[58]

A corporation authorized to construct a dam across a river or stream may be afterwards required to construct and maintain fish-

App. Div. 43, 58 N. Y. Supp. 346; U. S. v. Union P. R. Co., 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406; Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744, 16 Ann. Cas. 695, affirmed 221 U. S. 467, 31 Sup. Ct. 709, 55 L. Ed. 815. An act providing that, whenever any railroad corporation shall receive or ship live stock by the car load, it shall, in consideration of the usual price paid for the shipment of such car, pass the shipper without further expense in the way of fare, is not a legitimate exercise of the reserved power, being a deprivation of property without due process of law, and a denial of the equal protection of the laws. Atchison, T. & S. F. Ry. Co. v. Campbell, 61 Kan. 439, 59 Pac. 1051, 48 L. R. A. 251, 78 Am. St. Rep. 328. With People v. O'Brien, supra, compare New York Central & H. R. R. Co. v. City of New York, 202 N. Y. 212, 221, 95 N. E. 638.

[55] Colby v. Equitable Trust Co., 124 App. Div. 262, 108 N. Y. Supp. 978, affirmed 192 N. Y. 535, 84 N. E. 1111. And see People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684.

[56] Colby v. Equitable Trust Co., supra; Garey v. St. Joe Min. Co., 32 Utah, 497, 91 Pac. 369, 12 L. R. A. (N. S.) 554; Lewis v. Northern Pac. R. Co., 36 Mont. 207, 92 Pac. 469.

[57] Bond v. Atlantic Terra Cotta Co., 137 App. Div. 671, 122 N. Y. Supp. 425, reversing order, 66 Misc. Rep. 546, 123 N. Y. Supp. 1085, by a three to two decision.

[58] Lord v. Equitable Life Assur. Soc. of United States, 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420; Berea College v. Kentucky, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81; Venner v. Chicago City R. Co., 246 Ill. 170, 92 N. E. 643, 138 Am. St. Rep. 229, 20 Ann. Cas. 607.

ways to permit the passage of migratory fish.[59] But where such a corporation had built a fishway in its dam, as required by statute, and had afterwards been granted an enlargement of its charter, upon the consideration that it should pay the damage caused to the owners of fishing rights by the dam as already built, with a fishway known to the Legislature to be insufficient, and the corporation paid such damages, it was held that the right to maintain the dam as it was, with the insufficient fishway, had been paid for, and was vested in the corporation, and that this vested right could not be taken from it by a subsequent act requiring it to construct sufficient fishways at great cost, though the Legislature had reserved the right to alter, amend, or repeal the charter.[60]

So, where a corporation had built a plank road, and established a toll gate, as authorized by its charter, it was held that the reserved power to amend, alter, or repeal its charter did not give the Legislature the right to require it to move the toll gate beyond the limits of a city which had grown up around it, and so to take from the company the right to collect tolls upon more than two miles of its road. "A statute which could have this effect," said Judge Cooley, "would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation." [61]

The power to alter, amend, or repeal a charter does not give the Legislature the power to change the charter, and force a new and different charter upon the corporators. As was said in a New Jersey case: "It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a

[59] Com. v. Essex Co., 13 Gray (Mass.) 239; Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247.

[60] Com. v. Essex Co., supra. The court said in this case: "No amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted. It appears to us, in the present case, that after the government, acting in behalf of the public, and also of all those riparian owners whose fish rights would be damnified by the defendant's dam, with the fishway as it was, entered into a solemn and formal contract with the defendant company to exempt them from the obligation of making and maintaining a suitable and sufficient fishway, if such were practicable, by indemnifying all persons damnified in their several fisheries, and the defendant company had executed their part of the contract by the payment of a large sum of money, it was not competent for the legislature, without any change of circumstances, under their authority to amend and alter the charter of the company, to pass a law requiring them to do the acts from which, by the terms of such contract, they had been exempted, and therefore that the said act was null and void." See, also, Woodward v. Central Vermont Ry. Co., 180 Mass. 599, 62 N. E. 1051.

[61] City of Detroit v. Detroit & H. P. R. Co., 43 Mich. 140, 5 N. W. 275.

new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind wholly or chiefly new, substituted for another, is not an alteration; it is a change." [62]

Under the reservation of power to amend, alter, or repeal charters, it has been held that the Legislature may make the stockholders of a corporation individually liable for its future debts; [63] that it may vary the measure, and thus enlarge the proportion, of the profits which a mutual life insurance company is required by the terms of its charter to pay a charitable institution; [64] that railroad companies may be compelled to make changes in the level, grade, and surface of the roadbed, new structures at crossings of other railroads or of highways, or station houses at particular places, in a manner and to be enforced by forms of process different from those provided for or contemplated by the original charter, or the general laws in force when the original charter was granted; [65] or that it may require a corporation authorized to build and maintain a dam across a navigable river to construct a lock for purposes of navigation; [66] or require a corporation authorized to

[62] Zabriskie v. Hackensack & N. Y. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; St. John v. Iowa Business Men's, etc., Ass'n, 136 Iowa, 448, 113 N. W. 863, 15 L. R. A. (N. S.) 503.

[63] Sherman v. Smith, 1 Black (U. S.) 587, 17 L. Ed. 163; In re Lee & Co.'s Bank, 21 N. Y. 9; Bailey v. Hollister, 26 N. Y. 112; Gardner v. Hope Ins. Co., 9 R. I. 194, 11 Am. Rep. 238; Williams v. Nall, 108 Ky. 21, 55 S. W. 706. In some states this is a legitimate exercise of the police power of the state. Ante, p. 265, note 38.

[64] Massachusetts General Hospital v. State Mut. Life Assur. Co. of Worcester, 4 Gray (Mass.) 227.

[65] City of Roxbury v. Boston & P. R. Corp., 6 Cush. (Mass.) 424; Fitchburg R. Co. v. Grand Junction R. & Depot Co., 4 Allen (Mass.) 198; Com. v. Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555; Albany N. R. Co. v. Brownell, 24 N. Y. 345 (overruling Miller v. New York & E. R. Co., 21 Barb. [N. Y.] 513). In Mayor, etc., of Worcester v. Norwich & W. R. Co., 109 Mass. 103, the Legislature had passed an act requiring certain railroad companies to unite in a passenger station in the city of Worcester, to extend their tracks in the city to the union station, and after the extension to discontinue parts of their existing locations. The act was held to be constitutional and valid, as it was a reasonable exercise of the reserved right to amend, alter, or repeal the charters of the corporations.

[66] South Bay Meadow Dam Co. v. Gray, 30 Me. 547.

maintain a dam to maintain suitable fishways;[67] or revoke an exemption from taxation, or increase a tax or license fee;[68] or require a corporation to establish a sinking fund to meet its obligations;[69] or authorize a city to subscribe for stock, and to appoint two directors;[70] or, according to some of the decisions, but not all, authorize cumulative voting at stockholders' meetings at an election of directors;[71] or increase the number of trustees of an incorporated college, in which the state is part owner, and require a majority of them to consist of certain state officers, instead of being elected, as formerly, by the private stockholders;[72] or regulate the charges of railroad companies, water companies, and other quasi public corporations;[73] or require employés to be paid in full when discharged.[74]

[67] Commissioners on Inland Fisheries v. Holyoke Water-Power Co., 104 Mass. 446, 6 Am. Rep. 247.

[68] Post, p. 288.

[69] Union Pac. R. Co. v. U. S., 99 U. S. 700, 25 L. Ed. 496.

[70] New Haven & D. R. Co. v. Chapman, 38 Conn. 56.

[71] Cross v. West Virginia Cent. P. Ry. Co., 35 W. Va. 174, 12 S. E. 1071; Looker v. Maynard ex rel. Dusenbury, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79, affirming 111 Mich. 498, 69 N. W. 929, 56 L. R. A. 947. Under the reserved power the state can alter the provisions of a charter defining the internal scheme of organization of the corporation, and may authorize the issue of preferred stock by the consent of the holders of two-thirds of the capital stock, although the corporation was organized under a general law which authorized the issue of preferred stock by the unanimous consent of the shareholders. Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. 470, 95 N. Y. S. 357. But see Orr v. Bracken County, 81 Ky. 593; Hays v. Com. ex rel. McCutcheon, 82 Pa. 518. See also, Lord v. Equitable Life Assur. Soc. of United States, 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420, on impairment of voting rights.

[72] Jackson v. Walsh, 75 Md. 304, 23 Atl. 778. And see McKee v. Chautauqua Assembly (C. C.) 124 Fed. 808. Contra, in a corporation in which shareholders are vested with the right of private property in their shares. In re Election of Directors of Newark Library Ass'n, 64 N. J. Law, 217, 43 Atl. 435. See, also, Lord v. Equitable Life Assur. Soc. of United States, 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420.

[73] Shields v. Ohio, 95 U. S. 319, 24 L. Ed. 357; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; Parker v. Metropolitan R. Co., 109 Mass. 506; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406. Cf. Pingree v. Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274; Lake Shore & M.

[74] Leep v. St. Louis, I. M. & S. Ry. Co., 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109; St. Louis, I. M. & S. Ry. Co. v. Paul, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154, affirmed 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746; Skinner v. Garnett Gold Min. Co. (C. C.) 96 Fed. 735. Cf. Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206; Johnson v. Goodyear Min. Co., 127 Cal. 4, 59 Pac. 305, 47 L. R. A. 338, 78 Am. St. Rep. 17.

A reserved power of amending or repealing the charter of a corporation is a legislative power, and cannot authorize the Legislature to exercise judicial powers. This would be unconstitutional. For instance, it cannot authorize the Legislature to foreclose a mortgage on the corporate property.[75] It may, however, appoint a receiver or trustee to settle the affairs of an insolvent corporation. This is a legislative act.[76] It is also perfectly competent for the Legislature to reserve to itself the right to repeal a charter for a violation thereof or other default. Such a reservation is not a reservation of judicial power, and for that reason unconstitutional, for an inquiry by the Legislature into the affairs or defaults of a corporation, with a view to discontinue it, is not a judicial act.[77]

It has been held by some of the courts that, where the Legislature reserves the power at any time to annul and vacate the charter of a corporation, if it shall fail to go into operation, or shall abuse or misuse its privileges, the Legislature reserves the power of determining whether these contingencies have happened and a future Legislature may repeal the charter without any judicial proceeding or prior notice.[78] But the weight of authority is against this view. Most of the courts have held that under such a reservation the investigation and determination of the question whether the occasion has arisen upon which the reserved power of the Legislature may be exercised, is one of judicial, and not of legislative, cognizance, and that the power can be exercised only after a judicial investigation and determination, after notice to the corporation, and an opportunity to be heard.[79] In some jurisdictions it is held that the Legislature may exercise the power of repeal before

S. Ry. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. An act empowering cities to fix reasonable rates for the supply of water by any corporation does not impair the obligation of a contract, in the form of an ordinance by which a city granted a franchise to a corporation and fixed the water rentals during the period of the franchise, where the corporation was organized under a law providing that the Legislature might prescribe such regulations as it deemed advisable. Freeport Water Co. v. City of Freeport, 186 Ill. 179, 57 N. E. 862; City of Danville v. Danville Water Co., 178 Ill. 299, 53 N. E. 118, 69 Am. St. Rep. 304; Id., 180 Ill. 235, 54 N. E. 224.

[75] Ashuelot R. Co. v. Elliot, 58 N. H. 451.

[76] Lothrop v. Stedman, 42 Conn. 584, Fed. Cas. No. 8,519; Carey v. Giles, 9 Ga. 253.

[77] Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; Lothrop v. Stedman, 42 Conn. 584, Fed. Cas. No. 8,519.

[78] Miners' Bank of Dubuque v. U. S., Morris (Iowa) 482, 43 Am. Dec. 115.

[79] Flint & Fentonville Plank Road Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233; State v. Noyes, 47 Me. 189; Chesapeake & Ohio Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 122; Regents of University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

a judicial investigation, and without notice, but that its action is subject to review by the courts.[80]

Where a charter is offered before, but is not accepted until after, the adoption of a constitutional provision, or enactment of a statute, making all charters, subject to amendment, alteration, or repeal, the provision enters into and forms a part of the contract between the corporation and the state, as the contract is not made until the charter is accepted.[81]

78. OFFER OF AMENDMENT—POWER OF MAJORITY

We are dealing here only with the power of the state to alter or amend a charter without the consent of the members of the corporation. Of course, there is nothing to prevent the Legislature from authorizing a corporation to engage in new enterprises, if all the members see fit to accept the amendment. It is like the case where both parties to a contract rescind it by mutual agreement, and substitute a new contract. The power of the majority of the members to bind a dissenting minority by accepting an amendment of the charter thus offered will be discussed in a subsequent chapter.[82]

TAXATION OF CORPORATIONS

79. Unless a corporation is expressly exempted from taxation by its charter, the state may tax it to the same extent as it may tax individuals, without impairing the contract implied between the state and the corporation. But the power to tax is not unlimited. Thus:

(a) Taxes can be imposed only for a public purpose.

(b) The taxing power is limited to persons, property, and business within the jurisdiction of the state.

(c) Provisions of the state constitution must not be violated, as provisions requiring uniformity and equality of taxation.

(d) In the absence of constitutional limitations, double taxation is not prohibited, but in a number of states it is prohibited by the constitution. Even when not prohibited, it is unjust, and in construing statutes all presumptions are against it.

[80] Erie & N. E. R. v. Casey, 26 Pa. 287.

[81] Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425; Stone v. Wisconsin, 94 U. S. 181, 24 L. Ed. 102.

[82] Post, p. 565. And see Perkins v. Coffin, 84 Conn. 275, 79 Atl. 1070, Ann. Cas. 1912C, 1188.

(e) Provisions of the federal constitution must not be violated, such as—

(1) The provision that no state shall deny to any person within its jurisdiction the equal protection of the laws. This prohibits unequal taxation.

(2) The provision that no state shall pass any law impairing the obligation of contracts. This prevents taxation of a corporation in violation of the express terms of its charter.

(3) As government bonds cannot be taxed, capital invested in them is exempt.

(4) No tax can be imposed which will amount to a regulation of or interference with interstate commerce.

(5) The states cannot interfere by taxation with the operation of corporations created by Congress for the purpose of carrying into effect the constitutional powers of the federal government, except in so far as it may be permitted by Congress.

80. By the weight of authority, a state, in creating a corporation, or afterwards for a consideration, but not otherwise, may agree that it shall be exempt from taxation, in whole or in part; and it cannot, in such a case, impose a tax in violation of the charter without impairing the obligation of its contract. But—

(a) Exemption from taxation must be clearly shown. All presumptions are against it.

(b) An exemption from taxation may be revoked if the state has reserved the power to repeal, alter, or amend the charter.

81. A corporation cannot escape liability for taxes on the plea of ultra vires.

Unless the case comes within one of the exceptions hereafter explained, a state has the same power to tax corporations as it has to tax natural persons, and no greater power than this. In the absence of express exemption from taxation, the imposition of a tax upon the property of a corporation is not a violation of its charter, and so within the constitutional prohibition against laws impairing the obligation of contracts, for exemption from taxation is not an implied term of the contract between the corporation and the state.[88]

[88] Providence Bank v. Billings, 4 Pet. (U. S.) 514, 7 L. Ed. 939. As to the taxation of railroad companies, see State Railroad Tax Cases, 92 U. S. 575–

Object of Taxation

The Legislature can only use the power of taxation in aid of a public object, an object which is within the purpose for which governments are established. It cannot, therefore, be exercised in aid of private enterprises, even though the local public may be benefited in a remote or collateral way. Thus a tax cannot be imposed to aid a manufacturing enterprise of individuals.[84] This principle is not peculiar to the taxation of corporations. In Lowell v. City of Boston [85] it was held that a statute authorizing the city of Boston to issue bonds, which, of course, might require taxation to pay them, and to lend the proceeds on mortgage to the owners of land, the buildings upon which were burned by the great fire of 1872, was unconstitutional.

Jurisdiction

The power of taxation of a state is limited to persons, property, and business within her jurisdiction. All taxation must relate to one of these objects.[86] Presumptively, all property within the territorial limits of a state is subject to its taxing power.[87] Bonds issued by a railroad company, for instance, are property in the hands of the holders, and, when held by nonresidents of the state in which the company was incorporated, they cannot be taxed by the state, and it can make no difference that they are secured by a mortgage on land in the state.[88] A law, therefore, which requires a corporation to retain a certain percentage of the interest due on bonds made payable out of the state to citizens of another state, and held by them, is not a legitimate exercise of the taxing power.[89]

Property Taxable

The statutes generally provide very specifically what property of corporations shall be taxed, and how the taxes shall be assessed.

618, 23 L. Ed. 663; Indianapolis & St. L. R. Co. v. Vance, 96 U. S. 450, 24 L. Ed. 752; Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888.

[84] Citizens' Sav. Loan Ass'n v. Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455; City of Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238.

[85] Lowell v. City of Boston, 111 Mass. 454, 15 Am. Rep. 39.

[86] Case of State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300, 21 L. Ed. 179; South Nashville St. R. Co. v. Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; Com. v. Standard Oil Co., 101 Pa. 119; Com. v. Chesapeake & O. R. Co., 27 Grat. (Va.) 344.

[87] New York ex rel. Metropolitan Street R. Co. v. New York State Board of Tax Commissioners, 199 U. S. 1, 35, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381, affirming 174 N. Y. 417, 67 N. E. 69. And see HAWLEY v. CITY OF MALDEN, 232 U. S. 1, 34 Sup. Ct. 201, 58 L. Ed. 477, Wormser Cas. Corporations, 219.

[88] Case of State Tax on Foreign-Held Bonds, supra; South Nashville St. R. Co. v. Morrow, supra; Com. v. Chesapeake & O. R. Co., supra.

[89] Case of State Tax on Foreign-Held Bonds, supra.

But the construction of the statutes is not always clear. In corporations there are sometimes four elements of taxable value, namely: (1) The franchises of the corporation; (2) capital stock in the hands of the corporation; (3) corporate property, i. e., surplus such as real estate, moneys, credits, and other personal property, over and beyond the capital stock; and (4) shares of stock in the hands of the individual stockholders.[90] Any one of these may be taxed, provided no constitutional limitations, federal or state, are violated. The Supreme Court of Illinois has stated that there are taxable: "1. The capital stock. 2. The corporate property. 3. The franchise of the corporation—all of which is taxable to the corporation; and (4) the shares in the capital stock which is taxable only to the stockholders." [91]

And where the shares of stock in a corporation are taxed, the Legislature may require that the tax shall be paid by the corporation, and allow it to collect the same from the stockholders, or deduct it from dividends,[92] unless the corporation, by its charter, is exempt from taxation, so that this might be a tax upon it.[93]

Double Taxation

In many jurisdictions double taxation is prohibited by the Constitution. In the absence of such prohibition, it is no doubt within the power of the Legislature to assess taxes in such a way as to subject the corporation or the stockholders to double taxation.[94] But an intention to impose double taxes is never to be presumed. It is unjust, and therefore "all presumptions are against such an imposition." [95] It should be held in disfavor by courts and legisla-

[90] Tennessee v. Whitworth, 117 U. S. 129, 6 Sup. Ct. 645, 29 L. Ed. 830; HAWLEY v. CITY OF MALDEN, 232 U. S. 1, 34 Sup. Ct. 201, 58 L. Ed. 477, Wormser Cas. Corporations, 219.

[91] Porter v. Rockford, etc., R. Co., 76 Ill. 561; People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762; Bank of Commerce v. Tennessee, Use of Memphis, 161 U. S. 134, 16 Sup. Ct. 456, 40 L. Ed. 645. The exercise of the franchise is a right subject to taxation. People ex rel. Tetragon Co. v. Sohmer, 162 App. Div. 433, 147 N. Y. Supp. 611; Monroe County Sav. Bank v. City of Rochester, 37 N. Y. 365.

[92] Town of St. Albans v. National Car Co., 57 Vt. 68.

[93] Post, p. 290, and note 38.

[94] See Board of Revenue of Montgomery County v. Montgomery Gaslight Co., 64 Ala. 269; Pittsburg, F. W. & C. R. Co. v. Com., 66 Pa. 77, 5 Am. Rep. 344; Cook v. City of Burlington, 59 Iowa, 251, 13 N. W. 113, 44 Am. St. Rep. 679.

[95] Tennessee v. Whitworth, 117 U. S. 129, 6 Sup. Ct. 645, 647, 29 L. Ed. 830; Wright v. Southwestern R. Co., 64 Ga. 783; Boston & Sandwich Glass Co. v. City of Boston, 4 Metc. (Mass.) 181; City of Fall River v. County Com'rs of Bristol, 125 Mass. 567; State v. Hannibal & St. J. R. Co., 37 Mo. 265; Cook v. City of Burlington, supra.

tures. Thus, where a charter exempted the stock of a corporation from taxation, but taxed its property, it was held that the exemption extended to shares of stock in the hands of the individual shareholders, the capital represented by which had been converted by the corporation into property which was liable to taxation.[96]

A tax on the franchises of a corporation is not a tax on its property. Both may be taxed, and it will not be double taxation.[97] Some of the courts have held that the capital stock of a corporation and the property of the individual shareholders in their shares are distinct property interests, and that the taxation of both does not amount to double taxation, and is authorized.[98] Thus, in an Iowa case, plaintiffs were the executors of an estate; part of which consisted of shares of stock in an Iowa corporation whose sole tangible property was a bridge across the Mississippi river. This bridge had been assessed and the taxes thereon duly paid. Later, the state sought, also, to tax the shares of stock in the corporation. It was held that this could lawfully be done and plaintiffs' appeal was dismissed, the decision being rested on the elementary distinction between the corporate entity and its stockholders.[99] Other courts hold, however, that this is double taxation, and in a number of states it is expressly provided that, where a corporation is taxed on its capital stock or property, the stockholders shall not be taxed on their shares.[1] In Maryland, by the declaration of rights, every

[96] Tennessee v. Whitworth, supra.

[97] See Manufacturers' Ins. Co. v. Loud, 99 Mass. 146, 96 Am. Dec. 715; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. Ed. 953.

[98] Ogden v. City of St. Joseph, 90 Mo. 522, 3 S. W. 25; Farrington v. Tennessee, 95 U. S. 686, 24 L. Ed. 558; Sturges v. Carter, 114 U. S. 521, 5 Sup. Ct. 1014, 29 L. Ed. 240; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; South Nashville St. R. Co. v. Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; State Bank of Virginia v. City of Richmond, 79 Va. 113; Danville Banking & Trust Co. v. Parks, 88 Ill. 170; Belo v. Forsyth County Com'rs, 82 N. C. 415, 33 Am. Rep. 688; City of Memphis v. Ensley, 6 Baxt. (Tenn.) 553, 32 Am. Rep. 532.

[99] Cook v. City of Burlington, 59 Iowa, 251, 13 N. W. 113, 44 Am. Rep. 679.

[1] See article by Edward C. Moore, Jr., Esq., 19 Am. Law Rev. 755. See Griffith v. Watson, 19 Kan. 23; People ex rel. Burke v. Badlam, 57 Cal. 594; Osborn v. New York & N. H. R. Co., 40 Conn. 494; Salem Iron Factory Co. v. Inhabitants of Danvers, 10 Mass. 514; Singer Mfg. Co. v. Heppenheimer, 58 N. J. Law, 633, 637, 638, 34 Atl. 1061, 32 L. R. A. 643. In the last cited case, the court held that a law which exempts a corporation and its property from taxation exempts its shares also. In other words, that exemption of the corporate capital stock exempts also the shares of stock. It was further declared that an exemption of the shares from taxation also exempts the corporate capital stock. Otherwise, the court insisted, the exemption would be meaningless. In all cases of this sort, the real question, it is submitted,

owner of property is required to pay taxes in proportion to its actual worth. This has been held to prohibit double taxation, and it is held that the payment of a tax on the capital stock of a corporation is a bar to taxation on the corporate property, as the capital stock represents the whole property of the corporation; and this principle has been recognized in other states, though not in most.[2]

It has been held in the Supreme Court of the United States that the exemption of the shares of corporate stock from taxation does not thereby exempt either the capital stock of the corporation or its surplus.[3] "There is," said the court, "a clear distinction between the capital stock of a corporation and the shares of stock of such corporation in the hands of its individual shareholders." It has also been decided that the surplus of a corporation may lawfully be taxed though the capital stock thereof is exempt. The surplus, as the name itself indicates, is something over and beyond the capital stock of the corporation.[4]

Place of Taxation

Personal property, including shares of stock, in the absence of any law to the contrary, follows the person of the owner, and has its situs at his domicile; but for the purposes of taxation it may be separated from him, and he may be taxed on its account at the place where it is actually located.[5] Shares of stock in a domestic corporation may therefore be taxed at the place within the state where the corporation is located, without regard to the place of residence of the holders; and the state may tax the shares of

is to determine: What did the Legislature intend to tax? See, also, People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762. Sometimes the result seems unjust. HAWLEY v. CITY OF MALDEN, 232 U. S. 1, 13, 34 Sup. Ct. 201, 58 L. Ed. 477, Wormser Cas. Corporations, 219; Kidd v. Alabama, 188 U. S. 730, 732, 23 Sup. Ct. 401, 47 L. Ed. 669.

[2] See 19 Am. Law Rev. 757; State v. Sterling, 20 Md. 520; State v. Cumberland & P. R. Co., 40 Md. 22; County Com'rs of Frederick County v. Farmers' & Mechanics' Nat. Bank of Frederick, 48 Md. 117; Jones v. Davis, 35 Ohio St. 474; Whitney v. City of Madison, 23 Ind. 331. Contra, Lackawanna Iron & Coal Co. v. Luzerne County, 42 Pa. 424. In Mayor, etc., of Baltimore v. Baltimore & O. R. R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531, the court held that an exemption from taxation of the shares of stock included an exemption of the franchise and capital stock which give to the shares of the individual stockholders their value.

[3] Shelby County v. Union & Planters' Bank, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. Ed. 650. Contra, Singer Mfg. Co. v. Heppenheimer, 58 N. J. Law, 633, 34 Atl. 1061, 32 L. R. A. 643.

[4] Bank of Commerce v. Tennessee, Use of Memphis, 161 U. S. 134, 16 Sup. Ct. 456, 40 L. Ed. 993.

[5] Tappan v. Merchants' Nat. Bank, 19 Wall. (U. S.) 490, 22 L. Ed. 189.

nonresidents as well as of residents.[6] When a contrary rule is not declared by statute, the situs of shares of stock, for the purpose of taxation, is the residence of the owner.[7] The New York Court of Appeals has declared that the legal situation of that species of personal property represented by certificates of corporate stock "is where the corporation exists, or where the shareholder has his domicile."[8] Shares in a foreign corporation may be taxed to a resident owner.[9]

Restrictions in the Federal Constitution—Federal Corporations

The Constitution of the United States imposes some limitations upon the taxing power of the states. We can only mention these shortly, leaving the reader to follow up the subject by referring to works on taxation and constitutional law.

Under the constitutional provision (Fourteenth Amendment) that no state shall deny to any person within its jurisdiction the equal protection of the laws, a state cannot impose unequal taxation; but all taxes must be uniform, and must be uniformly assessed. Corporations are persons within the protection of this rule.[10]

[6] So as to shares in national banks. U. S. Comp. St. 1913, § 9784; Tappan v. Merchants' Nat. Bank, 19 Wall. (U. S.) 490, 22 L. Ed. 189; South Nashville St. R. Co. v. Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; Town of St. Albans v. National Car Co., 57 Vt. 68.

[7] Ogden v. City of St. Joseph, 90 Mo. 522, 3 S. W. 25.

[8] Matter of James, 144 N. Y. 6, 12, 38 N. E. 961. Cf. Lockwood v. United States Steel Corp., 209 N. Y. 375, 103 N. E. 697, L. R. A. 1915C, 471.

[9] Cooley, Tax'n, 22; Sturges v. Carter, 114 U. S. 521, 5 Sup. Ct. 1014, 29 L. Ed. 240; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547. In the recent case of HAWLEY v. CITY OF MALDEN, 232 U. S. 1, 34 Sup. Ct. 201, 58 L. Ed. 477, Wormser Cas. Corporations, 219, it was held that the taxation by a state of shares owned by its citizens of stock of foreign corporations having no property and doing no business therein is perfectly valid. The court intimated that non-conflicting principles of taxation ought to be agreed upon, however, by the states, so as to avoid double and treble taxation.

[10] By section 4 of the thirteenth article of the Constitution of California, "a mortgage, deed of trust, contract, or other obligation by which a debt is secured," is treated, "for the purposes of assessment and taxation, as an interest in the property affected thereby"; and, "except as to railroad and other quasi public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. But by section 10 of the same article, "the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county" are to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads are located, in proportion to the number of miles of railway laid therein; no deduction from this value being allowed for any mortgages on the property. It has been held that in the different modes thus prescribed of assessing the value of the property of natural persons and the property of railroad corporations, as the basis of taxation, there is a departure from the rule of equality

If the state, in granting a charter, has stipulated that it will not tax the corporation, or that it will tax it in a certain way only, or on cerain property only, or to a certain amount only, it cannot afterwards tax in violation of the stipulation, without violating the clause of the federal Constitution, by which it is declared that no state shall pass any law impairing the obligation of contracts. This subject will be more fully explained on a subsequent page.[11]

A state cannot tax United States government bonds. Therefore it cannot tax the capital of corporations—like national banks, for instance—which is invested in such bonds.[12]

A state can impose no tax upon railroad or other corporations that amounts to a regulation of or interference with foreign or interstate commerce, for by the federal Constitution the power to regulate commerce is vested exclusively in Congress. Thus a state could not impose a tax upon freight or passengers transported by a railroad company into or through the state. A state law imposing a tax on freight or passengers, so far as it applies to articles or persons carried through the state, or taken up in the state and carried out of it, or taken up out of the state and brought into it, is unconstitutional and void.[13] But a state may tax a corporation on freight or passengers transported from point to point in the state. And a tax upon the gross receipts of a railroad company, after they have reached its treasury, is not an interference with interstate commerce, though part of the receipts may have been derived from transportation of persons or property into, out of, or through the state.[14] The same principles apply to telegraph companies and all

and uniformity. Railroad Tax Cases (C. C.) 13 Fed. 722. See, also, Santa Clara County v. Southern P. R. Co., 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118.

[11] Post, p. 287.

[12] Post, note 35. See, also, Home Sav. Bank v. Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901; Farmers' & Mechanics' Sav. Bank of Minneapolis v. Minnesota, 232 U. S. 516, 34 Sup. Ct. 354, 58 L. Ed. 706.

[13] State Freight Tax Case, 15 Wall. (U. S.) 232, 21 L. Ed. 146; Crandall v. Nevada, 6 Wall. (U. S.) 35, 18 L. Ed. 744, 745. See, also, International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

[14] State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284, 21 L. Ed. 164. But, if the tax is levied specifically upon the gross receipts for the carriage of freight or passengers into, out of, or through the state, it is void. Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. 857, 30 L. Ed. 888; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200. See, also, U. S. Exp. Co. v. Minnesota, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459, distinguishing Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031; Ohio Tax Cases, 232 U. S. 576, 593, 34 Sup. Ct. 372, 58 L. Ed. 737.

other corporations engaged in interstate or foreign commerce.[15] The effect of the interstate commerce clause of the federal Constitution on the power of the states to tax foreign corporations is considered in dealing with the law relating to foreign corporations.[16]

Since the states have no power, by taxation or otherwise, to impede or in any manner control the operation of the constitutional laws enacted by Congress to carry into effect the powers vested in the national government, it follows that, where Congress creates a corporation as a means of executing a power conferred by the federal Constitution,[17] the franchise of the corporation cannot be taxed by a state without the consent of Congress.[18] A state, however, may tax property owned by the corporation within its limits, and it may tax shares in the corporation against resident owners.[19]

The states can exercise no control over national banks, nor in any way affect their operation, except in so far as Congress may see fit to permit.[20] The franchises, therefore, of a national bank, could not be taxed by a state. Congress, in the National Banking Act, has expressly declared the shares in national banks to be taxable by the states against the holders as personal property,[21] provided "the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such state," [22] and provided shares owned by nonresidents shall be taxed where the bank is located. Real property of national banks is also declared taxable by the states. Capital of national

[15] Western Union Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067. As to telephones, see City of Pomona v. Sunset Telephone & Telegraph Co., 224 U. S. 330, 32 Sup. Ct. 477, 56 L. Ed. 788.

[16] Post, p. 764.

[17] Ante, p. 40.

[18] McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; California v. Central Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150.

[19] McCulloch v. Maryland, supra; Union P. R. Co. v. Peniston, 18 Wall. (U. S.) 5, 21 L. Ed. 787.

[20] Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196.

[21] This allows taxation of shares in national banks against other national banks which may hold them. National Bank of Redemption v. Boston, 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689.

[22] Rev. St. U. S. § 5219 (U. S. Comp. St. 1913, § 9784). As to the effect of this provision, see New York ex rel. Williams v. Weaver, 100 U. S. 539, 25 L. Ed. 705; Boyer v. Boyer, 113 U. S. 689, 5 Sup. Ct. 706, 28 L. Ed. 1089; Mercantile Nat. Bank v. New York, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; Davenport Nat. Bank v. Board of Equalization, 123 U. S. 83, 8 Sup. Ct. 73, 31 L. Ed. 94; National Bank of Redemption v. Boston, 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689; Whitbeck v. Mercantile Nat. Bank, 127 U. S. 193, 8 Sup. Ct. 1121, 32 L. Ed. 118.

banks invested in United States government bonds, is of course, not taxable.

Exemption from Taxation

Some of the state constitutions expressly prohibit the Legislature from granting exemptions from taxation, except to charitable institutions, and in certain other special cases. And some of the state courts have held, independently of any such prohibition, that the taxing power of the state is a power which the Legislature cannot barter away, and that a grant of exemption from taxation is revocable.[23] But, according to the decisions of the Supreme Court of the United States, and the decisions of most of the state courts, in the absence of constitutional restrictions, a state may, in granting a charter, stipulate that the corporation shall be exempt from taxation, or that it shall be taxable only to a certain amount, or on certain property, or in a certain way; and if it does so in clear and unmistakable terms, it cannot afterwards impose a tax in violation of the charter, without impairing the obligation of its contract with the corporation, and so violating the federal Constitution.[24]

If an exemption of the property of a corporation from taxation, conceded by an act of the Legislature, was spontaneous, and no service or duty or other condition was imposed upon the corporation, it may be revoked at the pleasure of the Legislature, for there is no consideration.[25]

It is well settled that exemption from taxation must be expressed in the charter in clear and unmistakable terms. An intention to

[23] Mechanics' & Traders' Branch of State Bank v. Debolt, 1 Ohio St. 591; Bank of Toledo v. City of Toledo, 1 Ohio St. 622; Skelly v. Jefferson Branch Bank of Ohio, 9 Ohio St. 606; Mott v. Pennsylvania R. Co., 30 Pa. 9, 72 Am. Dec. 664. And see West Wisconsin Ry. Co. v. Board of Sup'rs of Trempealeau County, 35 Wis. 257.

[24] Jefferson Branch Bank v. Skelly, 1 Black (U. S.) 436, 17 L. Ed. 173; Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430, 19 L. Ed. 495; Wilmington & W. R. Co. v. Reid, 13 Wall. (U. S.) 264, 20 L. Ed. 568; Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. Ed. 401; Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558; New Orleans v. Houston, 119 U. S. 265, 7 Sup. Ct. 198, 30 L. Ed. 411; Northwestern University v. Illinois ex rel. Miller, 99 U. S. 309, 25 L. Ed. 387; Nichols v. New Haven & Northampton Co., 42 Conn. 103; Bank of Commerce v. McGowan, 6 Lea (Tenn.) 703; Mobile & O. R. Co. v. Moseley, 52 Miss. 127; Neustadt v. Illinois Cent. R. Co., 31 Ill. 484; Wicomico County Com'rs v. Bancroft, 135 Fed. 977, 70 C. C. A. 287; Detroit, G. H. & M. Ry. Co. v. Powers (C. C.) 138 Fed. 264.

[25] Rector, etc., of Christ Church v. County of Philadelphia, 24 How. (U. S.) 300, 16 L. Ed. 602; Tucker v. Ferguson, 22 Wall. (U. S.) 527, 22 L. Ed. 805; Wilmington & W. R. Co. v. Alsbrook, 110 N. C. 137, 14 S. E. 652, affirmed, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; Grand Lodge F. & A. M. v. New Orleans, 166 U. S. 143, 17 Sup. Ct. 523, 41 L. Ed. 951.

grant exemption can never be implied from doubtful language. In this respect a charter will be strictly construed, and every doubt will be resolved in favor of the state and against the corporation.[26] For example, it has been held that an exemption of the capital stock of the corporation from taxation is not necessarily to be taken as an exemption of property into which the capital stock has been converted.[27] And a grant to one company of the powers and privileges of another, for the purpose of making and repairing a railroad, does not include an exemption from taxation, which was one of the privileges of the other company.[28] And an exemption of the real estate of a charitable corporation from taxation cannot be construed as exempting it from an assessment for a local improvement.[29]

If the Legislature has reserved the power to repeal, alter, or amend the charter of a corporation, which it has exempted in whole or in part from taxation, the exemption is subject to revocation.[30]

[26] Delaware Railroad Tax, 18 Wall. (U. S.) 206, 21 L. Ed. 888; People v. Commissioners of Taxes, 82 N. Y. 459; Danville Banking & Trust Co. v. Parks, 88 Ill. 170; Metropolitan Street R. Co. v. State Bd. of Tax Com'rs., 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381, affirming 174 N. Y. 417, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. Rep. 674, and cases cited in the following notes.

[27] Memphis & C. R. Co. v. Gaines, 97 U. S. 697, 24 L. Ed. 1091; Shelby County v. Union & P. Bank, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. Ed. 650; Central R. & B. Co. v. Wright, 164 U. S. 327, 17 Sup. Ct. 80, 41 L. Ed. 454.

[28] Annapolis & Elk Ridge R. Co. v. Anne Arundel County, 103 U. S. 1, 26 L. Ed. 359; Wilmington & W. R. Co. v. Alsbrook, 110 N. C. 137, 14 S. E. 652, affirmed, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; Philadelphia & W. R. Co. v. Maryland, 10 How. 376, 13 L. Ed. 461. Contra, Nichols v. New Haven & Northampton Co., 42 Conn. 103. And compare State Treasurer v. Auditor General, 46 Mich. 224, 9 N. W. 258.

[29] Roosevelt Hospital v. Mayor, etc., of City of New York, 84 N. Y. 108.

[30] Tomlinson v. Jessup, 15 Wall. (U. S.) 454, 21 L. Ed. 204. And see Nichols v. New Haven & Northampton Co., 42 Conn. 103; Morris & E. R. Co. v. Commissioners of Railroad Taxation, 37 N. J. Law, 228; West Wisconsin Ry. Co. v. Board of Sup'rs of Trempealeau County, 35 Wis. 257; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 19 Sup. Ct. 530, 571, 43 L. Ed. 840; Louisville v. Bank of Louisville, 174 U. S. 439, 19 Sup. Ct. 753, 43 L. Ed. 1039; Northern Central Ry. Co. v. Maryland, 187 U. S. 258, 23 Sup. Ct. 63, 47 L. Ed. 167; Northern Bank of Kentucky v. Stone (C. C.) 88 Fed. 413. Where a railroad company was exempted from all other taxes on payment of a percentage of its gross earnings, the power to alter, amend, or repeal could not be exercised, so as to continue in full the obligation as to payment of the percentage of gross earnings and at the same time deny to the company, either in whole or in part, the exemption conferred upon it. Stearns v. Minnesota ex rel. Marr, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. Ed. 162. See, also, Duluth & I. R. R. Co. v. County of St. Louis, 179 U. S. 302, 21 Sup. Ct. 124, 45 L. Ed. 201.

And, under such a reservation, if the charter fixes the taxes which the corporation shall be required to pay at a certain amount, they may be increased.[81]

The cases do not agree as to what property of a corporation is exempt from taxation under a general exemption clause. There is no doubt that such a clause exempts all property that is reasonably necessary to carry out the objects for which the company was created.[82] It would also seem clear that such a clause exempts property which, though it might be dispensed with, is obviously appropriate and convenient for such purpose, for such property may well be said to be necessary.[83] It does not, however, exempt property which is not necessary, and which is not obviously appropriate and convenient, though it may be property which the corporation is authorized to hold.[84]

[81] Union Passenger Ry. Co. v. Philadelphia, 101 U. S. 528, 25 L. Ed. 912. See also, Northern Central Ry. Co. v. Maryland, 187 U. S. 258, 23 Sup. Ct. 62, 47 L. Ed. 167.

[82] In Lehigh Coal & Nav. Co. v. Northampton County, 8 Watts & S. (Pa.) 334, it was held that, inasmuch as an incorporated canal was not taxable by the laws of Pennsylvania, not only the bed, berme bank, and tow path of the canal, but also the lock houses and collectors' offices, were exempt, as they were considered constituent parts of the canal, or necessarily incident thereto. And in Berks County v. Railroad, 6 Pa. 70, it was held that the exemption of a railroad covered water stations and depots, including the offices, oil houses, places to hold cars, etc., such places being necessary to the construction and operation of the road.

[83] In Camden & A. R. & Transp. Co. v. Commissioners of Mansfield Tp., 23 N. J. Law, 510, 57 Am. Dec. 409, it was said that property of a corporation is exempt from taxation, under a general exemption clause, only in so far as it is necessary, and not merely convenient, for the company to acquire and hold for the purposes for which it was incorporated; but in a later case it was held that this dictum was too narrow, and that the exemption includes whatever is obviously appropriate and convenient in carrying into effect the franchise granted. New Jersey R. & Transp. Co. v. Hancock, 35 N. J. Law, 545. And see Illinois Cent. R. Co. v. Irvin, 72 Ill. 456.

[84] In Berks County v. Railroad, it was held that the exemption of a railroad from taxation, while it covered water stations, depots, offices, oil houses, places to hold cars, etc., did not include warehouses, coal lots, coal chutes, and wood yards used or intended to be used as depots for merchandise, coal, wood, etc., for transportation, and machine shops for the manufacture of engines. In Camden & A. R. & Transp. Co. v. Commissioners of Mansfield Tp., 23 N. J. Law, 510, 57 Am. Dec. 409, it was held that exemption of a railroad company from taxation did not include dwelling houses and lots of land situated near the line of their road, and used exclusively by workmen and mechanics in the employ of the company. Compare Northwestern University v. Illinois ex rel. Miller, 99 U. S. 309, 25 L. Ed. 387; Ramsey County v. Chicago, M. & St. P. Ry. Co., 33 Minn. 537, 24 N. W. 313; County of Todd v. St. Paul, M. & M. Ry. Co., 38 Minn. 163, 36 N. W. 109.

Where it is held, as in most of the states, that the property of stockholders in their shares, and the property of the corporation in its capital stock, are distinct property interests, a tax on shares of stock in the hands of the stockholders is not a tax on the capital of the corporation, in violation of an exemption. Thus the capital stock of national banks invested in United States securities is not taxable by the states, but shares of the stock in the hands of the individual stockholders may be taxed without deduction on account of such an investment.[35] So the franchises of a corporation may be taxed without deduction for a portion of its capital invested in government bonds.[36] If a corporation is exempt from taxation, it cannot be taxed by a statute which purports to tax the shares of stockholders, but which requires the tax to be paid by the corporation, leaving it to collect the amount so paid from the stockholders, without regard to whether there may be any profits to be paid to the stockholders.[37]

Ultra Vires

The doctrine of ultra vires cannot be set up to defeat liability for taxes any more than it can be set up to defeat liability for torts, or to escape responsibility for a misdemeanor. A corporation cannot escape the taxes due upon its property or business on the ground that it was not authorized to acquire the property or to engage in the business.[38]

Foreign Corporations

The right of a state to tax a foreign corporation doing business within its limits has nothing to do with the present subject—the power of the state over corporations of its own creation—and is considered in treating of foreign corporations in a subsequent chapter.[39]

[35] Van Allen v. Assessors, 3 Wall. (U. S.) 573, 18 L. Ed. 229 (decision by bare majority of court); First Nat. Bank v. Kentucky, 9 Wall. (U. S.) 353, 19 L. Ed. 701. And see People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762; Bank of Commerce v. Tennessee, Use of Memphis, 161 U. S. 134, 16 Sup. Ct. 456, 40 L. Ed. 645; Home Sav. Bank v. Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901; Farmers' & Mechanics' Bank of Minneapolis v. Minnesota, 232 U. S. 516, 34 Sup. Ct. 354, 58 L. Ed. 706.

[36] Manufacturers' Ins. Co. v. Loud, 99 Mass. 146, 96 Am. Dec. 715.

[37] New Orleans v. Houston, 119 U. S. 265, 7 Sup. Ct. 198, 30 L. Ed. 411.

[38] Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176. And see, People ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166, 38 N. E. 990.

[39] Post, p. 758.

CHAPTER IX

DISSOLUTION OF CORPORATIONS

82. How Dissolution is Effected.
83–84. Equity Jurisdiction.
85. Effect of Dissolution.

HOW DISSOLUTION IS EFFECTED

82. Unless otherwise provided by statute, a private corporation may be dissolved only in five ways:

(a) By the weight of authority, by expiration of its charter.

(b) By an act of the Legislature repealing its charter, under the power of repeal reserved by the state in granting the charter.

(c) By the loss of an essential integral part, which cannot be supplied; as by the death or withdrawal of all the members, where there are no means of supplying their places; but this does not apply to modern stock corporations.

(d) By surrender of its charter with the consent of the state.

(e) By forfeiture of its charter for misuser or nonuser of its powers. But

(1) A forfeiture only takes effect upon the judgment of a competent court ascertaining and decreeing a forfeiture, unless the Legislature has clearly provided otherwise.

(2) Where the acts or omissions of which the corporation has been guilty are, by statute, expressly made a cause of forfeiture, the court has no discretion to refuse a judgment of forfeiture. But in other cases the court has a discretion to determine from the circumstances whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be merely ousted from the exercise of the powers illegally assumed.

(3) The Legislature, as the representative of the state, may waive the right to insist upon a cause of forfeiture, as by acts recognizing the right of a body to continue as a corporation. But, to constitute a waiver, the acts must be inconsistent with the intention to insist upon a forfeiture.

(4) The forfeiture must be enforced by the state, by its authorized representative. It cannot be enforced or insisted upon by private individuals, either collaterally or directly.

(5) A forfeiture may be enforced by scire facias where there is a legal existing body, capable of acting, but who have abused their power; or, by an information in the nature of quo warranto where the body is merely a corporation de facto, or where it is neither a corporation de facto nor de jure. The procedure is now generally fixed by statute.

These are the only ways mentioned in the books by which a corporation can cease to exist. It can be dissolved in no other way, except by express statutory provision.[1] In most states, statutes now allow the repeal of a corporate charter by vote of the shareholders; the consent of at least two-thirds being generally required.[2] And other causes for dissolution than above enumerated have also frequently been added by local statutes.

Expiration of Charter

According to the weight of authority, after the period of existence of a corporation has expired by force of express provision in its charter, or in a general law, it becomes ipso facto dissolved, and no longer has any existence at all, either de jure or de facto, for there is no law under which it can longer exist.[3] "If the law under which a corporation is organized, or the special act creating the corporation, fixes a definite time when its corporate life must end, it is evident that, when that date is reached, said corporation is ipso facto dissolved without any direct action on the part of the state or its members."[4] It is thereafter not even a de facto corporation and its existence may be questioned collaterally. Some courts hold,

[1] Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Morley v. Thayer (C. C.) 3 Fed. 737, 748; Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577; Barnes v. Smith, 48 Mont. 309, 137 Pac. 541.

[2] Thus, see General Corporation Law N. Y. (Consol. Laws, c. 23) § 221.

[3] Bradley v. Reppell, 133 Mo. 545, 32 S. W. 645, 34 S. W. 841, 54 Am. St. Rep. 685; Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 24 Am. Rep. 585; Sturges v. Vanderbilt, 73 N. Y. 384; Dobson v. Simonton, 86 N. C. 492; Krutz v. Paola Town Co., 20 Kan. 397; La Grange & M. R. Co. v. Rainey, 7 Cold. (Tenn.) 432; Supreme Lodge of Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. 891; Clark v. Brown (Tex. Civ. App.) 108 S. W. 421. And see Davis v. Stevens (D. C.) 104 Fed. 235.

[4] CLARK v. AMERICAN CANNEL COAL CO., 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217, Wormser Cas. Corporations, 68.

contrary to this proposition, that the fact that the charter of a corporation has expired does not terminate its existence, so as to prevent it from doing business, and suing and being sued; that it remains a de facto corporation, and subject to all the rules relating to such bodies, including the rule that its existence and right to do business can only be questioned by the state in a direct proceeding.[5]

Dissolution by Act of the Legislature

As shown in a former chapter, the British Parliament is, in theory at least, omnipotent, there being no constitutional restraints upon its action; and in England, therefore, corporations hold their charters at the will of the Legislature. But in this country the power of the state Legislatures and of Congress is greatly restricted by constitutional provisions, the chief one of which, as far as the present subject is concerned, is the provision contained in the federal Constitution, and also in most of the state Constitutions, that no state shall pass any law impairing the obligation of contracts. The charter of a corporation, as we have seen, is a contract between the state and the corporators, and the state cannot dissolve a corporation which it has created, without the consent of the corporators,[6] unless it has reserved the right to do so, or unless the corporation has been guilty of such an abuse of its franchises as to forfeit its charter. And even in the latter case, as we shall see, the forfeiture must generally be judicially ascertained and declared.[7] Whether the state has reserved the right to repeal a charter, and thereby dissolve the corporation, is to be determined from the terms of the charter, and of such statutes as apply to the corporation, and so form a part of its charter. A corporation is dissolved and ceases to exist for any purpose as a body corporate upon the repeal of its charter by the Legislature, by virtue of a power reserved in creating it.[8] And a corporation is dissolved by a repeal of its charter, where there is no reservation of power to repeal, if it accepts the repeal.[9] This, however, is a surrender of its charter with the consent of the Legislature.[10]

[5] Miller v. Newburg Orrel Coal Co., 31 W. Va. 836, 8 S. E. 600, 13 Am. St. Rep. 903; Bushnell v. Consolidated Ice Mach. Co., 138 Ill. 67, 27 N. E. 596; Merges v. Altenbrand, 45 Mont. 355, 123 Pac. 21 (semble).

[6] Ante, p. 256.

[7] Post, p. 299.

[8] Thornton v. Marginal Freight Ry. Co., 123 Mass. 32; Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; Greenwood v. Union Freight R. Co., 105 U. S. 13, 26 L. Ed. 961.

[9] President, etc., of Port Gibson v. Moore, 13 Smedes & M. (Miss.) 157.

[10] Post, p. 295.

Loss of Integral Part—Death or Loss of Members

"A corporation," said Chancellor Kent, "may also be dissolved when an integral part of the corporation is gone, without whose existence the functions of the corporation cannot be exercised, and when the corporation has no means of supplying that integral part, and has become incapable of acting. The incorporation becomes then virtually dead or extinguished." [11] If all the members of a corporation should die or withdraw, and there were no way in which new members could come in, dissolution would necessarily result. To work a dissolution because of the loss of an integral part of the corporation, there must be a permanent incapacity to restore the part.[12] Thus it has been held that dissolution does not result from an omission to continue the succession to certain offices, which are essential to the existence of the corporation, where the offices are in fact exercised by officers de facto, or even where there are no officers at all, if it is possible for the offices to be filled by an election or otherwise.[13]

The statement that a corporation is dissolved by the death of all its members can have no application to modern business corporations, since the shares, being personal property, pass by assignment, bequest, or descent, and must ever remain the property of some persons, who must, of necessity, be members of the corporation as long as it may exist.[14]

Where a corporation is legally organized by the requisite number of persons the fact that one person becomes the owner of all the shares of stock does not dissolve the corporation. It is still a corporation aggregate, and the stock may be transferred, and so distributed again. The property of the corporation remains vested in it, and suits on causes of action accruing in favor of or against it are brought by or against it as a corporation.[15] It has been held

[11] 2 Kent, Comm. 308, 309; King v. Pasmore, 3 Term R. 199; Philips v. Wickham, 1 Paige (N. Y.) 590.

[12] President, etc., of Bridge over River Lehigh v. Lehigh Coal & Nav. Co., 4 Rawle (Pa.) 9, 26 Am. Dec. 111. And see Nicolai v. Maryland Agricultural & Mechanical Ass'n, 96 Md. 323, 53 Atl. 965.

[13] President, etc., of Bridge over River Lehigh v. Lehigh Coal & Nav. Co., supra; Philips v. Wickham, 1 Paige (N. Y.) 590; Russell v. McLellan, 14 Pick. (Mass.) 63; Youree v. Home Town Mut. Ins. Co., of Warrensburg, Mo., 180 Mo. 153, 79 S. W. 175. And see In re Belton, 47 La. Ann. 1614, 18 South. 642, 30 L. R. A. 648.

[14] BOSTON GLASS MANUFACTORY v. LANGDON, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, Wormser Cas. Corporations, 224.

[15] Ante, p. 5; BUTTON v. HOFFMAN, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131, Wormser Cas. Corporations, 1; Wilde v. Jenkins, 4 Paige (N. Y.) 481; Louisville Banking Co. v. Eisenman, 94 Ky. 83, 21 S. W. 531, 1049, 19 L.

that in such an event the operation of the charter is suspended until, by a transfer of part of the stock, other members come in;[16] but this is very doubtful, to say the least.[17] On principle, the doctrine of corporate entity should not be ignored simply because the number of shareholders is reduced to one.[18]

Surrender of Charter

It has been said that a corporation may be dissolved by the voluntary surrender of its charter; but this statement is too broad. Such a surrender cannot work a dissolution without an acceptance of the surrender, or consent on the part of the state. As was said by Morton, J., in a Massachusetts case: "Charters are in many respects compacts between the government and the corporators. And, as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal, solemn act of the corporation; and it will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve that there was to form the compact. It is the acceptance which gives efficacy to the surrender. The dissolution of a corporation, it is said, extinguishes all its debts. The power of dissolving itself by its own act would be a dangerous power, and one which cannot be supposed to exist." [19]

R. A. 684, 42 Am. St. Rep. 335; Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336; Russell v. McLellan, 14 Pick. (Mass.) 63; In re Belton, 47 La. Ann. 1614, 18 South. 642, 30 L. R. A. 648; Mioton v. Del Corral, 132 La. 730, 61 South. 771; Harrington v. Connor, 51 Neb. 214, 70 N. W. 911; FIRST NAT. BANK OF GADSDEN v. WINCHESTER, 119 Ala. 168, 24 South. 351, 72 Am. St. Rep. 904, Wormser Cas. Corporations, 231; Geo. T. Stagg Co. v. E. H. Taylor, Jr. & Sons, 68 S. W. 863, 24 Ky. Law Rep. 495; Com. v. Monongahela Bridge Co., 216 Pa. 108, 64 Atl. 909, 8 Ann. Cas. 1073; Coal Belt Electric R. Co. v. Peabody Coal Co., 230 Ill. 164, 82 N. E. 627, 13 L. R. A. (N. S.) 1144, 120 Am. St. Rep. 282; Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387; Palmer v. Ring, 113 App. Div. 643, 99 N. Y. Supp. 290; Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Electric Light Co., 162 N. Y. 67, 56 N. E. 505; Saranac & L. P. R. Co. v. Arnold, 167 N. Y. 368, 60 N. E. 647. Acquisition of all the stock of a corporation by one person, and its failure for several years to transact business, does not amount to a dissolution. Elliott v. Sullivan, 156 Mo. App. 496, 137 S. W. 287.

[16] Swift v. Smith, supra; Louisville Banking Co. v. Eisenman, supra.

[17] Cases cited in note 15, supra; Russell v. McLellan, 14 Pick. (Mass.) 70; Newton Mfg. Co. v. White, 42 Ga. 148; Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 12 Ga. App. 818, 79 S. E. 45.

[18] See article by I. Maurice Wormser, 12 Columbia Law Rev. 496, 515–517.

[19] BOSTON GLASS MANUFACTORY v. LANGDON, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, Wormser Cas. Corporations, 224. And see Attorney General v. Superior & St. C. R. Co., 93 Wis. 604, 67 N. W. 1138; Economy Building &

And in a Minnesota case Judge Elliott said: "Although this is the era of free incorporation, it will not do to lose sight of the fact that incorporation is a privilege granted by the state for a definite period, which cannot be abandoned or cast aside at will without the consent of the state." [20] Frequently the statute provides a manner of voluntary dissolution for corporations organized under general laws.[21]

Where a statute authorizes a corporation to surrender its charter, and transfer its property, rights, etc., to another corporation, and provides that upon such surrender and transfer, and acceptance thereof by the other corporation, the said charter shall be vacated and annulled, such a surrender, transfer, and acceptance result in a dissolution of the corporation, and it no longer exists as such for any purpose.[22] A corporation is dissolved on a repeal of its charter, and an acceptance of the repeal by it.[23]

A corporation cannot dissolve itself, before the expiration of the period fixed by its charter, without the consent of all the shareholders, unless such dissolution is provided for in the charter.[24]

In a recent New Hampshire case it was held that a majority in interest of the shareholders in a private business corporation, on a going, solvent basis, have implied authority to sell all the corporate property for an adequate price and thus effect a practical dissolution of the company, when in the fair and honest exercise of their judgment they conclude that such a course will be advantageous to the shareholders.[25] Most jurisdictions refuse to go to this extent, and limit the right of the majority of the shareholders in a

L. Ass'n v. Paris Ice Mfg. Co., 68 S. W. 21, 24 Ky. Law Rep. 107. But see Merchants' & Planters' Line v. Waganer, 71 Ala. 581; State v. Chilhowee Woolen Mills Co., 115 Tenn. 266, 89 S. W. 741, 2 L. R. A. (N. S.) 493, 112 Am. St. Rep. 825.

[20] Beyer v. Woolpert, 99 Minn. 475, 109 N. W. 1116; Southern Elec. Securities Co. v. State, 91 Miss. 195, 44 South. 785, 124 Am. St. Rep. 638.

[21] Under a provision of statute authorizing stockholders by resolution to discontinue business, such a resolution operates as a voluntary surrender of the corporate franchise, and a dissolution of the corporation. Law v. Rich, 47 W. Va. 634, 35 S. E. 858. See Taylor, Priv. Corp. § 434. And see N. Y. General Corporation Law (Consol. Laws, c. 23) § 221.

[22] Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 8 L. Ed. 945.

[23] President, etc., of Port Gibson v. Moore, 13 Smedes & M. (Miss.) 157.

[24] Barton v. Enterprise Loan & Bldg. Ass'n, 114 Ind. 226, 16 N. E. 486, 5 Am. St. Rep. 608.

[25] BOWDITCH v. JACKSON CO., 76 N. H. 351, 82 Atl. 1014, Ann. Cas. 1913A, 366, Wormser Cas. Corporations, 226; Jackson Co. v. Gardiner Inv. Co., 217 Fed. 350, 133 C. C. A. 121; Cohen v. Big Stone Gap Iron Co., 111 Va. 486, 69 S. E. 359, Ann. Cas. 1912A, 203; Tanner v. Lindell R. Co., 180 Mo. 1, 79 S. W. 155, 103 Am. St. Rep. 534. And see note, 13 Mich. Law Rev. 334, 335.

corporation to alienate all its assets for the purpose of winding up its business to cases where the corporation is in failing circumstances and the sale is necessary in order to prevent further loss.[26] Under such circumstances, it would be a harsh rule that would permit a minority of the stockholders to hold the majority to their investment.[27] But, where the corporation is on a solvent and going basis, as in the New Hampshire case above referred to, the unanimous consent of the shareholders logically should be required, since the corporation is doing and able to continue to do a profitable business and the shareholders should have a right to insist that the enterprise to which they dedicated their investment be continued.[28] Under such conditions, it has been held that the protest of a solitary dissenting shareholder suffices to prevent the threatened alienation of the corporate assets.[29] However sound this may be on principle, it is open to criticism from a business standpoint. Why should one stockholder, or a small minority, be able to force the continuation of a corporate enterprise netting only three or four per cent. on the capital invested, when six or seven per cent. may be earned with equal safety in some other proposed way? On this reasoning, the New Hampshire decision has been commended.

Loss or Surrender of Property

The possession of property is not at all essential to corporate existence; and it follows, therefore, that the insolvency of a corporation, the failure to maintain its active organization, the discontinu-

[26] Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Bartholomew v. Derby Rubber Co., 69 Conn. 521, 38 Atl. 45, 61 Am. St. Rep. 57; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; Werle v. Northwestern Flint & Sandpaper Co., 125 Wis. 534, 104 N. W. 743.

[27] Price v. Holcomb, supra; Hayden v. Official Hotel Red-Book & Directory Co. (C. C.) 42 Fed. 875. Neither the directors nor the stockholders of a prosperous and going concern may sell all or substantially all of its property, if the holder of a single share dissents; but, if the business be unprofitable and hopeless, the holders of a majority of the stock may, against the dissent of the minority, sell all the property with a view to winding up the corporate affairs. Butler v. New Keystone Copper Co. (Del. Ch.) 93 Atl. 380.

[28] Abbot v. American Hard Rubber Co., 33 Barb. (N. Y.) 578; People v. Ballard, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737; Phillips v. Providence Steam Engine Co., 21 R. I. 302, 43 Atl. 598, 45 L. R. A. 560; Decatur Land Co. v. Robinson, 184 Ala. 322, 63 South. 522. And see, People ex rel. Barney v. Whalen, 119 App. Div. 749, 104 N. Y. Supp. 555, affirmed 189 N. Y. 560, 82 N. E. 1131.

[29] Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189; Butler v. New Keystone Copper Co. (Del. Ch.) 93 Atl. 380. But see BOWDITCH v. JACKSON CO., supra. As to need of good faith, see Godley v. Crandall & Godley Co., 212 N. Y. 121, 105 N. E. 818, L. R. A. 1915D, 632.

ance of its business, or the transfer or loss of all its property, cannot work a dissolution.[29] Of course, if a corporation, by an assignment of all its property, violates its charter, the state may enforce a forfeiture; but that is a different question.

Where a statute declares that the stockholders of a corporation shall be liable for all debts due and owing by it at the time of its dissolution, it has been held that it is sufficient dissolution within the meaning of the statute if a corporation becomes totally insolvent, and suspends its business.[31] But such insolvency and suspension of business does not dissolve a corporation for other purposes. It is merely a quasi dissolution as respects creditors.[32] For instance, it would not prevent a receiver of the corporation from maintaining an action in its name against a director or other person against whom the corporation has a right of action.[33]

Abandonment of Franchises or Business

The neglect of a corporation to exercise or use the franchises granted to it by its charter, or the abandonment of its franchises, may be ground for proceedings by the state to enforce a forfeiture of its charter, but it does not, ipso facto, work a dissolution.[34]

[29] 2 Kent, Comm. 309, 310; BOSTON GLASS MANUFACTORY v. LANGDON, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, Wormser Cas. Corporations, 224; Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; Reichwald v. Commercial Hotel Co., 106 Ill. 439; In re Belton, 47 La. Ann. 1614, 18 South. 642, 30 L. R. A. 648; Auburn Button Co. v. Sylvester, 68 Hun, 401, 22 N. Y. Supp. 891; State v. President, etc., of Bank of Maryland, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; State v. Mitchell, 104 Tenn. 336, 58 S. W. 365; Hirsch v. Independent Steel Co. of America (C. C.) 196 Fed. 104, appeal dismissed, Hirsch v. Taylor, 225 U. S. 698, 32 Sup. Ct. 841, 56 L. Ed. 1263; Beidenkopf v. Des Moines Life Ins. Co., 160 Iowa, 629, 142 N. W. 434, 46 L. R. A. (N. S.) 290; People ex rel. v. Union Gas & Electric Co., 254 Ill. 395, 98 N. E. 768; Fields v. U. S., 27 App. D. C. 433, certiorari denied, 205 U. S. 292, 27 Sup. Ct. 543, 51 L. Ed. 807. A corporation, by merely ceasing to exercise its franchise and selling all of its property, does not cease to exist. Tatum v. Leigh, 136 Ga. 791, 72 S. E. 236, Ann. Cas. 1912D, 216.

[31] Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454.

[32] Bank of Niagara v. Johnson, 8 Wend. (N. Y.) 656; Bradt v. Benedict, 17 N. Y. 99; Barclay v. Talman, 4 Edw. Ch. (N. Y.) 128, 129; Law v. Rich, 47 W. Va. 634, 35 S. E. 858; Sleeper v. Norris, 59 Kan. 555, 53 Pac. 757.

[33] Bank of Niagara v. Johnson, supra. The appointment of a receiver of an insolvent national bank does not dissolve it, so as to prevent the recovery of a judgment against it. Chemical Nat. Bank v. Hartford Deposit Co., 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595.

[34] Heard v. Talbot, 7 Gray (Mass.) 113; Morley v. Thayer (C. C.) 3 Fed. 737, 748; Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; Russell v. McLellan, 14 Pick. (Mass.) 63; Bradt v. Benedict, 17 N. Y. 93; Attorney General v. Superior & St. C. R. Co., 93 Wis. 604, 67 N. W. 1138;

Thus, where a canal company was incorporated, and authorized to maintain a dam for the purpose of supplying its canal, it was held, in effect, that its abandonment of the canal did not of itself work a forfeiture of its charter, and a dissolution, so as to make the maintenance of the dam unlawful, as against third persons.[35]

Forfeiture of Charter

A corporation may furnish ground for a forfeiture of its charter and of its right to corporate existence by an abuse or misuser of its powers and franchises, or by neglect or nonuser. But it is well settled that, as a general rule, the forfeiture can only take effect upon a judgment of a competent tribunal in a proceeding by the state to enforce the forfeiture.[36] Whatever neglect of duty or abuse of power a corporation may be guilty of, it does not, in the absence of express statutory or charter provision, by reason of that alone, lose its corporate existence. Until it has had a hearing before a competent tribunal, and a forfeiture has been judicially declared by judgment of ouster, it continues to be a corporation for all purposes. In State v. Fourth New Hampshire Turnpike Road,[37] the defendant corporation had neglected to make returns to the Legislature of expenditures and profits, as it was required by its charter to do under penalty of forfeiture, but no proceedings were taken to

Jones v. Spartanburg Herald Co., 44 S. C. 526, 22 S. E. 731; Richards v. Minnesota Sav. Bank, 75 Minn. 196, 77 N. W. 822; Law v. Rich, 47 W. Va. 634, 35 S. E. 858; Tatum v. Leigh, 136 Ga. 791, 72 S. E. 236, Ann. Cas. 1912D, 216; Saunders v. Bank of Mecklenburg, 112 Va. 443, 71 S. E. 714, Ann. Cas. 1913B, 982.

[35] Heard v. Talbot, supra.

[36] 2 Kent. Comm. 312; State v. Real-Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; King v. Amery, 2 Term R. 515; Colchester v. Seaber, 3 Burrows, 1866; Smith's Case, 4 Mod. 53; State v. Fourth New Hampshire Turnpike Road, 15 N. H. 162, 41 Am. Dec. 690; BOSTON GLASS MANUFACTORY v. LANGDON, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, Wormser Cas. Corporations, 224; Heard v. Talbot, 7 Gray (Mass.) 113; Baker v. Backus' Adm'r, 32 Ill. 79; John v. Farmers' & Mechanics' Bank of Indiana, 2 Blackf. (Ind.) 367, 20 Am. Dec. 119; Receivers of Bank of Circleville v. Renick, 15 Ohio, 322; Trustees of Vernon Soc. v. Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; Crump v. United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116; Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227; In re Philadelphia & M. Ry. Co., 187 Pa. 123, 40 Atl. 967; Wallamet Falls C. & L. Co. v. Kittridge, 5 Sawy. (U. S.) 44, Fed. Cas. No. 17,105; State ex rel. City Council of Spartanburg v. Spartanburg, C. & G. Ry. Co., 51 S. C. 129, 28 S. E. 145; Stolze v. Manitowoc Terminal Co., 100 Wis. 208, 75 N. W. 987; Utah, N. & C. R. Co. v. Utah & C. Ry. Co. (C. C.) 110 Fed. 879; Golconda Northern Ry. v. Gulf Lines Connecting R. R. of Illinois, 265 Ill. 194, 106 N. E. 818, Ann. Cas. 1916A, 833; Reed v. Sampson, 54 Tex. Civ. App. 552, 118 S. W. 749; Saunders v. Bank of Mecklenburg, 112 Va. 443, 71 S. E. 714, Ann. Cas. 1913B, 982.

[37] 15 N. H. 162, 41 Am. Dec. 690.

obtain a judgment of forfeiture and ouster. It was held that the charter was not forfeited merely by the neglect, but that the corporation continued to exist, so that the right to enforce a forfeiture could be waived by the state. A provision in a charter that the corporation shall do certain things—as that it shall make periodical returns to the Legislature of its expenditures and profits—"under forfeiture of the privileges of the act in future," does not absolutely determine the existence of the corporation on a violation thereof; but the meaning is that the forfeiture shall be proved in the regular, legal manner, and a judgment of forfeiture in proper proceedings by the state is necessary.[38]

The cancellation which the Secretary of State was authorized by law of Illinois to enter in case a corporation failed to make its annual report is not an absolute forfeiture of the corporate charter, but simply the evidence of nonuser of which the public may avail itself in a direct proceeding to oust the corporation of its franchise.[39]

It is perfectly competent, however, for the Legislature, in granting a charter, or by an authorized amendment of a charter, to provide that the corporation shall lose its corporate existence without the intervention of the courts by any omission of duty or violation of its charter or default as to limitations imposed, and whether the Legislature intended to so provide in any case depends upon the construction of the language used. In Brooklyn Steam Transit Co. v. City of Brooklyn,[40] the act incorporating a street railroad company provided that, unless it should be organized, and should lay at least a certain amount of its road within a given time, "this act, and all the powers, rights, and franchises herein and hereby granted, shall be deemed forfeited and terminated." The company organized, and made preparations to build its road, but did not build any portion of it before the expiration of the time limited, when it began to lay foundations for its road in the streets. It was held that under the provisions of the act it had lost its corporate franchises, and the right to build the road, and that the city could prevent it from proceeding with the work.[41] In a recent New York case, it was

[38] State v. Fourth New Hampshire Turnpike Road, 15 N. H. 162, 41 Am. Dec. 690.

[39] Gilmer Creamery Ass'n v. Quentin, 142 Ill. App. 448. And see Potwin v. Grunewald, 123 Ill. App. 34.

[40] 78 N. Y. 524.

[41] And see In re Brooklyn, W. & N. Ry. Co., 72 N. Y. 245; Id., 75 N. Y. 335; Oakland R. Co. v. Oakland, B. & F. V. R. Co., 45 Cal. 365, 13 Am. Rep. 181. Cf. New York & Long Island Bridge Co. v. Smith, 148 N. Y. 540, 42 N. E. 1088, where it was held that a provision in the charter of a bridge corporation

held that General Corporation Law (Consol. Laws, c. 23) § 36, providing that if any corporation except a railroad corporation, etc., shall not organize or commence transacting its business within two years from the date of its incorporation its corporate powers shall cease, is self-executory, so that no judicial action is necessary to forfeit its corporate powers after the two years.[42] Justice Dowling said: "Compliance with the requirement * * * was a condition precedent to the right to exercise any corporate powers whatever. Upon failure to satisfy the condition within the time limited, the right to exercise such powers at once ceased. The statute is self-executory and no action or judicial procedure was needed to declare or complete the loss of its corporate powers."

While, as we have just seen, a statute prescribing a forfeiture may be self-executing, it is submitted that a statute should be construed against an ipso facto forfeiture without further proceedings, if it can be fairly so construed. The question, of course, is ultimately one of determination of the legislative intention in the light of the language employed by it; but the decidedly better policy is to construe statutes, if possible, as not self-operative.[43] At the same time, an obvious legislative mandate should not be judicially nullified or emasculated.[44]

Same—When a Forfeiture will be Decreed

Where a corporation has been guilty of acts or omissions which, by statute, are expressly made a cause of forfeiture of its franchise to be a corporation, the court, in proceedings by the state, to enforce such forfeiture, has no discretion to refuse a judgment.[45] But in

that the bridge shall be commenced within two years, "or this act and all rights and privileges granted hereby shall be null and void," was not self-executing. The words "null and void" were interpreted to mean "null and voidable," and an action necessary. After referring to the above New York cases, the decision says: "It requires, however, strong and unmistakable language, such as each of the cases presents, to authorize the court to hold that it was the intention of the Legislature to dispense with judicial proceedings on the intervention of the Attorney General." And see Utah, N. & C. Ry. Co. v. Utah & C. Ry. Co. (C. C.) 110 Fed. 879; Nicholai v. Maryland Agricultural & Mechanical Ass'n, 96 Md. 323, 53 Atl. 965.

[42] People v. Stilwell, 157 App. Div. 839, 142 N. Y. Supp. 881, affirming 78 Misc. Rep. 96, 138 N. Y. Supp. 693.

[43] Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341; Reed v. Sampson, 54 Tex. Civ. App. 552, 118 S. W. 749; Golconda Northern Ry. v. Gulf Lines Connecting R. R. of Illinois, 265 Ill. 194, 106 N. E. 818, Ann. Cas. 1916A, 833. But see Attorney General v. Chicago & E. R. R. Co., 112 Ill. 520.

[44] Newhall v. Western Zinc Min. Co., 164 Cal. 380, 128 Pac. 1040; People v. Stilwell, supra.

[45] State ex rel. Attorney General v. Pennsylvania & Ohio Canal Co., 23

other cases the court is vested with discretion to determine whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be merely ousted from the exercise of the powers illegally assumed.[46] In arriving at a determination of this question, the court will take into consideration, not only the interests of the public, but also the interests of the stockholders, and of creditors; and the extent to which corporate powers have been exceeded, the character of the acts done, etc., will be considered. Thus, though a building and loan association had been guilty of direct and repeated violations of its charter, the court, with some hesitation, however, gave judgment of ouster merely from the exercise of the powers illegally assumed, as it appeared that the corporation, if permitted, could wind up its affairs in a few months, and if it should be dissolved, it would be necessary to appoint trustees to wind it up under the statute, which would occasion delay, and involve increased expense.[47] One of the judges dissented on the ground that the violations of its charter were so flagrant and persistent as to call for the severest penalties of the law, and he was in favor of a judgment of ouster from the franchise of being a corporation. "To justify forfeiture of corporate existence," said Judge Finch in a leading New York case, "the state, as prosecutor, must show on the part of the corporation accused some sin against the law of its being which has produced, or tends to produce, injury to the public. The transgression must not be merely formal or incidental, but material and serious, and such as to harm or menace the public welfare; for the state does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action." [48] Ordinarily, to forfeit a corporate franchise for

Ohio St. 121; State ex rel. Colburn v. Oberlin Building & Loan Ass'n, 35 Ohio St. 258; State v. Minnesota Cent. Ry. Co., 36 Minn. 246, 30 N. W. 816.

[46] State ex rel. Colburn v. Oberlin Building & Loan Ass'n, supra; State ex rel. Scott v. U. S. Endowment & Trust Co., 140 Ala. 610, 37 South. 442, 103 Am. St. Rep. 60.

[47] State ex rel. Colburn v. Oberlin Building & Loan Ass'n, supra. An information in the nature of quo warranto against a building and loan association to forfeit its charter for misuser of its franchise was sufficient, where it showed that it unlawfully assumed privileges and franchises not granted it in using "full-paid stock" secured by pledges of its other stock, and by deeds of trust to secure the redemption and payment of said full-paid stock and in acting as surety. State ex rel. Walker v. Equitable Loan & I. Ass'n of Sedalia, 142 Mo. 325, 41 S. W. 916.

[48] PEOPLE v. NORTH RIVER SUGAR REFINING CO., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843, Wormser Cas. Corporations, 20. So, in State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510, it was held that the object of proceedings by quo warranto

misuser, the acts complained of must be detrimental to the public welfare, and such as work or threaten substantial injury to the public, or amount to a clear violation of the purpose for which the corporation was organized.[49] A willful nonuser of a corporate franchise justifies a forfeiture of the charter,[50] especially where this is persistent.[51] It was recently said: "Only when the action of the corporation is willful should the Attorney General be permitted to bring suit to annul its charter." [52]

is to protect public interests, and therefore, to warrant a forfeiture of corporate franchises for misuser, the misuser must be such as to work or threaten a substantial injury to the public. In the syllabus by the court it is said: "Acts ultra vires, or in excess of powers, are not necessarily a misuser of franchises, such as will warrant their forfeiture. To justify such forfeiture, the ultra vires acts must be so substantial and continued as to so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created. Ultra vires acts may be such as to justify interference by the state by injunction to prevent a continuance of the excess of powers, while they would not be a sufficient ground for a forfeiture of the corporate franchises in proceedings by quo warranto. If the unauthorized acts affect merely stockholders and creditors who have an adequate legal remedy, the state will not interfere." And see State ex rel. Snyder v. Portland Natural Gas Co., 158 Ind. 483, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. Rep. 314; People v. Rosenstein Cohn Cigar Co., 131 Cal. 153, 63 Pac. 163; Illinois Trust & S. Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; State ex rel. Johnson v. Southern Building & L. Ass'n, 132 Ala. 50, 31 South. 375; State v. Twin Village Water Co., 98 Me. 214, 56 Atl. 763; State ex rel. Scott v. United States Endowment & T. Co., 140 Ala. 610, 37 South. 442, 103 Am. St. Rep. 60; State ex rel. v. Cumberland Telephone & Telegraph Co., 114 Tenn. 194, 86 S. W. 390. But see People ex rel. Attorney General v. Dashaway Ass'n, 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117. If an insurance company makes contracts of insurance, and accepts premiums, when it is in such a condition that there is no probability of its ever being able to pay losses, it is guilty of such an abuse of its franchises, as affords ground for forfeiture. Ward v. Farwell, 97 Ill. 593. For other instance of abuses held ground for forfeiture, see President, etc., of Bank of Vincennes v. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; State v. Topeka Water Co., 59 Kan. 151, 52 Pac. 422; State v. Debenture Guarantee & L. Co., 51 La. Ann. 1874, 26 South. 600; Independent Medical College v. People ex rel. Akin, 182 Ill. 274, 55 N. E. 345; State v. New Orleans Waterworks Co., 107 La. 1, 31 South. 395.

[48] State ex rel. Wear v. Business Men's Athletic Club, 178 Mo. App. 548, 163 S. W. 901; State ex rel. Ellis v. Tampa Waterworks Co., 57 Fla. 533, 48 South. 639, 22 L. R. A. (N. S.) 680. But see People ex rel. Attorney General v. Dashaway Ass'n, 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117.

[50] State ex inf. Hadley v. Delmar Jockey Club, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539.

[51] State ex rel. Weatherby v. Birmingham Waterworks Co., 185 Ala. 388, 64 South. 23.

[52] State ex rel. Attorney General v. Northern Pac. R. Co., 157 Wis. 73, 147 N. W. 219, 224; Com. v. Monongahela Bridge Co., 216 Pa. 108, 64 Atl. 909, 8 Ann. Cas. 1073.

Where a corporation enters into a partnership or association of independent corporations through the medium of a trust or other combination, for the purpose of obtaining a monopoly, disregarding all the statutory restraints as to the consolidation of corporations, and the rules of law prohibiting combinations in restraint of trade, it is guilty of such a violation of its charter, and such failure to perform its corporate duties, as renders it liable to dissolution in proceedings by the state.[53] And this has been held ground for forfeiture without proof of evil intent or injury to the public; the inquiry being, not as to the degree of injury, but whether the inevitable tendency of the acts is injurious to the public.[54]

Every grant of corporate power contains an implied condition that the corporation will not violate the criminal laws, for breach of which the state is authorized to terminate the corporation's existence.[55] In Missouri, a corporation which was engaged in giving illegally public boxing exhibitions was ousted recently of its franchise and privileges.[56]

Continued suspension of corporate franchises, and a failure to perform the implied conditions upon which the charter was granted, amount to a nonuser, for which the charter may be forfeited.[57] But

[53] PEOPLE v. NORTH RIVER SUGAR REFINING CO., supra. And see State v. Nebraska Distilling Co., 29 Neb. 700, 46 N. W. 155; Distilling & Cattle Feeding Co. v. People ex rel. Moloney, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; People ex rel. Peabody v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; Standard Oil Co. v. U. S., 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; U. S. v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. But see U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Henderson Loan & R. E. Ass'n v. People ex rel. Cobb, 163 Ill. 196, 45 N. E. 141; State ex rel. Snyder v. Portland Natural Gas Co., 153 Ind. 483, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. Rep. 314; People v. Plainfield Ave. Gravel Road Co., 105 Mich. 9, 62 N. W. 998. Under a provision of statute requiring corporations to have their place of business and to keep their books within the state, it is incumbent on a corporation so to do, to an extent necessary to the fullest jurisdiction and visitorial powers of the state, and for failure to comply substantially therewith the charter may be vacated. State v. Park & Nelson Lumber Co., 58 Minn. 330, 59 N. W. 1048, 49 Am. St. Rep. 516.

[54] State ex inf. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902. Cf. Attorney General v. Consolidated Gas Co., 124 App. Div. 401, 108 N. Y. Supp. 823, affirming 56 Misc. Rep. 49, 106 N. Y. Supp. 407.

[55] State v. French Lick Springs Hotel Co., 42 Ind. App. 282, 82 N. E. 801, rehearing denied 85 N. E. 724; State ex inf. Wear v. Business Men's Athletic Club, 178 Mo. App. 548, 163 S. W. 901.

[56] State ex inf. Wear v. Business Men's Athletic Club, supra.

[57] State v. Commercial Bank of Manchester, 13 Smedes & M. (Miss.) 569,

neither a mere temporary suspension of operations, nor an assignment for the benefit of creditors, is alone sufficient ground for forfeiture.[58] Where a corporation was organized to promote agriculture and to establish, maintain, and conduct fair grounds, races, and agricultural exhibitions, but for a long period of time willfully failed to conduct any agricultural fairs or to use its property, except for the operation of a race track, there was such a deliberate nonuser of its corporate franchise as justified a forfeiture of its charter.[59]

Where a penalty is fixed by the charter or statute under which a corporation is organized for the omission or commission of a particular act, it has been held that the penalty prescribed is the only punishment that can be inflicted for doing or omitting to do the act, and that it is no ground for forfeiture, the presumption being that the Legislature intended the penalty as satisfaction for the breach.[60] But the mere fact that the statute authorizes the court in its discretion to assess a fine, instead of rendering a judgment of ouster from a franchise for an abuse thereof, unless the court is of the opinion that the public good demands such judgment, is not a ground for denying a judgment of ouster, if the abuse goes to the object of the incorporation.[61]

If a corporation has not complied with the law in its organization, so that, though it is a corporation de facto, it is not a corporation de jure, the remedy is by quo warranto by the state. Private individuals, as we have seen, cannot attack the existence of the corporation, or question its right to do business.[62] In quo warranto by the state, however, its charter will be forfeited. Thus, where the state, by quo warranto proceedings, directly challenged the right of certain persons to act as a railway corporation, and it appeared that many of the subscribers for the stock were notoriously insolvent, and had no expectation, at the time they subscribed, of ever paying their sub-

53 Am. Dec. 106; State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109. As where a railroad company, without authority of law, leases its road to another company, with all its rights, property, and franchises, for a long period of time, and abandons the operation of its road. State ex rel. Leese v. Atchison & N. R. Co., 24 Neb. 143, 38 N. W. 43, 8 Am. St. Rep. 164.

[58] State v. Commercial Bank of Manchester, supra.

[59] State ex inf. Hadley v. Delmar Jockey Club, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539.

[60] State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; and see, Com. v. Newport, L. & A. Turnpike Co., 97 S. W. 375, 29 Ky. Law Rep. 1285, rehearing denied 100 S. W. 871, 30 Ky. Law Rep. 1235.

[61] People ex rel. Attorney General v. Kankakee River Imp. Co., 103 Ill. 491. And see State ex rel. Attorney General v. Capital City Dairy Co., 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181; People v. Buffalo Stone & Cement Co., 131 N. Y. 140, 29 N. E. 947, 15 L. R. A. 240.

[62] Ante, p. 97.

scription, thus leaving the amount subscribed in good faith less than that required by the statute, it was held that a judgment of forfeiture was proper.[63] So, where a corporation is illegally formed by a trust combination for the purpose of obtaining a monopoly in the manufacture and sale of an article, and controlling the production, and the price, quo warranto will lie.[64] Where the articles of incorporation falsely state that the entire capital stock has been paid in, when in reality only a fifth has been paid in, that false statement, made in direct contravention of the statute, is such a fraud on the public that the state is authorized in suing to forfeit the corporation's charter.[65]

Same—Waiver of Forfeiture

It is well settled that the state may waive the right to insist upon a forfeiture of the charter of a corporation because of a violation thereof, just as one individual may waive the right to object to the breach of a term of his contract with another. And such a waiver is generally established by showing that the Legislature, with knowledge of the ground of forfeiture, recognized the continued existence and right to existence of the corporation.[66] Thus, where the charter of a turnpike corporation required it to make returns to the Legislature, every sixth year, of its expenditures and profits, under penalty of forfeiture, and the corporation failed to make such returns for over twenty years, it was held that the Legislature, by accepting and acquiescing in returns made after such violation of the charter, and also by passing an act authorizing the corporation to change its route, waived any right it may have had to insist upon a forfeiture.[67] The doctrine of waiver of a forfeiture by the state by subsequent legislative acts does not apply where, by the terms of the charter, the franchise absolutely determines upon failure to perform certain conditions.[68]

If the acts relied upon as a waiver of a cause of forfeiture are perfectly consistent with the intention to insist upon a forfeiture, they will not be regarded as a waiver. Thus where a corporation had violated its charter by taking usury, it was held by the New York

[63] Holman v. State, 105 Ind. 569, 5 N. E. 702.

[64] Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200. See ante, p. 73.

[65] Floyd v. State ex rel. Baker, 177 Ala. 169, 59 South. 280.

[66] State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; State v. Fourth New Hampshire Turnpike Road, 15 N. H. 162, 41 Am. Dec. 690; State v. Bailey, 19 Ind. 452; Attorney General v. Superior & St. C. R. Co., 93 Wis. 604, 67 N. W. 1138.

[67] State v. Fourth New Hampshire Turnpike Road, supra. Cf. State ex inf. Hadley v. Delmar Jockey Club, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539.

[68] State v. Fourth New Hampshire Turnpike Road, supra.

court that, even conceding that the Governor and Senate could waive a forfeiture, the right to insist upon a forfeiture was not waived by the act of the Governor and Senate in appointing a state director of the corporation. "Notwithstanding the existing cause of forfeiture," it was said, "the defendants were a corporation de facto, and might continue to exercise their franchise until judgment of ouster should be pronounced against them. In the meantime it was the duty of the Governor and Senate, as well as all others, to treat the defendants as a legally existing corporation. The appointment of a state director was, therefore, perfectly consistent with the intention to continue his prosecution, and insist on the forfeiture." [69]

The right to insist upon a forfeiture can be waived only by the Legislature, legally acting as such. Neither the Attorney General, nor the Governor, nor the state Senate alone, nor any other man or body of men, save only the Legislature, has this power.[70] The right of the state to enforce a forfeiture will not be defeated by imputation of laches; [71] but the state, it has been held in Michigan recently, may act in such manner as to be estopped to assert a ground for forfeiture.[72] Where there is no law for the formation of a corporation for the purposes claimed, no lapse of time, acquiescence, or waiver can bar a prosecution by the state for the ouster of those claiming to exercise the corporate franchise.[73]

Same—The State Only can Enforce Forfeiture

Proceedings to forfeit the charter of a corporation must be brought directly by the state, or by its authorized representative acting in its name. As a general rule, no advantage can be taken of the misuser or nonuser of its powers and franchises by a corporation, or of failure to comply with conditions subsequent in its charter, by private individuals, either collaterally or directly.[74] In Heard v.

[69] People v. Phœnix Bank, 24 Wend. (N. Y.) 431, 35 Am. Dec. 634.

[70] People v. Phœnix Bank, supra.

[71] People ex rel. Moloney v. Pullman Palace Car Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366.

[72] Ruggles, Attorney General, ex rel. v. Buckley & Douglas Lumber Co., 164 Mich. 625, 130 N. W. 200.

[73] People ex rel. v. Shedd, 241 Ill. 155, 89 N. E. 332.

[74] 2 Kent, Comm. 312; Heard v. Talbot, 7 Gray (Mass.) 113; Com. v. Union F. & M. Ins. Co., 5 Mass. 230, 4 Am. Dec. 50; Baker v. Backus' Adm'r, 32 Ill. 79; Toledo & A. A. R. Co. v. Johnson, 49 Mich. 148, 13 N. W. 492; Trustees of Vernon Soc. v. Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; Crump v. United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116; John v. Farmers' & Mechanics' Bank of Indiana, 2 Blackf. (Ind.) 367, 20 Am. Dec. 119; BOSTON GLASS MANUFACTORY v. LANGDON, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, Wormser Cas. Corporations, 224; Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227; Bank of Circleville, Receivers of, v. Renick, 15 Ohio, 322;

Talbot,[75] a canal company, which was authorized to maintain a dam for the purpose of supplying its canal with water, abandoned the use of the canal. Private individuals afterwards brought suit for the flowing of their land by reason of the maintenance of the dam, and contended that the abandonment of the canal worked a forfeiture of the right to maintain the dam, and that its maintenance was, therefore, unlawful. The court held, however, that the abandonment of the canal was merely a violation of its charter by the corporation, and, while it might be cause for forfeiture in proceedings by the state to enforce a forfeiture, it could not thus be taken advantage of collaterally by private individuals.[76]

Olyphant Sewage-Drainage Co. v. Borough of Olyphant, 196 Pa. 553, 46 Atl. 896; Stephens v. Louisiana Long Leaf Lumber Co., 122 La. 547, 47 South. 887. The forfeiture of a corporate franchise for nonuser can only be effectuated at the suit of the state. Gaslight Co. of City of New Brunswick v. Borough of South River, 77 N. J. Eq. 487, 77 Atl. 473. In a New York case, it was claimed that a church corporation had ceased to exist from nonuser of its franchise and failure to keep up religious services or a church organization. It was held, semble, that the issue could only be raised by the state in some direct proceeding instituted for that purpose by it. Matter of Trustees of Congregational Church & Society of Cutchogue, 131 N. Y. 1, 30 N. E. 43. Contra by statute, State ex rel. Sanche v. Webb, 97 Ala. 111, 12 South. 377, 38 Am. St. Rep. 151.

[75] 7 Gray (Mass.) 113.

[76] The court said in this case: "Although the disuse of the canal and its abandonment by the corporation may be a gross disregard of the duty imposed on them by law, and an essential violation of the terms and conditions implied from the contract entered into with the government by the acceptance of the charter, and upon due proceedings had, might be a sufficient ground upon which to decree a forfeiture of all their corporate rights and privileges, they do not constitute any valid ground upon which the exercise by the corporation of any of the powers conferred by their charter can be defeated or denied by third persons in collateral proceedings. This results from the very nature of an act of incorporation. It is not a contract between the corporate body, on the one hand, and individuals whose rights and interests may be affected by the exercise of its powers, on the other. It is a compact between the corporation and the government from which they derive their powers. Individuals, therefore, cannot take it upon themselves, in the assertion of private rights, to insist on breaches of the contract by the corporation, as a ground for resisting or denying the exercise of a corporate power. That can be done only by the government with which the contract was made, and in proceedings duly instituted against the corporation. It would not only be a great anomaly to allow persons, not parties to the contract, to insist on its breach, and enforce a penalty for its violation; but it would be against public policy, and lead to confusion of rights, if corporate powers and privileges could be disputed and defeated by every person who might be aggrieved by their exercise. Therefore, it has been often held that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corporations collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the government."

A corporation, having power to condemn land by right of eminent domain, was guilty of such abuse of its powers that, although not ipso facto dissolved, such abuse was sufficient cause for dissolution. It sought, after such misconduct, to condemn the land of A., who set up such cause for forfeiture as an attempted bar to the condemnation proceeding. The Court of Appeals decided that the corporation's right to corporate existence could not be attacked by A. collaterally and overruled his defense.[77]

Nor can private individuals institute direct proceedings to enforce a forfeiture of a charter. An information in the nature of quo warranto may be granted to inquire into the election or admission of an officer or member of a corporation, when moved for by any person interested in or injured by such election or admission. But private persons cannot move for such an information in order to obtain a judgment of forfeiture of the charter of a corporation. Such an information can be prosecuted only by the authority of the state, acting by its proper officers,[78] e. g., the Attorney General of the state. This necessarily results from the doctrine that the state may waive a forfeiture.

Same—Modes of Proceeding to Enforce Forfeiture

There are at common law two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter for misuser or nonuser.[79] One is by scire facias; and that process is proper where there is a legal existing body, capable of acting, but which has abused its power. The other mode is by information in the nature of a quo warranto, which is in form a criminal, and in its nature a civil, remedy; and that proceeding applies where there is a body corporate de facto only, but which takes upon itself to act, though, from some defect in its constitution, it cannot legally exercise its powers, or where an association assumes to act as a corporation without even color of authority. Both of these modes of proceeding against corporations are at the instance and on behalf of the state. Private individuals, as we have seen, cannot institute proceedings, unless there is some statute expressly allowing them to do so. The judgment in such proceedings is that the parties be ousted from the exercise of corporate powers and privileges. The mode of proceeding is now very generally prescribed and regulated by statute, and in most states information in the nature of quo warranto is the mode

[77] Matter of Application of Brooklyn Elevated R. R. Co., 125 N. Y. 434, 26 N. E. 474. And see State ex rel. Attorney General v. Northern Pac. R. Co., 157 Wis. 73, 147 N. W. 219.

[78] Com. v. Union Fire & Marine Ins. Co., 5 Mass. 230, 4 Am. Dec. 50.

[79] 2 Kent, Comm. 313, 314.

in all cases. In some states, including New York,[80] the writs of quo warranto and scire facias have been abolished, and proceedings of this nature are brought by actions in the name of the people.

Where an order to dissolve is improvidently granted, it can be vacated just like any other judgment;[81] and it cannot be urged against the setting aside of the judgment of dissolution that by the judgment the corporation became, and was ever thereafter, legally dead, and so could not be revived by judicial authority.

EQUITY JURISDICTION

83. A court of equity has no jurisdiction unless it is conferred, as in some jurisdictions, by statute, to dissolve a corporation, and distribute its assets, at the suit of a stockholder or any other private individual. Some exceptions to this rule have been recognized.

84. Nor, generally, has a court of equity any jurisdiction to enforce a forfeiture, or enjoin exercise of unauthorized privileges and powers, at the suit of the state; but it may entertain an information to enjoin acts which constitute or threaten a public nuisance or injury, and which require immediate interference, and it may assume jurisdiction in case of a charitable trust where the beneficiaries are numerous and indefinite, and the breach of trust cannot be effectively redressed except by suit in behalf of the public.

At the Suit of Private Individuals

We shall see in a subsequent chapter that under certain circumstances a court of equity has jurisdiction to control and regulate the management of corporations at the suit of individual stockholders, where its interference is necessary to protect their equitable rights.[82] But a very different question is presented when a stockholder or any other private individual, comes into a court of equity, and asks to have a corporation dissolved, and its assets distributed; and by the overwhelming weight of authority a court of equity has no inherent jurisdiction in such a case.[83] Such jurisdiction

[80] Code Civ. Proc. N. Y. §§ 1983, 1984.

[81] In re Board of Directors of Automatic Chain Co., 134 App. Div. 863, 119 N. Y. Supp. 379, affirmed 198 N. Y. 618, 92 N. E. 1078.

[82] Post, p. 482.

[83] Strong v. McCagg, 55 Wis. 624, 13 N. W. 895; Hardon v. Newton, 14 Blatchf. 376, Fed. Cas. No. 6,054; Hodges v. New England Screw Co., 3 R. I. 9; Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 83; Bayless v. Orne, Freem. Ch. (Miss.) 161; State v. Merchants' Ins. & Trust Co., 8 Humph. (Tenn.)

is sometimes expressly conferred by statute under particular circumstances.[84] Without this, it does not exist. "A court of equity, independent of statutory authority, cannot decree the dissolution of a corporation." [85] "General jurisdiction of writs against corporations no more implies a power to destroy a corporation at the suit of an individual than jurisdiction of private suits against individuals authorizes the court to entertain a prosecution for crime, to pass sentence of death, and to issue a warrant for execution. The only modes of dissolving a corporation known to the common law were by the death of all its members; by act of the Legislature; by a surrender of the charter, accepted by the government; or by forfeiture of the franchise, which could only take effect upon a judgment of a competent tribunal on a proceeding in behalf of the state; and neither a court of law nor a court of equity had jurisdiction to decree a forfeiture of the charter or dissolution of the corporation at the suit of an individual." [86] When by statute a court of equity is given such jurisdiction under particular circumstances, it can only interfere when the case comes within the statute.[87]

This doctrine has been held subject to exceptions. In a Michigan case [88] it was said: "The general rule undoubtedly is that courts of equity have no power to wind up a corporation, in the absence of statutory authority. This rule is, however, subject to qualifications. It has been held that when it turns out that the purposes for which a corporation was formed cannot be attained it is the duty of the company to wind up its affairs; that the ultimate object of every ordinary trading corporation is the pecuniary gain of its

235; Folger v. Columbian Ins. Co., 99 Mass. 274, 96 Am. Dec. 747; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; Waterbury v. Merchants' Union Exp. Co., 50 Barb. (N. Y.) 157; Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637; Denike v. New York & R. Lime & Cement Co., 80 N. Y. 599; Wheeler v. Pullman Iron & S. Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; Cobe v. Guyer, 237 Ill. 516, 86 N. E. 1071, affirming 139 Ill. App. 592; Heitkamp v. American Pigment & Chemical Co., 158 Ill. App. 587; In re Electric Supply Co. (D. C.) 175 Fed. 612; State ex rel. Donnell v. Foster, 225 Mo. 171, 125 S. W. 184; Ashton v. Penfield, 233 Mo. 391, 135 S. W. 938; Law v. Rich, 47 W. Va. 634, 35 S. E. 858. See Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

[84] Platner v. Kirby, 138 Iowa, 259, 115 N. W. 1032; Wills v. Nehalem Coal Co., 52 Or. 70, 96 Pac. 528; Pride v. Pride Lumber Co., 109 Me. 452, 84 Atl. 989; Heitkamp v. American Pigment & Chemical Co., 158 Ill. App. 587.

[85] Conklin v. United States Shipbuilding Co. (C. C.) 140 Fed. 219; Lyon v. McKeefrey, 171 Fed. 384, 96 C. C. A. 340; Pride v. Pride Lumber Co., 109 Me. 452, 84 Atl. 989.

[86] Folger v. Columbian Ins. Co., supra.

[87] Hardon v. Newton, supra; Merrifield v. Barrows, 153 Ill. App. 523.

[88] Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412.

stockholders; that it is for this purpose, and no other, that the capital has been advanced; and, if circumstances have rendered it impossible to continue to carry out the purpose for which it was formed with profit to its stockholders, it is the duty of its managing agents to wind up its affairs. To continue the business of the company under such circumstances would involve both an unauthorized exercise of corporate franchises and a breach of the charter contract." And it was held that in a suit by a stockholder against the corporation, its directors, and other stockholders, for an accounting and the appointment of a receiver to wind up the affairs of the company, where it appeared that the defendants owned a majority of the stock, and had for a number of years controlled the corporation in their own interest, and for their own profit, fraudulently excluding the complainant, and paying no dividends to him, the failure to pay being due to their fraud, and not to natural causes, the court had jurisdiction to wind up the corporation, and distribute its assets. "This corporation," it was said, "has utterly failed of its purpose, not because of matters beyond its control, but because of fraudulent mismanagement and misappropriation of its funds. Complainant has a right to insist that it shall not continue as a cloak for a fraud upon him, and shall not longer retain his capital to be used for the sole advantage of the owner of the majority of the stock; and a court of equity will not so far tolerate such a manifest violation of the rules of natural justice as to deny him the relief to which his situation entitles him. I think a court of equity, under the circumstances of this case, in the exercise of its general equity jurisdiction, has the power to grant to this complainant ample relief, even to the dissolution of the trust relations."

At the Suit of the State

A court of equity has no inherent jurisdiction to forfeit the charter of a corporation, or decree a dissolution, at the suit of the state.[89] A court of equity does not administer punishment or enforce forfeitures for transgressions of law, but is limited in its jurisdiction to the protection of civil rights, and it is also limited in its jurisdiction to cases in which there is no adequate remedy at law. An information, therefore, cannot be maintained in equity in the name of the state or the Attorney General to forfeit the charter of a corporation for misuse or nonuser, or to enjoin a corporation or pretended corporation from exercising unauthorized powers, unless, in the latter case, there is some peculiar ground for equitable interference; but the only remedy is at law by quo warranto or scire facias.[89]

[89] Attorney General v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227; Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Attorney General.

A court of equity, however, has jurisdiction to grant relief by injunction in two cases: (1) Where the acts complained of constitute or threaten a public nuisance or injury, which affects or endangers the public safety or convenience, and requires immediate judicial interposition, like obstruction of highways and navigable rivers;[90] and (2) where there is a charitable trust, and the beneficiaries are so numerous and indefinite that the breach of trust cannot be effectively redressed except by suit in equity in behalf of the public.[91]

EFFECT OF DISSOLUTION

85. When a corporation is dissolved, it is dead, and, in the absence of a statute to the contrary, it no longer exists for any purpose. Therefore, after dissolution,

(a) It can exercise no power, the right to exercise which depended upon its charter.

(b) It cannot be sued, nor can a suit previously commenced be prosecuted to judgment, nor can it sue.

(c) At common law:

(1) Debts due to or from it were extinguished.

(2) Real property undisposed of at the time of the dissolution reverted to the grantors or their heirs.

(3) Personal property owned by it at the time of dissolution escheated to the state.

(d) But a court of equity, under its general jurisdiction to enforce and administer trusts, has jurisdiction to avoid the effect of the common law to the extent of causing the debts due a dissolved corporation to be collected, and taking control of the corporate property both real and personal and distributing it, so as to protect firstly the interests of the creditors and then of the shareholders.

ex rel. Pattee v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; Wallace v. Pierce-Wallace Pub. Co., 101 Iowa, 313, 70 N. W. 216, 38 L. R. A. 122, 63 Am. St. Rep. 389; Barton v. International Fraternal Alliance of Baltimore City, 85 Md. 14, 36 Atl. 658; Hunt v. Le Grand Roller Skating Rink Co., 143 Ill. 118, 32 N. E. 525; Attorney General v. American Tobacco Co., 55 N. J. Eq. 352, 36 Atl. 971; Id., 56 N. J. Eq. 847, 42 Atl. 1117; Law v. Rich, 47 W. Va. 634, 35 S. E. 858.

[90] Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361; Attorney General v. Great Northern Ry. Co., 4 De Gex & S. 75; Louisville & N. R. Co. v. Com., 97 Ky. 675, 31 S. W. 476, affirmed 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849; Trust Co. of Georgia v. State, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520.

[91] Attorney General v. Garrison, 101 Mass. 223; Jackson v. Phillips, 14 Allen (Mass.) 539; Parker v. May, 5 Cush. (Mass.) 336.

(e) In most states, if not in all, there are now statutory provisions under which the business of dissolved corporations may be liquidated and settled, and the equities of shareholders and creditors may be enforced.

When the charter of a corporation is repealed, or the corporation is otherwise dissolved, the corporation or members can no longer exercise any powers the right to exercise which depended upon the charter. If the corporation be a bank, for instance, authorized to lend money and issue circulating notes, it cannot make new loans or issue new notes. If the corporation was chartered to operate a railroad, and authorized to use the streets of a city for that purpose, it can no longer use the streets or exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons, under the general laws of the state, is abrogated by the repeal of the law which granted these special rights.[92]

When a corporation has been legally dissolved, it is no longer in existence for any purpose. It is dead. It cannot be recognized for the purpose of proceedings by or against it any more than could a dead natural person. Thus scire facias to revive a judgment recovered against a corporation cannot be maintained against it, and a judgment had thereon, after the corporation has been legally dissolved.[93] Nor can an action be maintained against it, or an action previously commenced be prosecuted to judgment. A judgment rendered against a corporation after it has been legally dissolved is as wholly void as if it had been rendered against a dead person.[94] Nor can an action be brought by or in the name of a corporation after its dissolution,[95] nor can it enforce a judgment.[96] In fine, the dissolution of a corporation terminates its existence as a legal

[92] Greenwood v. Union Freight R. Co., 105 U. S. 13, 26 L. Ed. 961; Insurance Com'r v. United Fire Ins. Co., 22 R. I. 377, 48 Atl. 202; Fitts v. National Life Ass'n, 130 Ala. 413, 30 South. 374; Dundee Mortgage & T. I. Co. v. Hughes (C. C.) 77 Fed. 855.

[93] Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 8 L. Ed. 945.

[94] Thornton v. Marginal Freight Ry. Co., 123 Mass. 32; Sturges v. Vanderbilt, 73 N. Y. 384; Dobson v. Simonton, 86 N. C. 492; Krutz v. Paola Town Co., 20 Kan. 397; Venable Bros. v. Southern Granite Co., 135 Ga. 508, 69 S. E. 822, 32 L. R. A. (N. S.) 446. As to whether expiration of charter ipso facto amounts to a dissolution, within this rule, see ante, p. 292.

[95] BOSTON GLASS MANUFACTORY v. LANGDON, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, Wormser Cas. Corporations, 224; MacRae v. Kansas City Piano Co., 69 Kan. 457, 77 Pac. 94.

[96] Buck Stove & Range Co. v. Vickers, 80 Kan. 29, 101 Pac. 668.

entity and renders it incapable of suing or being sued as a corporate body.[97] These rules of the common law have been modified in most states by statutes which either continue the corporation in existence for the purpose of winding up the corporation and prosecuting and defending suits, or constitute its directors as trustees for these purposes.[98]

Chancellor Kent said: "According to the old settled law of the land, where there is no special statute provision to the contrary, upon the civil death of a corporation, all its real estate remaining unsold reverts back to the original grantor and his heirs. The debts due to and from the corporation are all extinguished.[99] Neither the stockholders nor the directors or trustees of the corporation can recover those debts, or be charged with them, in their natural capacity. All the personal estate of the corporation vests in the people, as succeeding to this right and prerogative of the crown at common law." [1]

Such were the common-law rules,[2] but, as respects private business corporations, they are now obsolete. They were established before modern trading and commercial corporations came into existence. With the growth of such corporations, the Legislatures

[97] Brandon v. Umpqua Lumber & Timber Co., 166 Cal. 322, 136 Pac. 62.

[98] Thus see General Corporation Law N. Y. (Consol. Laws, c. 23) § 35; General Corporation Law N. J. (Act April 21, 1896 [P. L. p. 295]) § 53. As to the construction of these and similar statutes, see ATLANTIC DREDGING CO. v. BEARD, 203 N. Y. 584, 96 N. E. 415, affirming, 145 App. Div. 342, 130 N. Y. Supp. 4, Wormser Cas. Corporations, 236; B. A. Myers v. Montgomery (Sup.) 130 N. Y. Supp. 133; Harris-Woodbury Lumber Co. v. Coffin (C. C.) 179 Fed. 257, affirmed 187 Fed. 1005, 109 C. C. A. 663; Heenan & Finlen v. Parmele, 80 Neb. 514, 118 N. W. 324; Brandon v. Umpqua Lumber & Timber Co., supra.

[99] It has been held in England that a chose in action in favor of a banking corporation survived its dissolution, but passed to the crown as bona vacantia. Re HIGGINSON & DEAN, L. R. [1899] 1 Q. B. D. 325; Wormser Cas. Corporations, 238. See, also, Re Taylor's Agreements Trusts, [1904] 2 Ch. 737. But see Re No. 9, Bamare Road, [1906] 1 Ch. 539. It has also recently been held in England that upon the dissolution of a corporation, a leasehold held by it was immediately determined, and the land reverted to the grantor of the lease. Hastings Corporation v. Letton, L. R. [1908] 1 K. B. 378. The decision has been criticized adversely. See note, 8 Columbia Law Rev. 410.

[1] 2 Kent, Comm. 307; Co. Litt. 13b.

[2] 1 Bl. Comm. 484; 2 Kyd, Corp. 516; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; President, etc., of Port Gibson v. Moore, 13 Smedes & M. (Miss.) 157; State Bank of Indiana v. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Fox v. Horah, 36 N. C. 358, 36 Am. Dec. 48. The last cited case was expressly overruled in Wilson v. Leary, 120 N. C. 90, 26 S. E. 630, 38 L. R. A. 240, 58 Am. St. Rep. 778.

and the courts have been obliged to abolish or change many of the common-law rules—these among others.[3] These rules have not been recognized in equity. While a private corporation holds the legal title to the corporate property as a distinct legal person, it holds it in equity merely for the benefit of the stockholders and of creditors. If the corporation is dissolved, and ceases to exist, the debtors of the corporation are not, in equity, released from their liability, the creditors of the corporation are not left without a remedy to recover the amount due them,[4] and the property of the corporation does not revert to the grantors, or escheat to the state, instead of belonging to the stockholders. It is true that the legal title to the property does not vest in the stockholders, but they still retain the beneficial interest therein;[5] and, if the Legislature has

[3] Wilson v. Leary, 120 N. C. 90, 26 S. E. 630, 38 L. R. A. 240, 58 Am. St. Rep. 778, referring to "the barbarous rule of the common law"; Taylor v. Interstate Inv. Co., 75 Wash. 490, 135 Pac. 240; note, 8 Columbia Law Rev. 222.

[4] Where a corporation is dissolved, however, at least if the dissolution is not voluntary, its executory contracts are discharged, and the creditor is deprived of the right to recover damages for nonperformance. People v. Globe Mut. Life Ins. Co., 91 N. Y. 174; People v. Metropolitan Surety Co., 205 N. Y. 135, 141, 98 N. E. 412, Ann. Cas. 1913D, 1180; Griffith v. Blackwater Boom & Lumber Co., 46 W. Va. 56, 33 S. E. 125. But see Rosenbaum v. United States Credit System Co., 61 N. J. Law, 543, 40 Atl. 591; Weatherly v. Capital City Water Co., 115 Ala. 156, 22 South. 140. Where the dissolution is voluntary, while it deprives the creditor of the power to compel specific performance, it does not deprive him of the right to recover damages out of the assets. Schleider v. Dielman, 44 La. Ann. 462, 10 South. 935; STANNARD v. ROBERT H. REID & CO., 114 App. Div. 136, 99 N. Y. Supp. 567, Wormser Cas. Corporations, 234. Cf. Tiffin Glass Co. v. Stoehr, 54 Ohio St. 157, 43 N. E. 279. A claim for breach of contract by a corporation to-day is chargeable against its assets on dissolution. Bijur v. Standard Distilling & Distributing Co., 78 N. J. Eq. 582, 81 Atl. 1132, affirming 74 N. J. Eq. 546, 70 Atl. 934.

[5] Where a Louisiana corporation, owing no debts and owning land in Texas, was dissolved by act of the stockholders, and certain of them were appointed commissioners in accordance with the Louisiana law to wind up the business, the instrument evidencing their appointment not being such as required in Texas for the conveyance of land, they could not as such commissioners maintain an action of trespass to try title to the land, but they could maintain such action in their character as stockholders, since on dissolution the title passed to them as tenants in common. "If a receiver or some officer of the court had been appointed to wind up the affairs of the corporation," said the court, "the legal title would have vested in such officer in trust for the creditors and the stockholders. But, there being no corporation, no receiver, trustee, nor creditor in existence, the trust ceased to exist, and the legal and equitable title united in the stockholders, the only persons who had an interest in the land." Baldwin v. Johnson, 95 Tex. 85, 65 S. W. 171. Dissolution of a corporation terminates a stockholder's personal, but not his property,

made no provision by which they can reach it, and enforce their rights, they may come into a court of equity, and obtain relief. Such a court has jurisdiction, unless it has been taken away by statute, to reach the property of the defunct corporation, to cause the debts due to it to be collected, and to distribute the assets, after payment of the creditors, to the beneficial owners, that is, to the members or stockholders.[6] Hence to-day, where land, for example, is conveyed absolutely to a private corporation having shareholders, no reversion or possibility of a reverter remains in the grantor.[7]

There are now statutes in most states, if not in all, prescribing the mode by which the business of dissolved corporations may be liquidated and settled, and by which the equities of the creditors and members respectively may be enforced. To-day, where the life of a corporation ceases, its rights and property are not confiscated, but are adjusted for the benefit of its creditors and shareholders.[8] In many states there are also statutes by which corporations whose powers would expire by express limitation in their charters or otherwise are continued bodies corporate for a certain

rights. Bijur v. Standard Distilling & Distributing Co., 78 N. J. Eq. 582, 81 Atl. 1132, affirming 74 N. J. Eq. 546, 70 Atl. 934.

[6] Bacon v. Robertson, 18 How. (U. S.) 480, 15 L. Ed. 499; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747. When the charter of a corporation expires, the officers or trustees may safely distribute the assets to those who appear on the books of the company as stockholders, and need not require production of the stock certificates. "As between adverse claimants of the certificate, the possession of it, with the transfer upon it, is often the test of the title. But when the corporation itself is not dealing with its stockholder on the security of his stock, and is merely performing a corporate duty, its own record is all it needs to consult, for whoever would demand the privileges of a stockholder should produce the evidence of his title, and ask to be permitted to participate." Bank of Commerce's Appeal, 73 Pa. 59. The same is true of the payment of dividends. See post, p. 429. Where a corporation exists by law, after the expiration of its charter, solely for the purpose of winding up its affairs, a majority in interest of its stockholders cannot sell its property to a new corporation, of which they are directors and stockholders, at a valuation estimated by themselves, against the will of the minority, and compel such dissenting stockholders either to receive shares of stock in the new corporation in return for their old shares, or to be paid therefor on the basis of the estimated valuation of the property, and the minority may have the property publicly sold. Mason v. Pewabic Min. Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524. Though the dissolution of a corporation defendant in a libel suit abates the action, it may be revived against the former directors as trustees of the corporation under the general corporation law for the benefit of the stockholders. Shayne v. Evening Post Pub. Co., 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777, 85 Am. St. Rep. 654.

[7] Heath v. Barmore, 50 N. Y. 302.

[8] People v. Westchester Traction Co., 123 App. Div. 689, 108 N. Y. Supp. 59.

length of time from and after the day on which their powers would cease, for the purpose of prosecuting and defending suits, and of enabling them to gradually settle and close their business, and divide their capital stock, but not for the purpose of continuing business.[9] Such statutes are not invalid as impairing the obligation of contracts, nor are they invalid as being retrospective, because, as is generally the case, they are made applicable to corporations previously created, as well as to those created afterwards.[10]

If a corporation, when it ceases to exist, has no members, and owes no debts, the common-law rule by which its real property reverts to the grantor or its personal property escheats to the state applies. It has been held, for instance, that where a corporation which, like a mutual insurance company, has no stockholders, ceases to exist, the last policy having expired, and there no longer being any members, the common-law rule, which gives its surplus assets to the state, still applies, and the assets do not go to the former policy holders, nor to the original corporators.[11]

The common-law rule still applies to public, eleemosynary, and religious or charitable corporations. This question came up before the Supreme Court of the United States in a late case. Congress had repealed the charter granted by the territory of Utah, to the corporation known as the Church of Jesus Christ of Latter Day Saints, and it was held that its property reverted and escheated to the United States, and that it made no difference that all the property was held in trust for the corporation by individuals.[12] "When a business corporation," it was said, "instituted for the purpose of gain or private interest, is dissolved, the modern doctrine is that its property, after payment of its debts, equitably belongs to its stockholders. But this doctrine has never been extended to public or charitable corporations. As to these, the ancient and established rule prevails, namely, that when a corporation is dissolved, its personal property, like that of a man dying without heirs, ceases to

[9] Foster v. President, etc., of Essex Bank, 16 Mass. 245, 8 Am. Dec. 135; Heath v. Barmore, 50 N. Y. 302; Diamond State Iron Co. v. Husbands, 8 Del. Ch. 205, 68 Atl. 240; Harris-Woodbury Lumber Co. v. Coffin (C. C.) 179 Fed. 257, affirmed, 187 Fed. 1005, 109 C. C. A. 663; ATLANTIC DREDGING CO. v. BEARD, 203 N. Y. 584, 96 N. E. 415, Wormser Cas. Corporations, 236; Tapley Co. v. Keller, 133 App. Div. 54, 117 N. Y. Supp. 817; People v. Westchester Traction Co., 123 App. Div. 689, 108 N. Y. Supp. 59.

[10] Foster v. President, etc., of Essex Bank, 16 Mass. 245, 8 Am. Dec. 135.

[11] Titcomb v. Kennebunk Mut. Fire Ins. Co., 79 Me. 315, 9 Atl. 732.

[12] And see Fox v. Horah, 36 N. C. 358, 36 Am. Dec. 48. But see Wilson v. Leary, 120 N. C. 90, 26 S. E. 630, 38 L. R. A. 240, 58 Am. St. Rep. 778, overruling Fox v. Horah, supra.

be the subject of private ownership, and becomes subject to the disposal of the sovereign authority; while its real estate reverts or escheats to the grantor or donor, unless some other course of devolution has been directed by positive law, though still subject, as we shall hereafter see, to the charitable use." The court held that, as the real estate of the corporation was acquired by it from the United States under the town-site act, it reverted to the United States, and that its personal property also vested in the United States, to be applied, under the cy pres doctrine, either by the court, or by the direction of Congress, to some kindred object, whereby the general purposes of religion and charity may be promoted.[18]

[18] Late Corporation of Church of Jesus Christ of Latter Day Saints v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481. And see, Danville Seminary v. Mott, 136 Ill. 289, 28 N. E. 54.

CHAPTER X

MEMBERSHIP IN CORPORATIONS

86. How Membership is Acquired.
87–88. "Capital Stock" and "Capital."
89–90. Nature of Shares of Stock.
91. Certificates of Stock.
92. Subscriptions to Stock—Subscriptions after Incorporation.
93–97. Subscriptions Prior to Incorporation.
98. Who may Become Subscribers.
99. Form of Subscription—Statutory Formalities.
100. Mutual Consent.
101. Subscriptions Induced by Fraud.
102. Subscriptions under Mistake.
103. Subscription by Agent.
104–106. Agents to Receive Subscriptions.
107–109. Conditional Subscriptions.
110–112. Subscriptions upon Special Terms.
113. Conditional Delivery of Subscription.
114–115. Subscription of Entire Capital—Distribution.
116. Payment of Deposit.
117. Delivery of Certificate.
118–121. Remedy of Corporation on Subscriptions.
122–125. Calls.
126. Assignment of Unpaid Subscription.
127–132. Release and Discharge of Subscriber.
133. Estoppel of Subscriber.

HOW MEMBERSHIP IS ACQUIRED

86. Membership in a corporation is acquired by contract with the corporation.

(a) In nonstock corporations the mode of forming the contract of membership is regulated by the charter and by-laws.

(b) In stock corporations membership is determined by the ownership of one or more shares of the capital stock, which may be acquired.

(1) By subscription to the capital stock, either before or after incorporation.

(2) By purchase from the corporation.

(3) By transfer from the owner.

(4) By compliance with statute.

Membership in a corporation is the result of contract, express or implied. A person cannot be made a member or stockholder of a

corporation without his consent. Nor can he acquire membership without his consent and the consent of the corporation, as the representative of all the members. Membership, therefore, is the result of a contract between the individual and the corporation. It is sometimes said to be the result of a contract between the corporators, but this is inaccurate. Such is the case in a partnership, but in a corporation the contract of membership is a contract with the corporators in their collective capacity; that is, with the corporation. In some jurisdictions, the entire subject of stock subscriptions, however, is governed by statute, and in these states membership may be acquired only by compliance with the statutory requisites and formalities.[1]

Membership in Nonstock Corporations

The nature of the contract of membership, and the mode of forming it, will necessarily vary according to the nature of the corporation. In nonstock corporations the matter is regulated by the charter, or by the by-laws where the charter is silent. Usually, the charter or enabling act under which such a corporation is formed provides for the original membership necessary to constitute a corporation, and new members are taken in, after the corporation has come into existence, under the rules prescribed by the charter or by-laws. Such is the case, for instance, with mutual insurance and mutual benefit corporations, incorporated trade unions, literary societies, etc. No one can be made or become a member in such a corporation without his consent.[2] And, on the other hand, after the corporation has become organized, no one can become a member without its consent, and by compliance with its charter, and its authorized by-laws. In an Illinois case the question arose whether the complainant was a member of the Chicago Live Stock Exchange, a corporation organized by commission merchants engaged in buying and selling live stock for others at the stockyards. A by-law of the corporation provided that members should be admitted upon written application, indorsed by two members, and approved by at least seven directors,

[1] See Coppage v. Hutton, 124 Ind. 401, 24 N. E. 112, 7 L. R. A. 591; Planters' & Merchants' Independent Packet Co. v. Webb, 144 Ala. 666, 35 South. 562.

[2] An act of the Legislature by which "the members of" several mutual fire insurance companies are made a new corporation, and which "shall not affect the legal rights of any person," and is to take effect "when accepted by the members of said corporations," does not constitute a member of one of the old companies, who does not expressly assent to it, a member of the new corporation, although the act be duly accepted by a majority of the members of each of the old companies. Hamilton Mut. Ins. Co. v. Hobart, 2 Gray (Mass.) 543. See, to the same effect, Gardner v. Hamilton Mut. Ins. Co., 33 N. Y. 421.

and payment of an initiation fee or presentation of a certificate of membership duly transferred to the applicant. It was held that one to whom a certificate of membership had been duly transferred, but who had made no application for membership, was not a member of the corporation. The association, it was said, had an undoubted right to adopt this by-law, and, as it prescribed the mode, and the only mode, in which membership in the exchange could be acquired, no one could justly claim to be a member, who had not been admitted in the mode thus prescribed.[3]

A court of equity has no power to compel a corporation to admit a person to membership against the will of those whose consent is, according to the charter, or an authorized by-law, essential to the eligibility of the applicant.[4]

Membership in Stock Corporations

Membership in joint-stock corporations is determined by the ownership of shares of stock. Ownership of shares is acquired by contract with the corporation. This may be by a contract of subscription either before [5] or after [6] the corporation is organized, or by a purchase of shares from the corporation after its organization,[7] or by a purchase and transfer of shares from one who owns them.[8] In the latter case there is a novation of the contract of membership.[9] The transferee, as we shall see, is substituted by the implied or express consent of the corporation to all the rights and privileges of the transferror, and generally assumes his liabilities.

"CAPITAL STOCK" AND "CAPITAL"

87. The "capital stock" of a corporation is the amount in money, property or services subscribed and paid in, or secured to be paid in, by the shareholders, and always remains the same unless changed by legislative authority. It is the fund dedicated to the corporate enterprise by the associates.

88. The "capital" of a corporation includes all the property of the corporation, and may therefore be greater or less in value than the capital stock, depending on the degree of prosperity of the corporate undertaking.

[3] American Live Stock Commission Co. v. Chicago Live Stock Exch., 143 Ill. 210, 32 N. E. 274, 18 L. R. A. 190, 36 Am. St. Rep. 385. See State v. Sibley, 25 Minn. 387.

[4] Id.

[5] Post, p. 332.

[6] Post, p. 330.

[7] Post, p. 331.

[8] Post, p. 512.

[9] 1 Mor. Corp. § 159.

The terms "capital" and "capital stock," as applied to corporations, are often used by the courts and in statutes as if they were synonymous, but, strictly speaking, they are not so. They do not mean the same thing. The capital stock of a corporation is the amount in money, services or property subscribed and paid in, or secured to be paid in, by the shareholders, as the financial basis for the business of the corporation, and always remains the same unless changed by legislative authority.[10] It signifies those resources, the dedication of which to the uses of the corporation is made the foundation for the issuance of certificates of stock, and which, as a result of the dedication, become irrevocably devoted to the satisfaction of all obligations of the corporation.[11] The capital of a corporation is a broader term, and includes all the funds, securities, credits, and property, of whatever kind, which the corporation possesses.[12] It is the property or means which the corporation owns and with which it transacts business.[13] Colloquially speaking, it is the corporate pocketbook. Thus, if a banking corporation is organized with a capital stock of $100,000, and after this is paid in it makes profits amounting to $50,000, which it keeps instead of distributing it in the way of dividends, it has a capital of $150,000, but its capital stock remains, as at the start, $100,000. As was said by Chief Justice Green,

[10] Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429; State v. Morristown Fire Ass'n., 23 N. J. Law, 195; Williams v. Western Union Telegraph Co., 93 N. Y. 162, 188; Barry v. Merchants Exchange Co., 1 Sandf. Ch. (N. Y.) 280; Consolidated Coal Co. of St. Louis v. Miller, 236 Ill. 149, 86 N. E. 205; Continental Securities Co. v. Interborough Rapid Transit Co. (C. C.) 165 Fed. 945. A corporation cannot issue stock where the power to do so is not given by its charter. In an act creating certain persons a corporation for the purpose of establishing a cemetery, authority to "generally do all such other matters and things as are incident to a corporation" does not give power to issue stock. Cooke v. Marshall, 191 Pa. 315, 43 Atl. 314, 64 L. R. A. 413; Id., 196 Pa. 200, 46 Atl. 447, 64 L. R. A. 413.

[11] Stamford Trust Co. v. Yale & Towne Mfg. Co., 83 Conn. 43, 75 Atl. 90.

[12] Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429. "The word 'capital' is unambiguous. It signifies the actual estate, whether in money or property, which is owned by an individual or a corporation. In reference to a corporation, it is the aggregate of the sum subscribed and paid in, or secured to be paid in, by the shareholders, with the addition of all gains or profits realized in the use and investment of those sums, or, if losses have been incurred, then it is the residue after deducting such losses." People v. Commissioners of Taxes, etc., for the City and County of New York, 23 N. Y. 192, 219. As to the distinction between "capital" and "capital stock," see, also, Stemple v. Bruin, 57 Fla. 173, 49 South. 151; American Life & Accident Co. v. Ferguson, 66 Or. 417, 134 Pac. 1029.

[13] In re Wells' Estate, 156 Wis. 294, 144 N. W. 174. As to the expression "book value of stock," see Drucklieb v. Sam H. Harris, 209 N. Y. 211, 102 N. E. 599; MATTER OF OSBORNE, 209 N. Y. 450, 485, 103 N. E. 723, 823, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298, Wormser Cas. Corporations, 276.

capital stock, as employed in acts of incorporation, is never used to indicate the value of the property of the company. It is very generally, if not universally, used to designate the amount of capital prescribed to be contributed at the outset by the stockholders for the purposes of the corporation; that is, the amount dedicated by the associates to the corporate enterprise which it is proposed to undertake. The value of the corporate assets may be greatly increased by surplus profits, or be diminished by losses, but the amount of the capital stock remains the same. The funds of the company may fluctuate; its capital stock remains invariable, unless changed by legislative authority.[14]

NATURE OF SHARES OF STOCK

89. A share of stock in a corporation is the right to partake, according to the amount put into the fund representing the capital stock, of the surplus profits of the corporation, and ultimately on its dissolution, of so much of this fund as is not liable for the debts of the corporation.

90. A share of stock is in the nature of a chose in action, and it is personal property, though the corporation may own real estate, or even nothing but real estate. Thus

(a) A sale of shares is not within that clause of the statute of frauds requiring agreements for the sale of land or an interest therein to be in writing.

(b) On the death of the owner, shares are distributed as personal estate, and do not go to the heirs as real estate.

(c) In most states a sale of shares, like a sale of other choses in action, is within that clause of the statute of frauds relating to agreements for the sale of "goods, wares, and merchandises."

(d) Shares of stock, being intangible, and in the nature of choses in action, were not subject to execution at common law; but by statute they are now very generally made subject to execution and attachment.

(e) Bonds are very different in nature from shares, their distinguishing feature being that they are obligations to pay a fixed sum of money with stated interest.

[14] State v. Morristown Fire Ass'n, 23 N. J. Law, 195. And see Person & Riegel Co. v. Lipps, 219 Pa. 99, 67 Atl. 1081; People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762.

Shares of stock "are intangible, and rest in abstract legal contemplation." [15] When it is said that a person owns a certain number of shares of stock, it is meant that he has a right to share in the profits of the corporation, and in its property on dissolution, after payment of its debts, in the proportion that the number of his shares bears to the whole capital stock. A share of the capital stock is the right to partake, according to the amount put into the fund representing the capital stock, of the surplus profits of the corporation, and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired, and is not liable for the debts of the corporation.[16] Collin, J., speaking for the Court of Appeals of New York, recently said: "A share of corporate stock is the right which the stockholder has to participate according to the number of shares in the surplus profits of the corporation on a division, and in the assets or capital stock remaining after payment of its debts on its dissolution or the termination of its active business and operation." [17]

Shares of stock are not a chattel interest. The holders do not own the property of the corporation.[18] They are in the nature of a chose in action.[19] Thus shares of stock belonging to a married woman are not personal property in possession so as to vest in her husband at common law; but, like choses in action, they must be reduced to his possession.[20]

The fact that the corporation owns real estate, or even that all of its property is real estate, does not make the shares of its stock real property. They are in the nature of choses in action, and are per-

[15] Burrall v. Bushwick R. Co., 75 N. Y. 211, 217.

[16] Burrall v. Bushwick R. Co., 75 N. Y. 211, 216; Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co., 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; Fisher v. President, etc., of Essex Bank, 5 Gray (Mass.) 373; Consolidated Coal Co. of St. Louis v. Miller, 236 Ill. 149, 86 N. E. 205.

[17] UNITED STATES RADIATOR CORP. v. STATE, 208 N. Y. 144, 149, 101 N. E. 783, 46 L. R. A. (N. S.) 585, Wormser Cas. Corporations, 247, affirming 151 App. Div. 367, 135 N. Y. Supp. 981.

[18] Ante, p. 6, et seq.

[19] Fisher v. President, etc., of Essex Bank, 5 Gray (Mass.) 373; Kent v. Quicksilver Min. Co., 78 N. Y. 159; Talbot v. Talbot, 32 R. I. 72, 78 Atl. 535, Ann. Cas. 1912C, 1221. But see Central Trust Co. of New York v. West India Imp. Co., 169 N. Y. 314, 328, 329, 62 N. E. 387. Shares of stock in a Michigan corporation, being by the laws of that state deemed personal property, must be so considered within the meaning of an act of Congress authorizing an order to bring in absent defendants who are not inhabitants of the state or found within the district in a suit to remove an incumbrance or lien on real or personal property within the district in which the suit is brought. Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647.

[20] Tiff. Pers. & Dom. Rel. 89; Ang. & A. Corp. §§ 560, 561; Slaymaker v. Bank of Gettysburg, 10 Pa. 373; Arnold v. Ruggles, 1 R. I. 165.

sonal property.[21] A few early decisions to the contrary are unsound and are no longer law.[22] It follows that an agreement for the sale of shares in a corporation owning real estate, or even nothing but real estate, is not an agreement for the sale of land, or of an interest in land, so as to render writing necessary under the statute of frauds.[23] So, on the death of a shareholder in a corporation, the capital stock of which is represented by real estate, his shares are to be distributed as personal estate, and do not go to the heirs as real property.[24] Being personal property, shares of stock come within the ordinary rules of equity governing an agreement to sell and deliver specific personalty.[25]

It is held in England that shares of stock are not "goods, wares, or merchandise," within the meaning of the seventeenth section of the statute of frauds, and that a contract for the *sale* thereof to the value of more than £10 need not be in writing, as the statute is there considered as referring to corporeal movable property only, and not as including choses in action which are incapable of part delivery.[26] In this country some of the courts have followed the English rule;[27] but in most states the construction placed upon the statute is different, and it is held to include incorporeal as well as corporeal property, and therefore to include shares of stock.[28] "That contracts for

[21] Champollion v. Corbin, 71 N. H. 78, 51 Atl. 674; JOHNS v. JOHNS, 1 Ohio St. 350, Wormser Cas. Corporations, 243. And see Wuller v. Chuse Grocery Co., 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522; Haynes v. Brown, 18 Okl. 389, 89 Pac. 1124.

[22] Welles v. Cowles, 2 Conn. 567; Price v. Price's Heirs, 6 Dana (Ky.) 107. For the correct point of view, see the leading English case, Bligh v. Brent, 2 Younge & C. Ex. 268. And see, JOHNS v. JOHNS, 1 Ohio St. 350, Wormser Cas. Corporations, 243.

[23] Humble v. Mitchell, 11 Adol. & E. 205. And they will pass by a will not executed according to the provision of the statute of frauds relating to devises of land. Bligh v. Brent, 2 Younge & C. Ex. 268.

[24] Russell v. Temple (Mass.) 3 Dane, Abr. 108. Elkhorn Land & Imp. Co. v. Childers, 100 S. W. 222, 30 Ky. Law Rep. 1121. It carries with it the incidents of personal property, one of which is its alienation. Herring v. Ruskin Co-op. Ass'n (Tenn. Ch.) 52 S. W. 327.

[25] Bernier v. Griscom-Spencer Co. (C. C.) 161 Fed. 438.

[26] Humble v. Mitchell, 11 Adol. & E. 205; Knight v. Barber, 16 Mees. & W. 66.

[27] Webb v. Baltimore & E. S. R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396; Whittemore v. Gibbs, 24 N. H. 484; Vawter v. Griffin, 40 Ind. 593.

[28] Tiff. Sales, 43, 44; Clark, Cont. (2d Ed.) 100, 138; Tisdale v. Harris, 20 Pick. (Mass.) 9; Boardman v. Cutter, 128 Mass. 388; North v. Forest, 15 Conn. 400; Pray v. Mitchell, 60 Me. 430; Hinchman v. Lincoln, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. Ed. 337; Greenwood v. Law, 55 N. J. Law, 168, 26 Atl. 134, 19 L. R. A. 688; Hudson v. Weir, 29 Ala. 294; Green v. Brookins, 23 Mich. 48, 54, 9 Am. Rep. 74; Johnson v. Mulvy, 51 N. Y. 634; Spear v. Bach, 82 Wis. 192,

the sale and delivery of shares of stock are subject to the mischief aimed at by the statute, must be admitted." [29] In some states the statute is broader in its terms than the original statute. In New York and several other states it expressly includes choses in action, and in Florida it uses the term "personal property," and these statutes of course apply to stock in corporations.[30]

Where stock is *subscribed* for, however, it is not necessary that the subscription should have been made in writing and verbal contracts of subscription have repeatedly been upheld.[31] As said by Barker, J., in a recent Kentucky decision: [32] "It was not necessary that the subscription should have been made by appellee in writing. Subscriptions for the stock of corporations are made according to the principles governing contracts generally, and we know of no principle which forbids them being made by parol." The distinction is between contracts of subscription, on the one hand, and contracts for the sale of issued shares, on the other.

Shares of stock constitute property, and may be the subject of conversion.[33]

Execution and Attachment

A share of stock, being in the nature of a chose in action, could not be reached by execution at common law, and it is not subject to attachment, unless expressly made so by statute.[34] In most states,

52 N. W. 97; Sprague v. Hosie, 155 Mich. 30, 118 N. W. 497, 19 L. R. A. (N. S.) 874, 130 Am. St. Rep. 558.

[29] Sprague v. Hosie, supra, per Ostrander, J.

[30] Artcher v. Zeh, 5 Hill (N. Y.) 200; Peabody v. Speyers, 56 N. Y. 230; Mayer v. Child, 47 Cal. 142; Spear v. Bach, 82 Wis. 192, 52 N. W. 97; Southern Life Ins. & Trust Co. v. Cole, 4 Fla. 359.

[31] Somerset Nat. Banking Co.'s Receiver v. Adams, 72 S. W. 1125, 1127, 24 Ky. Law Rep. 2083; MEEHAN v. SHARP, 151 Mass. 564, 24 N. E. 907, Wormser Cas. Corporations, 245, semble; Manchester St. Ry. v. Williams, 71 N. H. 312, 52 Atl. 461; People v. Duffy-McInnerney Co., 122 App. Div. 336, 106 N. Y. Supp. 878.

[32] Somerset Nat. Banking Co.'s Receiver v. Adams, supra.

[33] Ayres v. French, 41 Conn. 142; Nabring v. Bank of Mobile, 58 Ala. 204; Kuhn v. McAllister, 1 Utah, 275; McAllister v. Kuhn, 96 U. S. 87, 24 L. Ed. 615; Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80; Ralston v. Bank of California, 112 Cal. 208, 44 Pac. 476; Daggett v. Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91; Hine v. Commercial Bank of Bay City, 119 Mich. 448, 78 N. W. 471; Allen v. American Bldg. & L. Ass'n, 49 Minn. 544, 52 N. W. 144, 32 Am. St. Rep. 574; Carpenter v. American Bldg. & L. Ass'n., 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 345. In Pennsylvania it seems that only the certificate, and not the share of stock, may be the subject of conversion. Neller v. Kelley, 69 Pa. 407.

[34] 1 Cook, Stock, Stockh. & Corp. Law, §§ 480–491; Denton v. Livingston, 9 Johns. (N. Y.) 96, 6 Am. Dec. 264; Blair v. Compton, 33 Mich. 414; Van Norman v. Jackson Circuit Judge, 45 Mich. 204, 7 N. W. 796; Barnes v. Hall, 55

however, if not in all, statutes have been enacted, making shares of stock and other choses in action subject to execution, and the statutes providing for attachment generally make shares of stock subject to that remedy.[35] It is not necessary that the statute shall expressly mention shares of stock. If it uses terms clearly showing an intention to include such property, it will be given effect accordingly. Thus shares of stock would clearly be included under the term "choses in action." [36] They have been held to be included under the terms "estate," [37] "rights and credits." [38] But there are some cases in which the statutes are more strictly construed, and in which shares of stock have been held not to be included under the phrase "real and personal property," or "estate both real and personal." [39]

To render a levy of execution or attachment on shares of stock and a sale thereunder valid, the provisions of the statute as to the mode of making the levy and sale, and the formalities to be observed, must be strictly observed.[40]

The situs of shares of stock for most purposes is in the state by which the corporation was created, and they can be levied upon in that state only.[41]

Vt. 420; State Ins. Co. v. Sax, 2 Tenn. Ch. 507, 509; Goss & Phillips Mfg. Co. v. People, 4 Ill. App. 510; Haley v. Reid, 16 Ga. 437; Foster v. Potter, 37 Mo. 525.

[35] Sprague v. Hosie, 155 Mich. 30, 118 N. W. 497, 19 L. R. A. (N. S.) 874, 130 Am. St. Rep. 558.

[36] Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938.

[37] Chesapeake & O. R. Co. v. Paine, 29 Grat. (Va.) 502, 505. And see Union Nat. Bank of Chicago v. Byram, 131 Ill. 92, 22 N. E. 842. Certificates of stock in a foreign corporation, when in the hands of a third person within the state, are subject to garnishment as "property." Puget Sound Nat. Bank of Everett v. Mather, 60 Minn. 362, 62 N. W. 396. Cf. O. L. Packard Mach. Co. v. Laev, 100 Wis. 644, 76 N. W. 596.

[38] Curtis v. Steever, 36 N. J. Law, 304.

[39] Haley v. Reid, 16 Ga. 437; Foster v. Potter, 37 Mo. 525. But see Union Nat. Bank of Chicago v. Byram, 131 Ill. 92, 22 N. E. 842.

[40] 1 Cook, Stock, Stockh. & Corp. Law, § 481; Titcomb v. Union Marine & Fire Ins. Co., 8 Mass. 326; Howe v. Starkweather, 17 Mass. 240; Blair v. Compton, 33 Mich. 414; Van Norman v. Jackson Circuit Judge, 45 Mich. 204, 7 N. W. 796; Morton v. Graffiin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298; Voorhis v. Terhune, 50 N. J. Law, 147, 13 Atl. 391, 7 Am. St. Rep. 781; Armour Bros. Banking Co. v. St. Louis Nat. Bank, 113 Mo. 12, 20 S. W. 691, 35 Am. St. Rep. 691; Moore v. Marshalltown Opera House Co., 81 Iowa, 45, 46 N. W. 750; Commercial Nat. Bank v. Farmers' & Traders' Nat. Bank, 82 Iowa, 192, 47 N. W. 1080; Keating v. J. Stone & Sons Live Stock Co., 83 Tex. 467, 18 S. W. 797, 29 Am. St. Rep. 670; McNaughton v. McLean, 73 Mich. 250, 41 N. W. 267; Goss & Phillips Mfg. Co. v. People, 4 Ill. App. 510; People ex rel. Adams v. Goss & Phillips Mfg. Co., 99 Ill. 355; O. L. Packard Mach. Co. v. Laev, 100 Wis. 644, 76 N. W. 596; Wells v. Price, 6 Idaho, 490, 56 Pac. 266.

[41] 1 Cook, Stock, Stockh. & Corp. Law, § 485; Plimpton v. Bigelow, 93 N.

Bonds and Shares Distinguished

The distinctive feature of a bond is that it is an obligation of the corporation to pay a fixed sum of money with stated interest. It may or may not be secured by real or chattel mortgage, or otherwise. If it is, and the security proves to be insufficient, the indebtedness is not thereby wiped out. The distinctive feature of stock, on the other hand, is that it confers upon the holder a part ownership of the assets and a right to participate according to the amount of the shareholder's stock in the surplus profits of the corporation, and ultimately, on its dissolution, in the assets remaining after the payment of its debts. It is fundamental that a stockholder, whether common or preferred, cannot have a lien upon the property of the corporation, even though the stock by its terms is accorded a lien.[42] Hence, where an instrument called a bond entitled the holder to a proportionate share in the surplus income of the corporation, if any, it is not, in law, a bond, but a certificate of stock.[43]

CERTIFICATES OF STOCK

91. A certificate of stock is simply a written acknowledgment by the corporation of the interest of the holder in its property and franchises. The certificate is in no sense the property itself, but is merely the evidence or muniment of title, symbolizing the stockholder's right to participate in the corporation.

Shares in the capital stock of a corporation are usually represented by certificates issued by the corporation to the stockholders, stating that the holder is the owner of a certain number of shares, and generally prescribing the mode in which they may be trans-

Y. 592; Armour Bros. Banking Co. v. St. Louis Nat. Bank, 113 Mo. 12, 20 S. W. 691, 35 Am. St. Rep. 691; New Jersey Sheep & Wool Co. v. Traders' Deposit Bank, 104 Ky. 90, 46 S. W. 677; Fahrig v. Milwaukee & Chicago Breweries, 113 Ill. App. 525; Puget Sound Nat. Bank of Everett v. Mather, 60 Minn. 362, 62 N. W. 396. But see Young v. South T. Iron Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752. As to the effect of the Uniform Stock Transfer Act, see sections 13, 14, thereof, declaring there can be no attachment or levy upon shares unless the certificate is surrendered or transfer by its holder enjoined.

[42] Cass v. Realty Securities Co., 148 App. Div. 96, 132 N. Y. Supp. 1074, affirmed short 206 N. Y. 649, 99 N. E. 1105; Burrall v. Bushwick R. Co., 75 N. Y. 211.

[43] Cass v. Realty Securities Co., supra; In the Matter of FECHHEIMER FISHEL CO., Bankrupt, 212 Fed. 357, 129 C. C. A. 33, Wormser Cas. Corporations, 129.

ferred, as on the books of the company in person or by attorney, and on surrender of the certificate. A stock certificate is merely evidence of the stockholder's rights. "The issuing of the original certificates is in no sense a transfer of stock. The interest of the parties to whom they are issued is the same before as after such issue. The certificate is simply a written acknowledgment by the company of the interest of the subscribers in its property and franchises." [44] A certificate of stock is not a security, much less a negotiable instrument,[45] though stock certificates, as we shall see, possess attributes of negotiability to a certain extent.[46] It is not necessary to constitute a subscriber a stockholder.[47]

"The certificate of the corporation for the shares, or the stock certificate, is not necessary to the existence of the shares or their ownership. It is merely the written evidence of those facts. It expresses the contract between the shareholder and the corporation and his co-shareholders." [48]

SUBSCRIPTIONS TO STOCK—SUBSCRIPTIONS AFTER INCORPORATION

92. A subscription to the stock of an existing corporation, when accepted, is a contract between the subscriber and the corporation, and is subject to the rules governing other kinds of contracts.

When a corporation is already organized, a subscription to its capital stock is like any other contract with the corporation. It is

[44] Burr v. Wilcox, 22 N. Y. 551, 557; Manchester St. Ry. v. Williams, 71 N. H. 312, 52 Atl. 461; Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938; Bijur v. Standard Distilling & Distributing Co., 78 N. J. Eq. 582, 81 Atl. 1132, affirming 74 N. J. Eq. 546, 70 Atl. 934. "The certificate of stock is the muniment of the shareholder's title, and evidence of his right." Kent v. Quicksilver Min. Co., 78 N. Y. 159.

[45] Post, p. 540.

[46] Central Trust Co. of New York v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387; Knox v. Eden Musee American Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700. And see Uniform Stock Transfer Act, enacted in Massachusetts (St. 1910, c. 171), New York (Laws 1913, c. 600), Pennsylvania (P. L. 1911, p. 126), Louisiana (Act No. 180 of 1910), Maryland (Laws 1910, c. 73), Michigan (Pub. Acts 1913, No. 106), Ohio (102 Ohio Laws, p. 500), Rhode Island (Laws 1912, c. 840), Wisconsin (Laws 1913, c. 458), and several other states, with slight local variations.

[47] Post, p. 390.

[48] Per Collin, J., in UNITED STATES RADIATOR CORP. v. STATE, 208 N. Y. 144, 101 N. E. 783, 46 L. R. A. (N. S.) 585, Wormser Cas. Corporations, 247.

a contract between the corporation and the subscriber, and is subject to the principles governing the formation of other contracts. There must be an offer by one party and acceptance by the other, resulting in mutual agreement. If the corporation opens subscription books or solicits subscriptions, and a person subscribes for shares, he makes an offer to the corporation; and when the subscription or offer is accepted by the corporation, it becomes binding. Or the solicitation of subscriptions may be a general offer by the corporation, and a subscription in accordance with the offer would be an acceptance, and result in a contract without further assent on the part of the corporation.[49] In these cases there is a contract between the subscriber and the corporation, which ipso facto makes the subscriber a shareholder, and binds him to pay the amount of the subscription.[50]

There must also be a consideration for the promise of the subscriber and for the undertaking of the corporation to recognize him as a stockholder. The consideration for the latter is the subscriber's promise to pay for his stock, and the consideration for the former is the acquisition by the subscriber of an interest in the franchises and property of the corporation and the right to share in the profits.[51] It follows that the obligation must be mutual. "A stock subscription is a transaction between the subscriber and the company, and the obligation of one can only be sustained by the corresponding obligation of the other. If both are not bound, neither is bound, and the transaction is a nullity." [52]

Distinguished from a Sale of Shares

A subscription to the capital stock of a corporation after its organization must be distinguished from a sale of shares by it.[53] A

[49] Greer v. Chartiers Ry. Co., 96 Pa. 391, 42 Am. Rep. 548. In this case plaintiff opened books for subscriptions, placing one of them in the defendant's hands for solicitation of subscriptions. Defendant entered his own name on the book as a subscriber, and kept the book for six months without attempting to withdraw his name. He then cut his name out, and returned the book to plaintiff. He claimed that he had a right to withdraw at any time before he returned the book, but it was held that the contract of subscription was binding upon him, because the company, in soliciting subscriptions, "made a continuing offer, which became an agreement with each acceptant for the number of shares for which he subscribed."

[50] Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 499, 506; Spear v. Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317; McClure v. Peoples' Freight Ry. Co., 90 Pa. 269; Bole v. Fulton, 233 Pa. 609, 82 Atl. 947.

[51] Post, p. 337.

[52] Per Campbell, J., in Carlisle v. Saginaw Valley & St. L. R. Co., 27 Mich. 315, 318.

[53] Walter A. Wood Harvester Co. v. Jefferson, 71 Minn. 367, 74 N. W. 149.

purchase of shares, if fully executed, will make the purchaser a stockholder, but it does not make him a subscriber; and the rules governing subscriptions and sales of shares are different. Thus, as we shall see, in the case of a subscription, failure of the corporation to issue or tender a certificate of stock, which is merely evidence of the ownership of shares, does not prevent the subscriber from becoming a shareholder, with all the rights and subject to all the liabilities of shareholders, unless there is a stipulation to that effect in the subscription.[54] On a sale of issued stock, however, the rule is different. Such a sale stands on the same footing as a sale of any other property, and tender of the certificate is a condition precedent to the right to maintain an action for the price.[55]

SAME—SUBSCRIPTIONS PRIOR TO INCORPORATION

93. A preliminary agreement by a number of persons to form a corporation and take stock therein is not a contract by the subscribers with each other, and cannot be enforced by one or more against any other, but is enforceable only by the corporation when formed.

94. Such an agreement, if not made as a step authorized by statute in the process of forming the corporation, is a mere continuing offer to the corporation by each subscriber, and may be revoked, or will lapse on the subscriber's death or insanity at any time before the corporation is organized. But the organization of the corporation before revocation or lapse and the recognition by it of the subscriber as a stockholder operate as an acceptance of the offer, and the subscriptions then become binding and irrevocable, and may be enforced by the corporation.

95. Such an agreement, if made as a step authorized by statute in the process of forming the corporation, is valid by virtue

[54] Post, p. 337; Marson v. Deither, 49 Minn. 423, 52 N. W. 38; Business Men's Ass'n v. Williams, 137 Mo. App. 575, 119 S. W. 439. Where a corporation has never before issued the stock, it is difficult to distinguish, however, between a subscription and a sale. See, Sanders v. Proctor, 158 N. Y. Supp. 433.

[55] Post, p. 337; Marson v. Deither, supra; Clark v. Continental Imp. Co., 57 Ind. 135. And see THRASHER v. PIKE COUNTY R. CO., 25 Ill. 393, Wormser Cas. Corporations, 258; St. Paul, S. & T. F. R. Co. v. Robbins, 23 Minn. 439; Weiss v. Mauch Chunk Iron Co., 58 Pa. 295. Cf. GALBRAITH v. McDONALD, 123 Minn. 208, 143 N. W. 353, L. R. A. 1915A, 464, Ann. Cas. 1915A, 420, Wormser Cas. Corporations, 252.

of the statute, though there is no consideration or mutuality prior to the organization of the corporation, and is binding on each subscriber from the time of signing, and is irrevocable thereafter; but it can be enforced only by the corporation. And in some jurisdictions, even in the absence of a statute, this doctrine prevails.

96. An agreement to pay money to trustees to be by them paid to a corporation thereafter to be created, the trustees to return to the subscribers stock in the corporation, is a valid contract between the subscribers and the trustees.[56]

97. Some courts make a distinction between a present subscription to the stock of a corporation to be formed and an agreement to subscribe at a future time. According to these cases, the former renders the party a stockholder, and liable on his subscription, when the corporation is organized; but the latter merely renders him liable to an action for damages on failure to take stock, the measure of damages being the difference between the market and par value of the stock. The distinction is similar to that between a present bargain and sale and an executory contract to sell.

The usual method of subscribing to the stock of a corporation which it is proposed to organize is for the parties to sign an agreement to form the corporation, and take stock in it when formed. Sometimes, but not always, they in terms promise to pay the amount of their subscriptions to the corporation. The better opinion supported by the weight of authority, is that such an agreement, at least in so far as the promises to subscribe are concerned, is not a contract by the subscribers with each other, and cannot be enforced by one or more of them against any other.

Common-Law Subscriptions

If the agreement is not made as a step authorized by statute in the process of forming the corporation, but depends upon the common law, it is a mere offer by each subscriber to the corporation not yet in existence to take stock, and thereby become a shareholder; and when the corporation is organized and accepts the offer, there is a binding contract of subscription between the corporation and the subscriber, by virtue of which, ipso facto, the subscriber becomes a shareholder, with all the rights and privileges, and sub-

[56] The above propositions are taken in substance from Prof. Collin's syllabus for his class on Corporations in the Cornell University Law School.

ject to all the liabilities, of a shareholder, and the subscription may be enforced by the corporation.[57] Before the corporation is formed, the subscriptions, as we shall see, are not binding, for there is no consideration or mutuality; and, besides this, the other party to the contract is not yet in existence. But the formation of the corporation and acceptance of the subscriptions supply the element of consideration and the other party, and render them binding.

A few cases take the view that as a subscription of this sort becomes a binding contract "when the corporation has been organized." [58] It is difficult to perceive how the mere coming into existence of the offeree can constitute per se the acceptance of the subscriber's offer. The better view would seem to require not only that the corporation should come into existence, but also that it

[57] Athol Music Hall Co. v. Carey, 116 Mass. 471; Penobscot R. Co. v. Dummer, 40 Me. 172, 63 Am. Dec. 654; Danbury & N. R. Co. v. Wilson, 22 Conn. 435; Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Tonica & P. R. Co. v. McNeely, 21 Ill. 71; Marysville Electric Light & Power Co. v. Johnson, 93 Cal. 538, 29 Pac. 126, 27 Am. St. Rep. 215; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294; Yonkers Gazette Co. v. Taylor, 30 App. Div. 334, 51 N. Y. Supp. 969; Instone v. Frankfort Bridge Co., 2 Bibb (Ky.) 576, 5 Am. Dec. 638; Bullock v. Falmouth & C. H. Turnpike Co., 85 Ky. 184, 3 S. W. 129; Gleaves v. Brick Church Turnpike Co., 1 Sneed (Tenn.) 491; Chaffin v. Cummings, 37 Me. 76, 83; Schaeffer v. Missouri Home Ins. Co., 46 Mo. 248; Red Wing Hotel Co. v. Friedrich, 26 Minn. 112, 1 N. W. 827; Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Hughes v. Antietam Mfg. Co. of Washington County, 34 Md. 316, 326; Low v. Connecticut & P. R. R. R. Co., 45 N. H. 370; Ashuelot Boot & Shoe Co. v. Holt, 56 N. H. 548, 556; McNaught v. Fisher, 96 Fed. 168, 37 C. C. A. 438; WRIGHT BROS. v. MERCHANTS' & PLANTERS' PACKET CO., 104 Miss. 507, 61 South. 550, Wormser Cas. Corporations, 256; Doherty v. Arkansas & O. R. Co., 142 Fed. 104, 73 C. C. A. 328. Where the payment of a bonus tax was required as a prerequisite to incorporation, a corporation which had not paid such tax had no power to accept a subscription, and the offer to subscribe was not binding on the subscriber. Cleveland v. Mullin, 96 Md. 598, 54 Atl. 665. The subscription cannot be enforced in the absence of a de jure organization. Williams v. Enterprise Co., 153 Ind. 496, 55 N. E. 425; Williams v Citizens' Enterprise Co., 25 Ind. App. 351, 57 N. E. 581; ante, p. 113, note 40; Planters' & Merchants' Independent Packet Co. v. Webb, 144 Ala. 666, 39 South. 562; WRIGHT BROS. v. MERCHANTS' & PLANTERS' PACKET CO., 104 Miss. 507, 61 South. 550, Wormser Cas. Corporations, 256; Dorris v. Sweeney, 60 N. Y. 463; Capps v. Hastings Prospecting Co., 40 Neb. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. Rep. 677. As said in Dorris v. Sweeney, supra, "A legal and effectual formation of a corporation or joint stock company for the purpose specified in the contract was a condition precedent. * * *" Per Rapallo, J.

[58] Hudson Real Estate Co. v. Tower, 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434; Id., 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379.

should accept the offer of the subscriber after coming into existence, "either expressly by issuing the share certificates, or impliedly by recognizing the subscriber as a shareholder." [59]

The contract, in its nature, is essentially unilateral. What the subscriber wants from the proposed corporation is the act of allotment to him of the requested number of shares of stock in return for his promise to accept membership. While, on strict principle, it would seem that the contract is complete upon the allotting of the shares—which is the act called for—yet since this act is peculiarly and exclusively within the knowledge of the corporation, a condition should be implied requiring the corporation to take reasonable means of notifying the subscriber of its act of acceptance. No actual communication is necessary; the posting of a notice of allotment, though it later miscarries, is sufficient, and it is so held.[60]

In Strasburg R. Co. v. Echternacht [61] it was held by the supreme court of Pennsylvania that such a subscription could not result in a contract between the subscriber and the corporation when formed, so as to entitle the corporation to maintain an action on it, since it was thought that the nonexistence of the corporation at the time of signing the subscription rendered the formation of a contract with it in this way impossible. This decision, if it has not been in effect overruled by later decisions of the Pennsylvania court,[62] is in conflict with the decisions in almost all of the other states. It is not at all necessary, as was assumed in the case referred to, that a contract shall result, if at all, at the time the offer or proposal is made. A continuing offer may be made, and a contract will result when it is subsequently accepted according to its terms. Nor is it necessary that an offer, to result in a contract, shall be made to an ascertained person.[63] Therefore, while it is true that a subscription to the capital stock of a corporation not yet formed is not, and cannot be, a contract with the corporation at the moment the subscription paper is signed, the corporation not being then in existence,

[59] Nebraska Chicory Co. v. Lednicky, 79 Neb. 587, 113 N. W. 245.

[60] Household Fire Ins. Co. v. Grant, L. R. 4 Ex. Div. 216. And see Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437.

[61] 21 Pa. 220, 60 Am. Dec. 49.

[62] See Edinboro Academy v. Robinson, 37 Pa. 210, 78 Am. Dec. 421; Hedge's & Horn's Appeal, 63 Pa. 273; McClure v. Railway Co., 90 Pa. 269; Shober's Adm'rs v. Lancaster County Park Ass'n., 68 Pa. 429; Steamship Co. v. Murphy, 6 Phila. (Pa.) 224; Muncy Traction Engine Co. v. De La Green, 143 Pa. 269, 13 Atl. 747; Garrett v. Philadelphia Lawn Mower Co., 39 Pa. Super. Ct. 78.

[63] See Anson, Cont. 31; Clark, Cont. (2d Ed.) 38. Yet it would, indeed, seem difficult on principle to conceive of an "offer" being made without a then existing offeree. Can there be said to exist an offer without an offeree?

this does not prevent its resulting in a contract at a subsequent time. It is a continuing offer or proposal on the part of the subscriber to take shares in the corporation when formed, and, by the weight of authority,[64] to pay the amount of the subscription; and when the corporation is organized as contemplated, before the offer is withdrawn, and accepts the subscription, it then becomes a binding contract between the subscriber and the corporation.

In Athol Music Hall Co. v. Carey[65] the defendant and others signed a written agreement by which, in terms, they severally promised and agreed to and with each other that they would associate themselves into a corporation, and pay to the treasurer of the corporation the amount of the several shares set against their respective names; and it was held that the corporation, when it was organized and accepted the promises, could maintain an action against the subscribers on the agreement. "In agreements of this nature," it was said, "entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber, 'to and with each other,' is not a contract capable of being enforced between each subscriber and each other who may have signed previously, or who should sign afterwards, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case, to wit, as a contract with the common representative of the several associates."[66]

Some of the courts regard an agreement by a number of persons to subscribe for stock in a corporation to be formed as a contract between the parties for the benefit of the corporation when formed, and allow the corporation to maintain an action thereon as upon a contract made for its benefit.[67] This view, however, could not be

[64] Post, p. 392.

[65] 116 Mass. 471.

[66] And see the other cases cited in note 57, supra; Shelby County R. Co. v. Crow, 137 Mo. App. 461, 119 S. W. 435.

[67] See Marysville Electric Light & Power Co. v. Johnson, 93 Cal. 538, 29 Pac. 126, 27 Am. St. Rep. 215; International Fair & Exposition Ass'n of Detroit, v. Walker, 83 Mich. 386, 47 N. W. 338; Glenn v. Busey, 5 Mackey (D. C.) 233.

sustained in those jurisdictions where a person for whose benefit a contract is made, but who is not a party to it, cannot maintain an action thereon.

According to a recent New York case, it is essential, where persons subscribe for stock in a corporation to be thereafter organized, that the corporation should be organized by the parties to the agreement or their representatives.[68] "We think," said the court, "such rule is reasonable and will prevent the anomalous situation of strangers to a subscription agreement for stock in a corporation to be formed, and to the party or parties thereto, organizing such corporation perchance without the knowledge or consent of such subscribers for its stock and then by action brought in its name compel payment of their subscriptions." [69]

A contract by which work is paid for by stock and bonds is not a stock subscription. Thus, an agreement by a railroad company to pay a contractor in bonds and full-paid nonassessable stock of the corporation for his work, labor, and materials in constructing and equipping the road is not a stock subscription by the contractor, which makes him liable for the par value of the stock.[70]

Consideration for Subscription

At common law a consideration is just as essential to a contract of subscription, and to the express or implied promise of the subscriber to pay the same, as in the case of any other kind of contract. It might be rendered unnecessary in the case of an existing corporation by subscribing under seal in those jurisdictions where a seal dispenses with the necessity for a consideration.[71] And, as will be presently seen, the Legislature, in providing for subscriptions preliminary to the organization of a corporation, may expressly or impliedly make them binding without a consideration.[72] Except in these cases, a subscription is not binding unless there is a sufficient consideration. In the case of subscriptions to stock a consideration arises from the benefit received by the subscriber in acquiring an

[68] Avon Springs Sanitarium Co. v. Weed, 189 N. Y. 557, 82 N. E. 1123, reversing 119 App. Div. 560, 104 N. Y. Supp. 58, on the dissenting opinion rendered by McLennan, P. J., in the court below.

[69] See, also, Smith v. Kellogg, 194 N. Y. 567, 88 N. E. 1132, affirming short, Avon Springs Sanitarium Co. v. Kellogg, 125 App. Div. 51, 109 N. Y. Supp. 153; Yonkers Gazette Co. v. Taylor, 30 App. Div. 334, 51 N. Y. Supp. 969; Cook, Corp. (7th Ed.) 73–75.

[70] Bostwick v. Young, 118 App. Div. 490, 103 N. Y. Supp. 607, affirmed short 194 N. Y. 516, 87 N. E. 1115.

[71] Hudson Real Estate Co. v. Tower, 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434.

[72] Post, p. 342.

interest in the corporate franchises and property, and a right to share in the profits, or, as it has been otherwise expressed, there is a consideration in the title which the subscriber acquires to shares,[73] amounting to both a benefit to the subscriber and a legal detriment to the corporate promisee.

It follows that a subscription, to be binding on the subscriber, must be binding on the corporation, so that it is bound to recognize the subscriber as a shareholder. In Fanning v. Hibernia Ins. Co.[74] the defendant, prior to the organization of the plaintiff corporation, orally promised to take shares of stock, and gave her note to pay therefor, and the plaintiff brought an action on the note after its organization. The court held that the verbal subscription was not sufficient to make the defendant a shareholder, and that, therefore, there was no consideration for her promise.

It has been said that there is a consideration for a subscription in the corresponding promises of the other subscribers,[75] but this is generally not true. "Of course, subscription papers may be so worded as to create binding contracts between the subscribers themselves." [76] It is not ordinarily, however, a case of mutual promises, where the promise of one party forms the consideration for the promise of the other. The promises are all to the corporation. Each is, as we have seen, an offer to the corporation until it is organized and accepts it.[77] Then it becomes a promise to it, not to the other subscribers. One subscriber is not liable to an action by the others on his subscription.

It has even been declared that a subscription agreement is a "trilateral" contract, being an understanding between the corporation,

[73] Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Worcester Turnpike Corp. v. Willard, 5 Mass. 80, 4 Am. Dec. 39; Athol Music Hall Co. v. Carey, 116 Mass. 471; Griswold v. Board of Trustees of Peoria University, 26 Ill. 41, 79 Am. Dec. 361; Gleaves v. Brick Church Turnpike Co., 1 Sneed (Tenn.) 491; East Tennessee & V. R. Co. v. Gammon, 5 Sneed (Tenn.) 567; Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; Danbury & N. R. Co. v. Wilson, 22 Conn. 435; Instone v. Frankfort Bridge Co., 2 Bibb (Ky.) 576, 5 Am. Dec. 638.

[74] 37 Ohio St. 339, 41 Am. Rep. 517. But see Somerset Nat. Banking Co.'s Receiver v. Adams, 24 Ky. Law Rep. 2083, 72 S. W. 1125, 1127; MEEHAN v. SHARP, 151 Mass. 564, 24 N. E. 907, Wormser Cas. Corporations, 245.

[75] Athol Music Hall Co. v. Carey, 116 Mass. 471; Tonica & P. R. Co. v. McNeely, 21 Ill. 71; Carlisle v. Saginaw Valley & St. L. R. Co., 27 Mich. 315; Business Men's Ass'n v. Williams, 137 Mo. App. 575, 119 S. W. 439.

[76] Bryant's Pond Steam-Mill Co. v. Felt, 87 Me. 234, 32 Atl. 888, 33 L. R. A. 593, 47 Am. St. Rep. 323; Bole v. Fulton, 233 Pa. 609, 82 Atl. 947.

[77] Midland City Hotel Co. v. Gibson, 11 Ga. App. 829, 76 S. E. 600. And see cases cited in note 57, supra.

the individual subscriber, and all other subscribers.[78] This view is not only unsound, but serves further to add to the difficulties of the problem.

Revocation or Lapse of Subscription

As we have just seen, in the case of subscriptions, or rather offers to subscribe, to the stock of a proposed corporation, until the corporation is organized and accepts the subscription, it is not binding at common law, for the reason, among others, that until then there is no consideration for it. There is no mutuality. Until the corporation is bound to recognize the subscriber as a shareholder, he receives no consideration for his subscription. It follows, necessarily, from this that the offer to subscribe may be revoked or withdrawn by the subscriber at any time before the corporation is organized and accepts it, or before organization if that alone is held to constitute acceptance so as to make the subscriber a shareholder.[79] This conclusion is a necessary corollary, also, to the right of the promoters of a proposed corporation, when organized, to reject an application for shares therein, since if both parties are not bound, neither is.[80]

It also follows that the offer to subscribe will lapse if the subscriber dies or becomes insane before the corporation is organized and accepts it, for the continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition, and this can no more be done by a dead or insane man than an offer can, in the first instance, be made by a dead or insane man.[81]

Not only is such an offer revocable because of the want of consideration, but it is revocable for the further reason that until the

[78] Shelby County R. Co. v. Crow, 137 Mo. App. 461, 119 S. W. 435.

[79] Hudson Real-Estate Co. v. Tower, 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434; Id., 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379; Wallace v. Townsend, 43 Ohio St. 537, 3 N. E. 601, 54 Am. Rep. 829; Muncy Traction Engine Co. v. De La Green, 143 Pa. 269, 13 Atl. 747; Auburn Bolt & Nut Works v. Shultz, 143 Pa. 256, 22 Atl. 904; Lewis v. Hillsboro Roller Mill Co. (Tex. Civ. App.) 23 S. W. 338; Patty v. Hillsboro Roller Mill Co., 4 Tex. Civ. App. 224, 23 S. W. 336; Plank's Tavern Co. v. Burkhard, 87 Mich. 182, 49 N. W. 562; Bryant's Pond Steam Mill Co. v. Felt, 87 Me. 234, 32 Atl. 888, 33 L. R. A. 593, 47 Am. St. Rep. 323. Planters' & Merchants' Independent Packet Co. v. Webb, 156 Ala. 551, 46 South. 977, 16 Ann. Cas. 529; Vermilion Sugar Co. v. Vallee, 134 La. 661, 64 South. 670; WRIGHT BROS. v. MERCHANTS' & PLANTERS' PACKET CO., 104 Miss. 507, 61 South. 550, Wormser Cas. Corporations, 256.

[80] Feitel v. Dreyfous, 117 La. 756, 42 South. 259.

[81] Pratt v. Trustees of Baptist Soc. of Elgin, 93 Ill. 475, 34 Am. Rep. 187; Beach v. First Methodist Episcopal Church, 96 Ill. 177; Phipps v. Jones, 20 Pa. 260, 59 Am. Dec. 708; Wallace v. Townsend, 43 Ohio St. 537, 3 N. E. 601, 54 Am. Rep. 829; Sedalia, W. & S. Ry. Co. v. Wilkerson, 83 Mo. 235.

corporation is organized there cannot, in the nature of things, be any contract, since one of the parties—the corporation—is not yet in existence. The right to revoke exists, therefore, where the subscription is under seal.[82] "Such a subscription is not a completed contract. It takes two parties to make a contract. A nonexisting corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it." [83]

In order that withdrawal of a subscription may be effectual, it is necessary, as in the case of other offers, that notice thereof shall be communicated. An uncommunicated revocation can have no effect whatever. It is not necessary that the notice of revocation be given to all the other subscribers, or at a meeting of subscribers. It is sufficient if it be given to the person or persons to whom the subscription was given, or to the person or persons who have been chosen to represent the subscribers in forming the corporation.[84] It was held in an early English case that all the other subscribers must not only have notice, but must consent, before one of the subscribers can withdraw;[85] but now, in England as well as in this country, such consent is unnecessary. If all the other subscribers should object, it would nevertheless be the right of a subscriber to withdraw before the corporation is formed.[86] Though one suffi-

[82] "Until the organization of the corporation, the subscription is a mere proposition or offer, which may be withdrawn, like any other unaccepted offer. Unless the signer is bound upon a contract, he is not bound at all. It is open to him to withdraw. It is not on the ground that there was no sufficient consideration. The seal would do away with any doubt on that score. But it is on the ground that for the time being, and until the corporation is organized, the writing does not take effect as a contract, because the contemplated party to the contract, on the other side, is not yet in existence, and for this reason, there being no contract, the whole undertaking is inchoate and incomplete, and since there is no contract, the party may withdraw." Hudson Real Estate Co. v. Tower, 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434; Id., 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379.

[83] Bryant's Pond Steam Mill Co. v. Felt, supra.

[84] Hudson Real Estate Co. v. Tower, 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379; Planters' & Merchants' Independent Packet Co. v. Webb, 156 Ala. 551, 46 South. 977, 16 Ann. Cas. 529. In Hudson Real Estate Co. v. Tower, supra, the defendants subscribed under seal for stock in a corporation. Afterwards articles of incorporation were executed, and officers elected; but, before the incorporation was complete, the defendants orally informed the president that, if a certain change in the policy was made, they would no longer be associates, and would not pay their subscriptions. The change of policy was made, and it was held that was a sufficient withdrawal by the defendants, and notice thereof. And see note, 8 Columbia Law Rev. 47.

[85] Kidwelly Canal Co. v. Raby, 2 Price, 93.

[86] Hudson Real Estate Co. v. Tower, 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379.

ciently exercised his right to revoke a subscription to the stock of a proposed corporation by directing the solicitor of subscriptions to erase his name from the list, yet if, after such orders and after the organization of the corporation, the subscriber recognized his subscription as being binding, he is bound thereby.[87]

Since, upon organization of the corporation and acceptance of subscriptions, they are changed into binding contracts, a subscriber cannot afterwards withdraw without the consent of the corporation and of all the other subscribers; nor will his subscription be affected by his death or insanity after that time.[88]

The supreme court of Minnesota has held as follows: "A subscription by a number of persons to the stock of a corporation to be thereafter formed by them has in law a double character: First. It is a contract between the subscribers themselves to become stockholders without further act on their part immediately upon the formation of the corporation. As such a contract it is binding and irrevocable from the date of the subscription (at least in the absence of fraud or mistake), unless canceled by consent of all the subscribers before acceptance by the corporation. Second. It is also in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes as to each subscriber a contract between him and the corporation." And it was further held that the promoter of a proposed corporation, who solicits and procures subscriptions, is the agent of the body of subscribers to hold the subscriptions until the corporation is formed, and then turn them over to it without any further act of delivery on the part of the subscribers; and hence, that a delivery of a subscription to such promoter is a complete delivery, so that it becomes eo instanti a binding contract as between the subscribers.[89] This decision is sound in so far as it holds that the subscriptions are continuing offers to the proposed corporation, and become binding when it is organized and accepts them; but it is opposed to the weight of authority in so far as it holds that an agreement by a number of persons to subscribe to the stock of a

[87] Planters' & Merchants' Independent Packet Co. v. Webb, supra. And see Davies v. Ball, 64 Wash. 292, 116 Pac. 833, Ann. Cas. 1914B, 750, as to what is sufficient to constitute one a stockholder by estoppel, though there be no formal subscription.

[88] Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Athol Music Hall Co. v. Carey, 116 Mass. 471; post, p. 404.

[89] Minneapolis Threshing Mach. Co. v. Davis, 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796, 12 Am. St. Rep. 701. And see Garrett v. Philadelphia Lawn Mower Co., 39 Pa. Super. Ct. 78.

proposed corporation is a contract between the subscribers, and binding upon them, so as to be irrevocable before the corporation is organized. However, there are a few decisions and dicta in accord.[90]

Subscriptions under Statutes

Thus far we have been speaking of those agreements to form a corporation and subscribe for stock that depend upon common-law principles only, and that are not made as a step authorized by statute in the process of forming the corporation. Such an agreement made as a step authorized by statute in the process of forming the corporation stands upon different ground. Like the agreements of which we have been speaking, it can only be enforced by the corporation after its organization; but it is binding on each subscriber, by virtue of the statute, from the time of signing, and he cannot revoke his subscription before the corporation is completely organized. In Buffalo & N. Y. City R. Co. v. Dudley [91] a railroad company had been organized under a statute (Laws 1845, c. 336), which appointed commissioners to open books and receive subscriptions to its capital stock. The defendant, among others, subscribed on the books, and otherwise complied with the statute. The corporation was completely organized, and accepted the subscriptions before the defendant attempted to withdraw his, and therefore his subscription could be sustained as a continuing offer accepted by the corporation, and thereby changed into a binding promise supported by a sufficient consideration; but the court went further than this, and said that no consideration or mutuality was necessary, and that the subscription could not have been revoked even before the corporation was organized. "The rules of the common law," it was said, "in regard to consideration and mutuality, do not apply to the case. Those rules may, I think, be regarded as superseded by the statute which not only expressly authorizes subscriptions to be made in anticipation of the existence of the corporation, but impliedly, at least, recognizes their validity. Section 4 of the act by which the plaintiffs are incorporated provides, among other things, as follows: 'And the said commissioners shall, at the time of any subscription, require the payment to them, by the person or persons subscribing, of five dollars towards and upon every hun-

[90] Nebraska Chicory Co. v. Lednicky, 79 Neb. 587, 113 N. W. 245; Planters' & Merchants' Independent Packet Co. v. Webb, 144 Ala. 666, 39 South. 562; Chicago Bldg. & Mfg. Co. v. Peterson, 133 Ky. 596, 118 S. W. 384; Garrett v. Philadelphia Lawn Mower Co., supra. And see note, 8 Columbia Law Rev. 47.

[91] 14 N. Y. 336.

dred dollars so subscribed, and unless the same shall be paid, the subscription shall be invalid.' This plainly implies that, if the required payment is made, the subscription shall be valid. But even without this clause it would, I think, be held that a statute which authorizes subscriptions in view of a subsequent incorporation, and regulates the manner in which they shall be made, must necessarily have the effect to give validity to such subscriptions, if made in accordance with the requirements of the act." The same principle applies where the statute provides for subscriptions by signing formal articles of association which are to be filed as required by the statute, or formal subscription papers. One who subscribes for stock by signing such articles or papers in compliance with the statute cannot revoke his subscription before the incorporation is perfected.[92]

Agreements to Pay Subscription to Trustees for Corporation when Formed

"An agreement to pay money to trustees, to be by them paid to a corporation thereafter to be created, the trustees to return to the subscribers stock in the corporation accordingly, is a valid contract between the subscribers and the trustees." [93] In West v. Crawford [94] the defendant and others entered into an agreement to form a corporation, and to take a certain number of shares of the stock, and expressly promised to pay a certain percentage of the par value thereof to one West within five days after filing of the articles of incorporation, and they constituted the said West their agent to collect the amount which might become due from them. It was held that West could maintain an action against them on their express promise as trustee of an express trust; and in a later case,[95] the corporation having been formed, and the money having been collected by West, it was held that the corporation could maintain an action against him for the same as money received by him to its use. It was held that the fact that the defendants did not sign the articles of incorporation, or otherwise comply with the statute under which the corporation was formed, and did not, therefore, become members of the corporation, was immaterial, as their liability to West was based on their express promise to pay the money to him for

[92] Lake Ontario, A. & N. Y. R. Co. v. Mason, 16 N. Y. 451; Johnson v. Wabash & Mt. Vernon Plank-Road Co., 16 Ind. 389; Coppage v. Hutton, 124 Ind. 401, 24 N. E. 112, 7 L. R. A. 591; Greenbrier Industrial Exposition v. Rodes, 37 W. Va. 738, 17 S. E. 305. And see Lowville & B. R. R. Co. v. Elliott, 115 App. Div. 884, 101 N. Y. Supp. 328, affirmed short 196 N. Y. 545, 89 N. E. 1104.

[93] Prof. Collin's Syllabus, Cornell Univ. Law School.

[94] 80 Cal. 19, 21 Pac. 1123.

[95] San Joaquin Land & Water Co. v. West, 94 Cal. 399, 29 Pac. 785.

the use of the corporation. The agreement was sustained on the ground that the promises of the parties were mutual, and each was a consideration for the others.[96]

Distinction between Present Subscription and Agreement to Subscribe

Some of the courts make a distinction between a present subscription to the stock of a projected corporation and a mere agreement to subscribe, and the distinction has been approved by Morawetz and other writers. The former, it is held, makes the parties stockholders, and renders them liable to the corporation on their promises, when it is organized. But the latter, it is held, is not a subscription or offer to the future corporation, but merely an agreement between the parties that they will subscribe at some future time; and until they do actually subscribe upon the books, or in some other formal way, no binding contract of subscription with the corporation can result.[97] It is claimed to be the same distinction which exists between a present bargain and sale, on the one hand, and an executory contract to sell on the other. In Thrasher v. Pike County R. Co.[98] the defendant and others signed a paper as follows: "We, the undersigned, agree to subscribe to the stock of the Pike County Railroad the sums set against our names, when the books may be opened for subscriptions." The corporation brought an action on this agreement, counting upon the agreement as a promise to subscribe, and alleging a failure to subscribe as a breach, and plaintiff claimed to recover the par value of the shares for which the defendant agreed to subscribe, or the amount of calls made upon the stock. It was held that it could not recover on such a cause of action, as the promise set up in the declaration was merely an agreement to subscribe when subscription books should be opened, and did not make the defendant a stockholder, so as to be liable to calls. The promise was regarded as similar to an agreement to purchase property, rendering him liable only for the actual loss sustained by plaintiff by reason of his failure to take the stock.[99]

[96] And see Hecla Consolidated Gold Min. Co. v. O'Neill, 65 Hun, 619, 19 N. Y. Supp. 592.

[97] 1 Mor. Corp. §§ 46, 49.

[98] THRASHER v. PIKE COUNTY R. CO., 25 Ill. 393, Wormser Cas. Corporations, 258.

[99] See, also, Stowe v. Flagg, 72 Ill. 397, 402; Quick v. Lemon, 105 Ill. 578, 585; Bole v. Fulton, 233 Pa. 609, 82 Atl. 947; Badger Paper Co. v. Rose, 95 Wis. 145, 70 N. W. 302, 37 L. R. A. 162. Cf. Southwestern Slate Co. v. Stephens, 139 Wis. 616, 120 N. W. 408, 29 L. R. A. (N. S.) 92, 131 Am. St. Rep. 1074. In Mt. Sterling Coal Road Co. v. Little, 14 Bush (Ky.) 429, the defendant signed the following writing: "The undersigned propose to sub-

It is at least doubtful whether this distinction is sound. Prof. Collin says that it is unsound, and disappears as mere dicta upon a thorough sifting of the cases.[1] Every agreement to subscribe to the stock of a corporation to be organized, unless there is a failure to comply with statutory requirements, should be held a continuing offer to the corporation, resulting in a binding contract of subscription when the corporation is organized as contemplated.[2] However, it has recently been held in New York that "a mere agreement to subscribe is not enforcible as a subscription.[3]

SAME—WHO MAY BECOME SUBSCRIBERS

98. Any person who is capable of contracting may subscribe for stock in a corporation, in the absence of express restrictions in the charter or act under which the corporation is organized.

The charter or act under which a corporation is organized may require the subscribers to its stock to be residents of the state or

scribe for the number of shares, of $50 each, to the capital stock of the Mt. Sterling Coal Road Company, when the charter shall have been obtained and the company organized," etc. It was held, following THRASHER v. PIKE COUNTY R. CO., supra, that this was not a subscription, but an agreement to subscribe, for breach of which the plaintiff could only recover as damages the difference between the market and par value of the stock. But see Bullock v. Falmouth & C. H. Turnpike Co., 85 Ky. 184, 3 S. W. 129. In Rhey v. Ebensburg & S. Plank Road Co., 27 Pa. 261, the defendant, to induce the plaintiff to locate its road along a certain route, signed an agreement that, if it should do so, one O'Neil "will subscribe $500 additional stock, for which I hold myself personally responsible." The road having been located, the plaintiff sued defendant for breach of the contract. It was held that it could not recover the par value of the stock, but only the damages resulting from failure to take the stock, the measure of which was the difference between the par value and the actual value of the stock. In Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 219, the defendant and others signed the following instrument: "We, the undersigned, citizens of Unionville and vicinity, pledge ourselves to subscribe for and take stock in and for the construction of the Lake Ontario Shore Railroad, to the amount set opposite our names, respectively, on condition said road be located and built through, or north of, the village of Unionville." It was held that this was not a subscription, but a mere agreement between the signers, to which the corporation was not a party, and upon which it could not maintain an action.

[1] Syllabus for Class in Corporations in Cornell University Law School.

[2] See Bullock v. Falmouth & C. H. Turnpike Co., 85 Ky. 184, 3 S. W. 129, qualifying, if not overruling, Mt. Sterling Coal Road Co. v. Little, supra.

[3] Van Schaick v. Mackin, 129 App. Div. 335, 113 N. Y. Supp. 408; General Electric Co. v. Wightman, 3 App. Div. 118, 39 N. Y. Supp. 420.

of the United States, or impose other restrictions.[4] But, in the absence of such restrictions, any person who is capable of entering into a binding contract may become a subscriber. It makes no difference that he is a nonresident of the state, or an alien.[5]

An infant may subscribe for shares in a corporation, but he may repudiate the contract either before or after attaining his majority, provided, in the latter case, he has not ratified it before electing to disaffirm.[6] If he elects to disaffirm, he must do so within a reasonable time after his majority, and before accepting benefits under the contract after majority, or he will be held to have ratified the contract, and will be liable for calls.[7] As we shall see, where the statute under which a corporation is formed requires that a certain amount of stock shall be subscribed before organization, there must be unconditional and binding subscriptions to that amount, and subscriptions by infants cannot be counted.[8] An infant, we have seen, cannot be an incorporator, though he may be, as has just been remarked, a subscriber.

Persons non compotes mentis whether their incapacity is the result of insanity, idiocy, senile dementia, or drunkenness, may avoid their stock subscriptions to the same extent, and subject to the same qualifications, as in the case of any other contract.

Where the common law in regard to the contractual capacity of married women still obtains, a subscription by a married woman is absolutely void.[9] In some states, by statute, a married woman may contract to the same extent as a feme sole, and in such a case she may bind herself by a stock subscription. In other states her incapacity has only been partially removed. Whether she can subscribe for stock in these states must depend upon the particular statute, and the extent to which it has removed her common law

[4] A state has the right to debar aliens from holding stock in its corporations. State v. Travellers' Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138. A restriction of membership by the charter to Norwegians and residents of M. or vicinity was valid. Blien v. Rand, 77 Minn. 110, 79 N. W. 606, 46 L. R. A. 618.

[5] Com. v. Hemmingway, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

[6] Tiff. Pers. & Dom. Rel. 376; London & N. W. Ry. Co. v. McMichael, 20 Law J. Exch. 97; Ebbett's Case, 5 Ch. App. 302; Lumsden's Case, 4 Ch. App. 31. Cf. Foster v. Chase (C. C.) 75 Fed. 797.

[7] Tiff. Pers. & Dom. Rel. 376; Clark, Cont. 241; Lumsden's Case, supra; Ebbett's Case, supra; Cork & B. Ry. Co. v. Cazenove, 10 Q. B. 935; Mitchell's Case, L. R. 9 Eq. 363; Dublin & W. Ry. Co. v. Black, 8 Exch. 181.

[8] Post, p. 384.

[9] 1 Cook, Stock, Stockh. & Corp. Law, § 66; National Commercial Bank v. McDonnell, 92 Ala. 387, 9 South. 149; Pugh and Sharman's Case, L. R. 13 Eq. 566.

disabilities.[10] Independently of any statute, a married woman may take shares by purchase, gift, or bequest, and hold the same, just as she may take and hold any other chose in action.[11] And in such a case she will incur statutory liability as a stockholder.[12] In the recent case of Christopher v. Norvell,[13] a receiver of a national bank in Florida sought to enforce the statutory liability, under the federal statute, against a married woman, a resident of that state and owner of record of shares of the bank stock. The argument advanced against the suit was that a married woman "was incapable, by the law of Florida, as at common law, of entering into a contract, at least one that would subject her to personal liability." The Supreme Court of the United States, through Mr. Justice Harlan, thus disposed of this contention: "The vice in the argument is in the assumption that the liability of Mrs. Christopher as a shareholder arises wholly out of *contract* between herself and the bank or its creditors; whereas, upon becoming a shareholder, she made, strictly, no direct contract with anyone, and became * * * *by force of the statute* individually responsible to the amount of her stock for the contracts, debts and engagements of the bank equally and ratably with other shareholders." She is not prohibited from purchasing stock by a statute providing that married women shall not be capable of making any contract to affect their real or personal estate, without the written consent of her husband, as the statute applies to executory contracts only.[14]

We have seen in a former chapter that by the apparent weight of authority in this country a corporation cannot purchase or subscribe for stock in another corporation. This is not because a corporation is incapable of making such a contract, but because it is generally not within the purposes for which it was created, and is, therefore, ultra vires. A corporation may be authorized by its charter or by statute to hold stock in other corporations.[15]

A corporation cannot, in its own name, or in the name of others as trustees for it, subscribe for shares of its own stock.[16]

[10] That she may bind her separate estate by subscription, under the married woman's acts, see 1 Cook, Stock, Stockh. & Corp. Law, § 66.

[11] Porter v. Bank of Rutland, 19 Vt. 410; Robinson v. Turrentine (C. C.) 59 Fed. 554; Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531; Christopher v. Norvell, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740.

[12] Robinson v. Turrentine, supra; Christopher v. Norvell, supra.

[13] Supra.

[14] Post, p. 724.

[15] Ante, p. 183. And see Cox v. Hardee, 135 Ga. 80, 68 S. E. 932.

[16] 1 Cook, Stock, Stockh. & Corp. Law, § 64; Holladay v. Elliott, 8 Or. 85; Allibone v. Hager, 46 Pa. 48.

Municipal corporations are often expressly authorized to subscribe for stock in railroad corporations for the purpose of aiding them; but they have no implied authority to subscribe for stock in any corporation.[17] In some states, New York for example, stock subscriptions by municipalities are forbidden by the state constitution.[18]

There is nothing to prevent the directors and other officers and agents of a corporation from subscribing for its stock, if there is no fraud.[19]

SAME—FORM OF SUBSCRIPTION—STATUTORY FORMALITIES

99. At common law no formalities are necessary to a contract of subscription. By the better opinion it may be entered into verbally. But, where the statute or charter prescribes particular formalities, they must generally be followed.

At Common Law

At common law no particular form is necessary to the validity of a contract of subscription, but all that is necessary is that an intention shall appear on the part of the subscriber to take stock and on the part of the corporation to recognize him as a stockholder. If such an intention appears, the fact that the writing is informal can make no difference.[20] The term "subscription" etymologically signifies writing; and some of the courts have held that writing is necessary to a valid contract of subscription.[21] By the better opinion, however, at common law, writing is not at all necessary. A

[17] 1 Cook, Stock, Stockh. & Corp. Law, §§ 90–103.

[18] Const. N. Y. art. 8, § 10.

[19] 1 Cook, Stock, Stockh. & Corp. Law, § 65; Walker v. Devereau, 4 Paige (N. Y.) 229; Sims v. Brooklyn Street R. Co., 37 Ohio St. 556.

[20] Nulton v. Clayton, 54 Iowa, 425, 6 N. W. 685, 37 Am. Rep. 213; Anderson v. Scott, 70 N. H. 534, 49 Atl. 568; Manchester St. Ry. v. Williams, 71 N. H. 312, 52 Atl. 461; Dupee v. Chicago Horse-Shoe Co., 117 Fed. 40, 54 C. C. A. 426. A subscription is not rendered invalid by a mistake in the name of the corporation, but the contract will operate in favor of the corporation for whose benefit it was intended. Milford & Chillicothe Turnpike Co. v. Brush, 10 Ohio, 111, 36 Am. Dec. 78. There need be no formal subscription if there is an assumption by the subscriber of a stockholder's rights and duties. Davies v. Ball, 64 Wash. 292, 116 Pac. 833, Ann. Cas. 1914B, 750.

[21] Fanning v. Hibernia Ins. Co., 37 Ohio St. 339, 41 Am. Rep. 517. In Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 188, the court, in holding a verbal contract of subscription invalid, expressly bases the decision on the ground that the charter required writing.

contract of *subscription*, like other contracts, may be entered into verbally unless writing is required by the charter or by some statute.[22] Such a contract is not within the statute of frauds,[23] and must be carefully distinguished from a contract for the *sale* of shares.

Formalities Required by Statute

If the general or special law under which a corporation is organized prescribes particular formalities, compliance with the law is generally essential to a valid contract of subscription, for the Legislature has a right to fix a particular mode for entering into such a contract. The Alabama court has declared that "where the statute prescribes the method of subscription, a subscription made in any other way cannot be enforced.[24] As was said by Judge Campbell in a Michigan case, no person can obtain rights of membership in a corporation except in compliance with its charter or governing law, and, if that prescribes any conditions or special methods of becoming a member, the law is imperative. There may be cases of mutual dealing which will estop the parties, but no contract of subscription can be valid if not in conformance with the statute.[25]

Thus, where the statute or charter requires subscriptions in writing, verbal subscriptions are invalid.[26] So, where the statute under which a corporation is formed requires the associates to organize the corporation, and subscribe formal articles of association, a person who signs preliminary subscription papers, but does not subscribe the articles of association, does not become a shareholder, and cannot be held liable to the corporation as a subscriber. In Poughkeepsie & S. Plank Road Co. v. Griffin[27] the statute under which the plaintiff corporation was organized, after providing for the opening of books for subscriptions, declared that when a cer-

[22] 1 Cook, Stock, Stockh. & Corp. Law, § 52; 1 Mor. Priv. Corp. § 54; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834, 58 N. W. 440; Colfax Hotel Co. v. Lyon, 69 Iowa, 683, 29 N. W. 780; Bullock v. Falmouth & C. H. Turnpike Co., 85 Ky. 184, 3 S. W. 129; Webb v. Baltimore & E. S. R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396; Wemple v. St. Louis, J. & S. R. Co., 120 Ill 196, 11 N. E. 906; Somerset Nat. Banking Co.'s Receiver v. Adams, 72 S. W. 1125, 24 Ky. Law Rep. 2083; MEEHAN v. SHARP, 151 Mass. 564, 24 N. E. 907, Wormser Cas. Corporations, 245; Manchester St. Ry. v. Williams, supra; People v. Duffy-McInnerney Co., 122 App. Div. 336, 106 N. Y. Supp. 878. And see Chaffin v. Cummings, 37 Me. 76.

[23] See the cases cited above.

[24] Planters' & Merchants' Independent Packet Co. v. Webb, 144 Ala. 666, 39 South. 562; Hapgoods v. Lusch, 123 App. Div. 23, 107 N. Y. Supp. 331.

[25] Carlisle v. Saginaw Valley & St. L. R. Co., 27 Mich. 315, 318. See 1 Mor. Priv. Corp. § 67.

[26] Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 188.

[27] 24 N. Y. 150.

tain amount of stock should be subscribed, and a certain percentage paid thereon, the subscribers might meet and elect directors, and that thereupon they should subscribe articles of association, in which should be set forth certain matters, and that each subscriber to such articles should subscribe thereto his name and place of residence, and the number of shares taken by him. It then provided for filing the articles of association in the office of the secretary of state, and declared that thereupon the persons who should so subscribe, and such persons as should from time to time become stockholders, should be a body corporate. The defendant, with others, signed a paper, agreeing to take a certain number of shares of stock, but he did not subscribe the articles of association. It was held that he was not liable as a subscriber, as the statute contemplated subscriptions only by subscribing the articles of association, and the paper signed by him was merely a preliminary agreement for the purpose of bringing the parties together.[28] So, where the statute provides that the persons desiring to organize a corporation should make, sign, and acknowledge the articles of association, one who signs, but does not acknowledge, them, does not become liable as a subscriber.[29] So, also, "the omission to obey a statutory requirement of a payment in cash upon a subscription makes the subscription invalid and not binding." [30]

Same—Subscriptions after Incorporation

This principle applies to subscriptions after incorporation as well as subscriptions prior to incorporation. Sometimes the disposal of unsubscribed stock is left to the unrestricted discretion of the corporation, but this is not always the case. To prevent abuse, unfairness, and fraud, the charter or governing statute often prescribes the method of subscribing to stock in corporations after they have been organized; and, unless a subscription is in compliance therewith, the subscriber does not become a member of the corporation, and therefore is not liable on his subscription, in the absence of elements of estoppel. In Carlisle v. Saginaw Val. & St. L. R. Co.[31] the charter of the corporation declared that the

[28] And see Troy & B. R. Co. v. Tibbits, 18 Barb. (N. Y.) 297; Dutchess & C. County R. Co. v. Mabbett, 58 N. Y. 397; Sedalia, W. & S. Ry. Co. v. Wilkerson, 83 Mo. 235; Monterey & S. V. R. Co. v. Hildreth, 53 Cal. 123. Compare, however, Peninsular Ry. Co. v. Duncan, 28 Mich. 130; Greenbrier Industrial Exposition v. Rodes, 37 W. Va. 738, 17 S. E. 305.

[29] Coppage v. Hutton, 124 Ind. 401, 24 N. E. 112, 7 L. R. A. 591; Greenbrier Industrial Exposition v. Rodes, 37 W. Va. 738, 17 S. E. 305.

[30] Hapgoods v. Lusch, supra; South Buffalo Natural Gas Co. v. Bain, 9 Misc. Rep. 425, 30 N. Y. Supp. 264.

[31] 27 Mich. 315.

persons who should subscribe the articles of association, and all other persons who should, from time to time thereafter, subscribe to or become the holders of the capital stock of said corporation, "in the manner to be prescribed by its by-laws," should be a body corporate. It was held that a subscription made after incorporation, but before any by-laws were adopted, gave no rights to either party, and, nothing having been done to operate as an estoppel, the subscriber was held not bound by a subsequent by-law adopting his subscription. So, as we shall see, if the statute or articles of association appoint or prescribe particular agents to receive subscriptions, no other person has authority to receive them, and a subscription received by another agent is not binding either on the corporation or on the subscriber.[32]

Same—Directory Provisions

The fact that the statute prescribes a particular way in which subscriptions may be received will not be held to render invalid subscriptions made in other ways, and good at common law, unless the intent of the Legislature to make the designated mode exclusive is clear. Thus, where the statute under which a corporation was formed provided that when the articles of association should be filed as therein provided the directors named in the articles might, in case the whole capital stock should not be subscribed, open books of subscription to fill up the capital stock, it was held that the Legislature did not intend to prohibit other modes of receiving subscriptions, and that a subscription which was good at common law was binding, though not received in the mode prescribed by the statute.[33]

Same—Substantial Compliance with Statute

Not every slight departure from the directions of the statute will render a subscription invalid. It is enough if there is a substantial compliance. Thus it has been held that, if the statute requires the directors to open books of subscription for the purpose of filling up the capital stock, it is a sufficient compliance with the provision if they adopt a book provided before the corporation was organized, and accept subscriptions, with the assent of the persons who made them, made and entered therein before organization. "The statute," it was said, "can mean no more than that the subscriptions are to be made in a book provided by the directors for that purpose, and, if they adopt one some one else has provided, every pur-

[32] Post, p. 366.

[33] Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294. And see Stuart v. Valley R. Co., 32 Grat. (Va.) 146.

pose of the statute is satisfied." [84] So where the statute requires articles of association to be signed, setting forth the name of the corporation, its duration, and certain other matters, it has been held that it is sufficient if several separate papers, exact copies or transcripts of each other, setting forth the prescribed facts, are signed by the corporators, some signing one and some signing another of them. The several papers may be regarded as one instrument.[85]

MUTUAL CONSENT

100. Mutual consent on the part of the subscriber and of the corporation is essential to a valid contract of subscription.

No true contract can exist without mutual consent. This is true of contracts of subscription to the capital stock of a corporation. In the absence of elements of estoppel, no person can be held liable as a subscriber to the stock of a corporation unless he has consented to become a stockholder, and to become so in that corporation.[86]

For this reason a person who subscribes to the stock of a corporation which it is proposed to form for a particular purpose, and with particular powers, does not become a shareholder, and is not liable on his subscription, if a corporation is formed by the other subscribers, without his consent, for a different purpose, or with different powers. In fine, if, after one has signed a contract of subscription, such agreement is changed in any material or substantial way, before the incorporation, without the subscriber's consent, "he is not bound, because the company formed is not the company he subscribed to." [87] It is the court's duty to instruct the jury as to the legal effect of the written instruments. In Dorris v. Sweeney,[88] the defendant signed a subscription paper for the formation of a

[84] Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294, 301. See Woodruff v. McDonald, 33 Ark. 97.

[85] Lake Ontario, A. & N. Y. R. Co. v. Mason, 16 N. Y. 451.

[86] Dorris v. Sweeney, 60 N. Y. 463; Ticonic Water Power & Mfg. Co. v. Lang, 63 Me. 480; Richmond Factory Ass'n v. Clarke, 61 Me. 351; Machias Hotel Co. v. Coyle, 35 Me. 405, 58 Am. Dec. 712; Stern v. McKee, 70 App. Div. 142, 75 N. Y. Supp. 157; West End Real Estate Co. v. Nash, 51 W. Va. 341, 41 S. E. 182; Woods Motor Vehicle Co. v. Brady, 181 N. Y. 145, 73 N. E. 674; Norwich Lock Mfg. Co. v. Hockaday, 89 Va. 557, 16 S. E. 877; Comanche Cotton Oil Co. v. Browne (Tex. Civ. App.) 90 S. W. 528, reversed 99 Tex. 660, 92 S. W. 450; Smith v. Burns Boiler & Mfg. Co., 132 Wis. 177, 111 N. W. 1123; Hanford Mercantile Store v. Sowlveere, 11 Cal. App. 261, 104 Pac. 708.

[87] Norwich Lock Mfg. Co. v. Hockaday, supra.

[88] 60 N. Y. 463.

corporation for the purpose of purchasing a patent "for preserving fruit or other products out of season," erecting a building, and "stocking the same with fruits to be preserved." Some of the subscribers organized a corporation under the general manufacturing act for "the manufacturing of preserved fruits, and the canning of fruits and other products, and the preserving and keeping of fruits and other articles from decay," etc. It was held that the defendant was not liable on his subscription, because the business of the company embraced branches in which he had never agreed to engage. So, in Richmond Factory Ass'n v. Clarke,[39] where a number of persons, including the defendant, signed an agreement to associate themselves together under a general law for the purpose of forming a manufacturing company, and the attorney general, to whom they had to apply under the law for a certificate, refused it, and some of those so subscribing, without the concurrence of the defendant, procured from the Legislature a special act of incorporation to effectuate the purpose originally contemplated, it was held that the corporation so created could not enforce the defendant's original subscription. Where the corporation's capital stock was later fixed at $30,000, instead of $25,000, as set forth in the subscription paper, the departure was held so material as to result in the release of the subscriber.[40] And it was recently decided in California that a subscription to stock of a corporation to be formed for the purposes "of acquiring and carrying on a general produce and merchandising business, etc.," did not bind subscribers to take stock in a corporation formed not only for such purposes, but also for dealing in real estate, bonds, and mortgages; the abbreviation "etc." not covering such other purposes under the rule of ejusdem generis.[41] But a mere change in the corporate designation does not necessarily have the effect of releasing the subscriber. Thus, that subscriptions were made to the stock of "Independent Packet Company," and the corporation was organized as "Planters' & Merchants' Independent Packet Company," does not invalidate the subscriptions.[42]

On the same principle, where the subscription paper or the articles of association are materially altered without the consent of one of the subscribers thereto, he cannot be held liable on his sub-

[39] 61 Me. 351.

[40] Middlecoff Hotel Co. v. Yeomans, 89 Ill. App. 170. Cf. Business Men's Ass'n v. Williams, 137 Mo. App. 575, 119 S. W. 439.

[41] Hanford Mercantile Store v. Sowlveere, supra.

[42] Planters' & Merchants' Independent Packet Co. v. Webb, 156 Ala. 551, 46 South. 977, 16 Ann. Cas. 529. And see Yonkers Gazette Co. v. Taylor, 30 App. Div. 334, 51 N. Y. Supp. 969; Cox v. Dickie, 48 Wash. 264, 93 Pac. 523.

scription.[43] And one who signs articles of association cannot be held liable as a subscriber if those articles are abandoned, and others substituted without his consent.[44] So, where the certificate of incorporation varies materially from the preliminary subscription, a subscriber is not bound,—as where, by the subscription, the corporation should expire on a certain date, and the certificate fixes a much later date for expiration.[45] But it is otherwise, where the change is neither substantial nor radical.[46]

A subscription paper, to bind the subscribers, must be complete. Nothing material must be left for further arrangement or consent. "A signature to an incomplete paper, wanting in any substantial particular, when no delegation of authority is conferred to supply the defect, does not bind the signer without further assent on his part to the completion of the instrument." [47] This applies to subscriptions. Therefore, where parties subscribed articles of association, leaving blank the spaces for the names of the directors, it was held that they were not bound as subscribers on the insertion of names of directors without their consent.[48]

SUBSCRIPTIONS INDUCED BY FRAUD

101. A subscription induced by the fraud of agents of the corporation authorized to solicit or receive subscriptions, or by unauthorized agents whose receipt of the subscription has been ratified by the corporation, is voidable at the option of the subscriber to the same extent, and subject to the same rules, as a contract between individuals would be. If corporate insolvency has occurred after the subscription, and the rights of subsequent creditors have intervened, the courts are reluctant to permit rescission on the part of the defrauded subscriber, and many courts forbid it absolutely.

[43] Burrows v. Smith, 10 N. Y. 550; Katama Land Co. v. Jernegan, 126 Mass. 155; Midland City Hotel Co. v. Gibson, 11 Ga. App. 829, 76 S. E. 600. In the last cited case it was held a change in the location of a proposed hotel company released nonassenting subscribers.

[44] Southern Hotel Co. v. Newman, 30 Mo. 118. See, also, Richmond St. R. Co. v. Reed, 83 Ind. 9.

[45] Greenbrier Industrial Exposition v. Rodes, 37 W. Va. 738, 17 S. E. 305 See, also, Bucher v. Dillsburg & M. R. Co., 76 Pa. 306.

[46] Casanas v. Audubon Hotel Co., 124 La. 786, 50 South. 714.

[47] Dutchess & C. County R. Co. v. Mabbett, 58 N. Y. 397.

[48] Dutchess & C. County R. Co. v. Mabbett, 58 N. Y. 397. And see McClelland v. Whiteley (C. C.) 15 Fed. 322.

So long as a corporation is a going concern, having the management and possession of its property, contracts made with it are governed by the same principles of law as contracts between individuals; and it is therefore well settled that if one is induced to become a subscriber to its capital stock by the fraud of the corporation or of its officers or agents, and within a reasonable time after discovery of the fraud, there having been no laches on his part, repudiates his subscription before the company becomes insolvent, he is entitled to be relieved of all liability on his subscription; and the mere fact that the company subsequently becomes insolvent, and action is brought by its assignee or receiver, can make no difference.[49]

Where, however, after the subscription and before the subscriber has taken steps to rescind it, the equities of subsequent creditors have intervened, different considerations are presented. The English rule is that insolvency of a corporation absolutely bars the defrauded subscriber's release, and seems based wholly upon an interpretation of the Companies Act of 1862.[50] All American cases concede that there must be no want of diligence on the part of the subscriber, either in discovering the fraud or in taking steps to rescind when he has discovered it.[51] And, while there are cases to the contrary,[52] the tendency of the courts in this country is to hold that if, after the subscription and before the subscriber has taken steps to repudiate it, the corporation has incurred debts and become insolvent, the equities of the subsequent creditors, who have contracted

[49] Fear v. Bartlett, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721; Savage v. Bartlett, 78 Md. 561, 28 Atl. 414; Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 188; Ramsey v. Thompson Mfg. Co., 116 Mo. 313, 22 S. W. 719; Rockford, R. I. & St. L. R. Co. v. Shunick, 65 Ill. 223; Walker v. Mobile & O. R. Co., 34 Miss. 245; Directors, etc., of Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99; Crump v. United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116; Bradley v. Poole, 98 Mass. 169, 93 Am. Dec. 144; Newton Nat. Bank v. Newbegin, 74 Fed. 135, 20 C. C. A. 339, 33 L. R. A. 727; Anderson v. Scott, 70 N. H. 350, 47 Atl. 607; Beal v. Dillon, 5 Kan. App. 27, 47 Pac. 317; Chamberlain v. Trogden, 148 N. C. 139, 61 S. E. 628, 16 Ann. Cas. 177, and note; Dorsey Mach. Co. v. McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; and cases hereafter cited.

[50] Oakes v. Turquand, L. R. 2 H. L. 325, 374; Henderson v. Royal British Bk., 7 El. & Bl. 356. See 25 & 26 Vict. 434, §§ 23, 26, et seq. And see Hinkley v. Sac Oil & Pipe Line Co., 132 Iowa, 396, 107 N. W. 629, 119 Am. St. Rep. 564.

[51] Turner v. Grangers' Life & Health Ins. Co., 65 Ga. 649, 38 Am. Rep. 801; Brown v. Allebach (C. C.) 166 Fed. 488; Meholin v. Carlson, 17 Idaho, 742, 107 Pac. 755, 134 Am. St. Rep. 286; Cf. White v. American Nat. Life Ins. Co., 115 Va. 305, 78 S. E. 582; post, p. 363.

[52] Ramsey v. Thompson Mfg. Co., 116 Mo. 313, 22 S. W. 719; dictum in Savage v. Bartlett, 78 Md. 561, 28 Atl. 414. See 10 Cyc. 440.

on the faith of the fraudulent subscription, are superior to those of the defrauded subscriber and a rescission will not be permitted.[53] In a recent case,[54] Lumpkin, J., speaking for the Supreme Court of Georgia, said: "As to creditors whose claims arose after the stockholders became such, their rights are superior to any right of rescission. The status of a stockholder relative to creditors who became such after he took the stock is not in all respects identical with that relative to antecedent creditors." The distinction taken seems correct and illustrates a tendency to limit the hard English rule by requiring the additional circumstance of debts created after the subscription to be shown.[55] Prior creditors, unlike subsequent creditors, could not have relied upon the subscription. A small number of courts of last resort, including the Court of Appeals of Kentucky in a recent decision, "hold that if the shareholder has been vigilant in discovering the fraud, and has not been guilty of any laches, he may rescind the contract after the corporation has become insolvent, and proceedings have been instituted to

[53] Turner v. Grangers' Life & Health Ins. Co., 65 Ga. 649, 38 Am. Rep. 801; Howard v. Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156; Bissell v. Heath, 98 Mich. 472, 57 N. W. 585; Deppen v. German-American Title Co., 70 S. W. 868, 24 Ky. Law Rep. 1110; Gress v. Knight, 135 Ga. 60, 68 S. E. 834, 31 L. R. A. (N. S.) 900. And see Tierney v. Parker, 58 N. J. Eq. 117, 44 Atl. 151; Dunn v. State Bank of Minneapolis, 59 Minn. 221, 61 N. W. 27; Olson v. State Bank, 67 Minn. 267, 69 N. W. 904; Stufflebeam v. De Lashmutt (C. C.) 83 Fed. 449; Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591. See Taylor, Corp. §§ 523–526; post, p. 363. "When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the rôle of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made; if the subscriber has actively participated in the management of the affairs of the corporation; if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud, or in taking steps to rescind when the fraud was discovered; and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid,—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent." Newton Nat. Bank v. Newbegin, 74 Fed. 135, 20 C. C. A. 339, 33 L. R. A. 727. See Taylor, Corp. §§ 523–526. The general rule, laid down in Newton Nat. Bank v. Newbegin, supra, does not apply where the proper equities of creditors will not be affected, and particularly where no debts have accrued subsequent to the subscription. MORRISEY v. WILLIAMS, 74 W. Va. 636, 82 S. E. 509, Wormser Cas. Corporations, 260.

[54] Gress v. Knight, 135 Ga. 60, 68 S. E. 834, 31 L. R. A. (N. S.) 900. Cf. Marion Trust Co. v. Blish, 170 Ind. 686, 84 N. E. 814, 85 N. E. 344, 18 L. R. A. (N. S.) 347.

[55] MORRISEY v. WILLIAMS, supra; Gress v. Knight, supra; Beal v. Dillon, supra. See note, 10 Columbia Law Rev. 771; 24 Harvard Law Rev. 147.

wind up its affairs," [56] making no distinction between prior and subsequent creditors' rights in this regard.

Authority of Agents

It was at one time held in England that, if the agents of a corporation by false and fraudulent representations induce a person to subscribe for shares, this does not entitle the subscriber to avoid the contract, nor give him a right of action against the corporation, but that his remedy is by action against the agents individually.[57] This view was based on the theory that the agents, in perpetrating the fraud, exceed their authority, and that the fraud therefore cannot be imputed to the corporation. These decisions have since been overruled, and it is now well settled, both in England and in this country, that, where the board of directors or other agents of a corporation, having authority to solicit or receive subscriptions for stock, induce a person to subscribe by false and fraudulent representations, the fraud is imputable to the corporation, and the subscriber may avoid his subscription.[58] Some of the cases proceed on the theory that the representations are within the agent's apparent authority, while others proceed on the theory that the corporation cannot seek to reap the fruits of the contract without adopting the means by which it was obtained. If a person solicits subscriptions for a corporation without authority, and is guilty of fraud, the corporation, in afterwards ratifying his act in receiving the subscription, becomes bound by his fraud, and the subscription may be avoided.[59] Where, however, a person is induced by the fraudulent representations of a promoter to subscribe for stock in a corporation to be formed, it has been held that the subscriber

[56] Reid v. Owensboro Sav. Bank & Trust Co., 141 Ky. 444, 132 S. W. 1026, citing numerous authorities on the entire subject.

[57] See note by Hon. Seymour D. Thompson in 14 Am. Law Rep. 177, 178; Holt's Case, 22 Beav. 48; Felgate's Case, 2 De Gex, J. & S. 456; Dodgson's Case, 3 De Gex & S. 85; Mulholland v. Washington Match Co., 35 Wash. 315, 77 Pac. 497; Hubbard v. International Mercantile Agency, 68 N. J. Eq. 434, 59 Atl. 24. Suit will lie in equity to rescind a subscription obtained by fraud, both against the individual officers who made the representations and the corporation, and the fact that the individuals received no benefit from the transaction does not release them from liability thereunder. Mack v. Latta, 178 N. Y. 525, 71 N. E. 97, 67 L. R. A. 126.

[58] Note by Hon. Seymour D. Thompson, supra. See Western Bank of Scotland v. Addie, 5 Ct. Sess. Cas. (3d Series) 80; Ranger v. Railway Co., 5 H. L. Cas. 72; Directors, etc., of Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99; Crump v. United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116, cases cited in note 49, supra, and in the following notes.

[59] Walker v. Mobile & O. R. Co., 34 Miss. 245. A corporation employing an agent to sell its stock is bound by his representations concerning the stock. Southern Ins. Co. v. Milligan, 154 Ky. 216, 157 S. W. 37.

cannot rescind, after formation of the corporation and its acceptance of the subscription, since a nonexisting corporation cannot have an agent, and hence the doctrine of ratification cannot be invoked to charge the corporation with the fraud.[60] But, on principle, these cases seem questionable since there can be an adoption, if not a technical ratification, by the corporation. Besides, in some of these cases, the equities of innocent third parties had meanwhile attached. Thus, in Regener v. Hubbard [61] the action was brought by the receiver of the corporation on behalf of its creditors to recover an assessment against a subscriber, who pleaded as a defense the alleged fraud of the corporate promoter in inducing his subscription. This was correctly held to be no defense, as "the rights of innocent third persons"—the corporate creditors—had intervened.

What Constitutes Fraud

The rules for determining what representations or concealment of facts constitute such fraud as will avoid a contract of subscription are the same as in the case of any other contract. "Contracts of this description between an individual and a company, so far as misrepresentation or suppression of truth is concerned, are to be treated like contracts between any two individuals. If one man makes a false statement, which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated where a company makes a false statement, which misleads an individual." [62]

Before going into details, it may be said, substantially in the language of Judge Chalmers in a Mississippi case,[63] that, to avoid a subscription upon the ground of false representations by an agent of the corporation, it must appear that the statement was not made as an opinion, but as an ascertained and existing fact. It must not only be false in fact, but must also be either known to be so by the

[60] St. Johns Mfg. Co. v. Munger, 106 Mich. 90, 64 N. W. 3, 29 L. R. A. 63, 58 Am. St. Rep. 468; Oldham v. Mt. Sterling Imp. Co., 103 Ky. 529, 45 S. W. 779; Franey v. Warner, 96 Wis. 222, 71 N. W. 81; Regener v. Hubbard (Sup.) 56 N. Y. Supp. 173, affirmed 40 App. Div. 359, 57 N. Y. Supp. 1018, affirmed 167 N. Y. 301, 60 N. E. 633. Contra: McDermott v. Harrison, 56 Hun, 640, 9 N. Y. Supp. 184; West End Real Estate Co. v. Nash, 51 W. Va. 341, 41 S. E. 182; Anderson v. Scott, 70 N. H. 350, 47 Atl. 607; Barcus v. Gates, 89 Fed. 783, 32 C. C. A. 337. The subscriber may rescind if the corporation had knowledge of the fraud when it accepted the subscription. In re Metropolitan, etc., Ass'n, [1892] 3 Ch. 1; In re Metal Constituents, Ltd., [1902] 1 Ch. 707.

[61] (Sup.) 56 N. Y. Supp. 173, affirmed 40 App. Div. 359, 57 N. Y. Supp. 1018, affirmed 167 N. Y. 301, 60 N. E. 633.

[62] Per Lord Romilly in Directors, etc., of Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99, 125.

[63] Selma, M. & M. R. Co. v. Anderson, 51 Miss. 829.

party uttering it, or his position must be one that made it his duty to know the truth. The resisting subscriber must show that he acted upon such statement; that his own position was such as warranted him in so acting; and that the statement was as to a fact material to the question of his subscription, and was relied upon by him. If the representations are as to matters controlled by the charter, and as to which the subscriber is bound to know that the agent has no right to make representations inconsistent therewith, they will not avoid the subscription. As to matters not controlled by the charter, false and fraudulent representations, which come within these limitations, and by which one has been entrapped into a subscription, will avoid the contract, just as fraud vitiates contracts of every character.

Fraud generally consists of a false representation of a material fact. But it must be borne in mind that concealment of facts may render a representation false.[64] Thus, where a subscription to stock in a corporation was obtained by the representation that a prominent business man had subscribed for a large amount, but the fact that he had paid nothing for his shares was concealed, his subscription having been obtained for the express purpose of influencing others to subscribe, it was held that such concealment made the representation false and fraudulent, and was ground for avoiding the subscription.[65] And a tricky, equivocal prospectus has been condemned as fraudulent though there was no specific allegation of fact proven to be false.[66]

It is well settled that a misrepresentation of misunderstanding of the law will not vitiate a contract, where there is no misunderstanding of the facts. And this principle applies to subscriptions to the capital stock of a corporation as fully as to other contracts. It follows that misrepresentations by a corporation, or by its officers or agents, as to the legal effect of contracts of subscription to its stock, or as to the rights and powers of the corporation under its charter, though made for the purpose of inducing persons to subscribe, will not vitiate subscriptions, or constitute any defense in an action thereon, for such representations are as to a matter of law, subscribers being bound to take notice of the provisions of the charter, and of all general laws affecting the corporation, and of the terms and

[64] Clark, Cont. (2d Ed.) 220.

[65] Coles v. Kennedy, 81 Iowa, 360, 46 N. W. 1088, 25 Am. St. Rep. 503; Alabama Foundry & Mach. Works v. Dallas, 127 Ala. 513, 29 South. 459; State Bank of Indiana v. Cook, 125 Iowa, 111, 100 N. W. 72. And see Crump v. United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116.

[66] Aaron's Reefs v. Twiss, [1896] App. Cas. 273, 285; Downey v. Finucane, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A. (N. S.) 887.

legal effect of subscription papers which they sign.[67] If the stock was of a foreign corporation, the rule would be otherwise, in conformity with the settled principle that foreign law is treated as matter of fact, not of law.

Mere expressions of opinion or promises by the corporation or its officers or agents, though fraudulently made for the purpose of inducing a subscription, will not render the subscription voidable. The representation must be as to an existing fact. Thus it has been held that promises and representations as to what will be done by the corporation, and as to the advantages that will accrue to the subscribers, or as to the future value of its assets and stock, or the holding out of flattering prospects, do not constitute such fraud as will vitiate a subscription induced thereby.[68] So, false representations in respect to such matters as the ability of a railroad company to construct the road, and the time within which it will be done, will not avoid a subscription to its stock.[69] And a report in the form of a circular containing the statement: "Value of wells, 31, at $1,500 ..... $46,500" being mere matter of opinion, is not fraudulent in law, so that one who purchased stock in reliance thereon could recover damages.[70] Representations, on the other hand,

[67] Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203. In this case the defendant had subscribed for shares in a corporation, and taken certificates, under which, by law, he became liable to assessment for the full amount of the shares. In an action on his subscription he set up fraud on the part of the agents of the corporation, relying upon false representations by them that 20 per cent. only of his subscription was required to be paid, and that 80 per cent. was nonassessable. It was held that these representations, being as to matter of law, were no defense. See, also, Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385; Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; New Albany & S. R. Co. v. Fields, 10 Ind. 187; Ellison v. Mobile & O. R. Co., 36 Miss. 572; Clem v. Newcastle & D. R. Co., 9 Ind. 488, 68 Am. Dec. 653; In re Sharood Shoe Corp. (D. C.) 192 Fed. 945; Grone v. Economic Life Ins. Co. (Del. Ch.) 80 Atl. 809. Compare Wert v. Crawfordsville & A. Turnpike Co., 19 Ind. 242.

[68] Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. 244; Walker v. Mobile & O. R. Co., 34 Miss. 245; Saffold v. Barnes, 39 Miss. 399; Hughes v. Antietam Mfg. Co. of Washington County, 34 Md. 316, 326; Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897; Southern Ins. Co. v. Milligan, 154 Ky. 216, 157 S. W. 37; Wilson v. Meyer, 154 App. Div. 300, 138 N. Y. Supp. 1048. Compare Union Nat. Bank v. Hunt, 76 Mo. 439; German Nat. Bank's Receiver v. Nagel, 82 S. W. 433, 26 Ky. Law Rep. 748; Zang v. Adams, 23 Colo. 408, 48 Pac. 509, 58 Am. St. Rep. 249.

[69] Bish v. Bradford, 17 Ind. 490; Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385. See, also, Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; Walker v. Mobile & O. R. Co., 34 Miss. 245.

[70] Craig v. Wade, 159 Cal. 172, 112 Pac. 891. And see Gough Mill & Gin Co. v. Looney (Tex. Civ. App.) 112 S. W. 782.

that there was a constantly increasing demand for the product of a corporation, that it had a plant costing a specified sum, that the experimental stage had passed and the basis for assured success had been laid, that the plant had an output of a designated quantity of goods which would give a net profit of a specified per cent. on the investment, are not mere expressions of opinion where made to one to induce a stock purchase.[71] So, also, the publication by directors of a corporation of the fact that a dividend had been declared, when in fact, none had been earned, was recently held in New York to constitute actionable misrepresentation. The court said: "A declaration of a dividend by a going concern implies earnings from which to pay it, and the publication of the fact of such declaration is certainly calculated to induce the public to believe that the dividend has been earned and that the corporation is prosperous." [72]

False representations, however fraudulently they may have been made, will never avoid a subscription, unless the subscriber believed in them, and relied upon them, so that his subscription was induced by them. This is a well-settled principle, applicable to all contracts, including subscriptions.[73]

On the other hand, it is also well settled that, where there has been fraudulent misrepresentation or willful concealment of facts, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it, that he might have known the truth by proper inquiry; and this principle applies where a subscription to stock is induced by fraud.[74] But this principle, of course, is not applicable when the purchaser is in possession of information showing that the representations are not true or putting him on notice as to their falsity.[75]

The rule that fraud must result in injury, in order to render a contract voidable, applies where a subscriber seeks to avoid his con-

[71] Martin v. Veana Food Co., 153 Mich. 282, 116 N. W. 978. Cf. Grone v. Economic Life Ins. Co. (Del. Ch.) 80 Atl. 809. And see Luetzke v. Roberts, 130 Wis. 97, 109 N. W. 949.

[72] Ottinger v. Bennett, 144 App. Div. 525, 129 N. Y. Supp. 819, reversed on dissenting opinion of Miller, J., 203 N. Y. 554, 96 N. E. 1123. The directors of a national bank are liable to a purchaser of stock in a common-law action for deceit, where they made a report listing assets which the comptroller of the currency had informed them were doubtful. Taylor v. Thomas, 195 N. Y. 590, 89 N. E. 1113, affirming 124 App. Div. 53, 108 N. Y. Supp. 454.

[73] Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385; Walker v. Mobile & O. R. Co., 34 Miss. 245, 256; Grone v. Economic Life Ins. Co. (Del. Ch.) 80 Atl. 809. Cf. Southern Ins. Co. v. Milligan, 154 Ky. 216, 157 S. W. 37.

[74] Directors, etc., of Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99.

[75] Southern Ins. Co. v. Milligan, supra.

tract on the ground of fraud.[76] In Connecticut & P. R. Co. v. Bailey [77] the defendant sought to defeat an action on his subscription to the stock of a corporation on the ground that subscriptions previous to his, and on the strength of which he was induced to subscribe, were fictitious, because of a secret agreement with the subscribers that they should not be called upon to pay. It was held that, as these subscribers were bound according to the expressed and absolute terms of their subscriptions, and could not avail themselves of the secret agreement, the fraud did not injure the defendant, and that he could not avoid his contract.[78] For a like reason, where a note is given in payment of a subscription previously made, the subscription cannot be avoided because of false representations at the time the note was given.[79]

Subscription Voidable and not Void—Ratification and Rescission—Laches—Burden of Proof

It is well settled that a subscription induced by false and fraudulent representations is not absolutely void, but, like other contracts induced by fraud, is merely voidable at the option of the subscriber. It is valid until repudiated.[80] If the defrauded subscriber affirms the subscription after discovery of the fraud, he cannot afterwards repudiate it.[81] And he will be held to have affirmed it if it appears that, with knowledge of the fraud, he took part as an officer or as a shareholder in the management of the corporation, or paid assessments on his shares, or took any benefit from his shares.[82]

[76] Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181; Anderson v. Newcastle & R. R. Co., 12 Ind. 376, 74 Am. Dec. 218; Keller v. Johnson, 11 Ind. 337, 71 Am. Dec. 355. Cf. Stern v. Kirby Lumber Co. (C. C.) 134 Fed. 509.

[77] 24 Vt. 465, 58 Am. Dec. 181.

[78] And see Chouteau Ins. Co. v. Floyd, 74 Mo. 286; Blodgett v. Morrill, 20 Vt. 509.

[79] Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

[80] See Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16,800; Farrar v. Walker, 3 Dill. 506, note, Fed. Cas. No. 4,679; Burleson v. Davis (Tex. Civ. App.) 141 S. W. 559; and cases in the following notes.

[81] City Bank of Macon v. Bartlett, 71 Ga. 797.

[82] City Bank of Macon v. Bartlett, 71 Ga. 797; Fear v. Bartlett, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721; Lear v. S. K. Paige Lumber & Mfg. Co. (Tenn. Ch. App.) 42 S. W. 808; Barrows v. Natchaug Silk Co., 72 Conn. 658, 45 Atl. 951; Gress v. Knight, 135 Ga. 60, 68 S. E. 834, 31 L. R. A. (N. S.) 900. There may be circumstances under which a payment by the subscriber will not be held an affirmance. In Fear v. Bartlett, supra, it appeared that the defendant, who was unable to read or write, was induced by the fraud of a corporation to subscribe to its capital stock. Two months later he discovered

To entitle a subscriber to be relieved from liability on his subscription on the ground that he was induced to subscribe by fraud, he must have exercised care and vigilance to discover the fraud, and, having discovered it, he must have acted promptly in repudiating his contract. There must be no laches. "A man must not," said Lord Romilly, "play fast and loose; he must not say, 'I will abide by the company if successful, and I will leave the company if it fails;' and therefore, whenever a representation is made, of which any one of the shareholders has notice, and can take advantage to avoid his contract with the company, it is his duty to determine at once whether he will depart from the company, or whether he will remain a member." [83]

In England, under the companies act, a person who has been induced to subscribe to the stock of a corporation by fraud must not only repudiate the subscription within a reasonable time after discovery of the fraud, but he must take steps to have his name removed from the books of the company; and the proceedings to have his name removed must be instituted before the insolvency of the company. In the absence of a statute requiring this step on the part of the subscriber, it is held with us that removal of his name from the books of the corporation is not necessary to relieve a subscriber on the ground of fraud, but it is sufficient if he repudiates the subscription, and gives the company notice thereof [84]—subject always and subordinate to the rights and equities of subsequent creditors.

the fraud, and immediately repudiated the contract. A year afterwards one of the directors came to the defendant, and told him he wanted to get $10,000 to save the property of the company, and that he had paid $5,000 in cash on account of his stock, and wanted to try and save what he had paid. To this the defendant replied that he would never give another dollar towards his subscription; but finally he said he was willing to give $1,000 to save what he had already paid on his subscription, and thereupon he gave his check for that amount. It was held that under the circumstances, the defendant having testified that he did not intend a payment on his subscription, he should not be held to have affirmed his subscription.

[83] Ashley's Case, L. R. 9 Eq. 263, 268. And see Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Ogilvie v. Knox Ins. Co., 22 How. (U. S.) 380, 16 L. Ed. 349; Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16,800; Farrar v. Walker, 3 Dill. 506, note, Fed. Cas. No. 4,679; Directors, etc., of Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99; City Bank of Macon v. Bartlett, 71 Ga. 797; American Building & Loan Ass'n v. Rainbolt, 48 Neb. 434, 67 N. W. 493; Bartol v. Walton & Whann Co. (C. C.) 92 Fed. 13; Urner v. Sollenberger, 89 Md. 316, 43 Atl. 810; Tierney v. Parker, 58 N. J. Eq. 117, 44 Atl. 151; Barrows v. Natchaug Silk Co., 72 Conn. 658, 45 Atl. 951; Brown v. Allebach (C. C.) 166 Fed. 488.

[84] Savage v. Bartlett, 78 Md. 561, 28 Atl. 414.

One suing to rescind a purchase of corporate stock, on the ground of misrepresentations inducing it, has the burden of proving the making of false representations as to material facts and reliance thereon.[85]

SUBSCRIPTIONS UNDER MISTAKE

102. If a person, without fault or negligence, signs a subscription paper under a mistake as to its nature, the subscription is not merely voidable, but void on the ground of mistake.

Fraud, as we have just seen, renders a subscription voidable. Mistake, on the other hand, renders it void. There are very few cases in which mistake can be set up to defeat a subscription. Perhaps it is safe to say that the only case is where the mistake was as to the nature of the transaction, and was induced by the deceit or other fault of the corporation or of some third party against which ordinary diligence could not guard.[86] It has been said that: "If a person signs a subscription paper, entirely misunderstanding the nature of the instrument which he is signing, his subscription must be treated as null and void for want of mutual consent. In this case the question of fraud is not material." [87] This is undoubtedly the law if the subscriber was not guilty of negligence in signing the paper.[88] If one should falsely read a subscription paper to a man who is unable to read, and he should sign it, without being guilty of negligence, the subscription would be void ab initio on the ground of mistake, and not merely voidable on the ground of fraud.[89] The mistake must be, however, not merely as to the legal effect, but as to the actual contents of the instrument.

Subscriptions cannot be avoided because of a mistake as to the advantages to be gained by the incorporation. Thus it has been held that a subscription to a milldam corporation could not be avoided on the ground that the published estimate of the capacity of a mill was erroneous, and that the parties could not derive the expected benefits from the corporation, where there was no fraudulent intent to deceive those subscribing on the faith of the estimate.[90] Mistake

[85] In re American Nat. Beverage Co. (D. C.) 193 Fed. 772; Southern States Fire & Casualty Ins. Co. v. De Long, 178 Ala. 110, 59 South. 61.

[86] See Clark, Cont. (2d Ed.) 196, for the cases in which mistake renders a contract void.

[87] 1 Mor. Corp. § 97.

[88] Clark, Cont. (2d Ed.) 198.

[89] Rockford, R. I. & St. L. R. Co. v. Shunick, 65 Ill. 223.

[90] Salem Milldam Corp. v. Ropes, 9 Pick. (Mass.) 187, 19 Am. Dec. 363.

of law can no more be set up as a defense in case of a subscription than in the case of any other contract.[91]

SUBSCRIPTION BY AGENT

103. A contract of subscription may be made by one person as agent for another, subject to the rules governing other contracts by agents. Some courts hold that one who assumes to subscribe as agent without authority does not himself become a stockholder, and so liable on the subscription, but is liable in damages for assuming to act without authority, as for breach of implied warranty of authority, while others hold him as a stockholder.

A contract of subscription, like any other contract, may be made by one person as agent for another, if he has authority, and, the subscription being accepted, and the shares apportioned to the agent for the principal, or to the principal, the latter becomes a stockholder as fully as if he had subscribed himself.[92] And where a person assumes to subscribe as agent for another without authority, the other may become a stockholder, and liable on the subscription by ratification.[93]

It has been held by some of the courts that if a person subscribes another's name for shares in a corporation, without authority to do so, or where the other is not capable of subscribing, he thereby binds himself, and becomes a stockholder.[94] Other courts hold that he will be liable for damages in an action on the case for assuming to act without authority, but that he does not himself become a member of the corporation, and cannot be held liable on the subscription.[95] The latter view is plainly preferable for the agent does not purport to bind himself personally. Ordinarily, it is immaterial that a subscription is made by an agent for an undisclosed principal; but

[91] Clark, Cont. (2d Ed.) 206. And see In re Sharood Shoe Corp. (D. C.) 192 Fed. 945.

[92] Burr v. Wilcox, 22 N. Y. 551. It is, of course, essential that authority be shown. See McClelland v. Whiteley (C. C.) 15 Fed. 322.

[93] Rutland & B. R. Co. v. Lincoln's Estate, 29 Vt. 206. Declarations by the alleged principal to strangers, that he had taken the amount of stock subscribed for by the alleged agent, were held insufficient to show a ratification. Rutland & B. R. Co. v. Lincoln's Estate, supra. See, also, as to what constitutes ratification, Ticonic Water Power Mfg. Co. v. Lang, 63 Me. 480; McClelland v. Whiteley (C. C.) 15 Fed. 322.

[94] State ex rel. Page v. Smith, 48 Vt. 266, 284; National Commercial Bank v. McDonnell, 92 Ala. 387, 9 South. 149; Allibone v. Hager, 46 Pa. 48.

[95] Salem Milldam Corp. v. Ropes, 9 Pick. (Mass.) 187, 19 Am. Dec. 363.

such a subscription may be expressly or impliedly prohibited by the statute or charter. Thus, where an act incorporating a railroad company and appointing commissioners to open books and receive subscriptions required them, in case of subscriptions in excess of the capital stock, to distribute the stock among the subscribers in their discretion, and in a manner most advantageous to the company, it was held that, since the commissioners, to perform their duty, must know who the subscribers are, a subscription by an agent for an undisclosed principal, for the purpose of evading the statute, was prohibited and unlawful.[96]

SAME—AGENTS TO RECEIVE SUBSCRIPTIONS

104. The person receiving a subscription to stock in a corporation that has been organized must be duly authorized, or the corporation must ratify his act, to render the subscription binding.

105. If the charter, enabling act, or articles of association appoint particular agents to receive subscriptions, prior to or after organization, no other person has authority to receive them. They may, however, act by deputy.

106. Agents appointed to receive subscriptions have such authority only as is conferred upon them; but unauthorized acts or stipulations may be ratified by the corporation.

Corporations can only contract by agent when the agent has been given authority to enter into the contract. A contract entered into by a person purporting to act as agent for a corporation, but who has not been given authority for the purpose, does not bind the corporation, and therefore does not bind the other party.[97] This is true of subscriptions taken by a person without authority.[98] Such a subscription will become binding, however, if the corporation ratifies its receipt, and adopts it.[99]

It often happens that the charter, or enabling act, or articles of association appoint or prescribe particular agents to receive subscriptions to the stock of a corporation which it is proposed to organize, or which has been organized. When this is the case, no other person has any authority to receive subscriptions. A subscription re-

[96] Perkins v. Savage, 15 Wend. (N. Y.) 412, cited approvingly in Knowlton v. Congress & E. Spring Co., 57 N. Y. 518, 530.

[97] Post, p. 619.

[98] Essex Turnpike Corp. v. Collins, 8 Mass. 292. [99] Post, p. 626.

ceived by any other person is absolutely void. In Shurtz v. Schoolcraft & Three Rivers R. Co.[1] the articles of association of a railroad company, as provided by the general law under which it was formed, named five commissioners to open books for subscriptions to stock. The commissioners did not open books, but a subscription paper was circulated by an agent appointed by the board of directors, and the defendant subscribed thereon, and subsequently on several occasions promised to pay his subscription. It was held that the subscription was a nullity, and that the defendant was not liable on it.[2]

It has been held that the receiving of subscriptions by commissioners appointed for that purpose is a ministerial act, since any one has a right to subscribe by complying with the statute, and that it may, therefore, be performed by an agent or deputy appointed by the commissioners, and that the commissioners may ratify a subscription received by one without authority.[3] But where the commissioners are required to distribute stock when more than the authorized amount has been subscribed, this power is a judicial one, being "a power to exercise a discretion founded on such considerations as may appear to them beneficial to the company's interests," and cannot be exercised by deputy. There being no provision that a majority shall constitute a quorum, all of the commissioners must be present to hear and consult, though a majority may then decide. A distribution at a meeting of less than all the commissioners is coram non judice and void.[4]

Agents appointed to receive subscriptions, either before or after incorporation, have such authority only as is conferred upon them.[5] If they do unauthorized acts, or enter into unauthorized stipulations with subscribers, such acts or stipulations may become binding on the corporation by ratification or adoption, if within its powers.[6]

[1] 9 Mich. 269.

[2] And see Parker v. Northern Cent. M. R. Co., 33 Mich. 23; Northern Cent. Michigan R. Co. v. Eslow, 40 Mich. 222.

[3] Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228. And see Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257.

[4] Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

[5] Post, p. 619.

[6] Post, p. 626.

SAME—CONDITIONAL SUBSCRIPTIONS

107. A conditional subscription to stock of a corporation is a subscription to take effect only on the fulfillment of a condition precedent. The subscriber does not become a shareholder, nor liable on his subscription, until the condition is substantially performed according to its terms. When it is so performed, the subscription becomes absolute and unconditional.

108. Conditional subscriptions after organization of a corporation are valid. Such subscriptions prior to and for the purpose of organization have also been sustained; but, by the better opinion, where it is proposed to organize a corporation under a charter or enabling act requiring a certain amount of stock to be subscribed, all subscriptions prior to organization must be absolute and unconditional. In some states, where a conditional subscription is made in such a case, the subscription is held void; but in others the condition only is void, and the subscription is valid.

109. Conditions precedent may be waived either by express agreement or by conduct showing such an intent.

By conditional subscription is meant a subscription the liability on which and the rights under which are dependent upon a condition precedent. Until the condition is fulfilled, no rights or liabilities at all arise out of the subscription. Any condition which may be legally performed by a corporation may be a condition of a subscription for its stock.[7] There is another class of subscriptions sometimes erroneously called "conditional subscriptions." These are absolute subscriptions on special terms. They are described by some writers and courts as subscriptions on conditions subsequent, but the better term is that applied by Mr. Morawetz, "subscriptions upon special terms." [8] They are subscriptions which are absolute in so far as the liability thereon is concerned, and which make the subscriber a shareholder before compliance with the stipulations contained therein. The stipulations are merely terms of the contract of membership for the breach of which by the corporation the subscriber must resort to his remedy against it, as by action for damages.[9] This class of subscriptions will be considered in the next section, and we will then see more at length the distinction between

[7] Bobzin v. Gould Balance Valve Co., 140 Iowa, 744, 118 N. W. 40.
[8] 1 Mor. Corp. § 82 et seq.
[9] Post, p. 375.

them and subscriptions upon conditions precedent, and the principles upon which it is determined whether a particular stipulation is a condition precedent or merely a special term.

Subscriptions after Organization of the Corporation

A person, in subscribing for stock in a corporation which has already been organized, has a right to make his subscription dependent upon the performance or fulfillment of a condition precedent, provided the corporation sees fit to accept such a subscription, and provided such subscriptions are not expressly or impliedly prohibited by its charter. In other words, he has a right to agree with the corporation that he will take stock and become a shareholder when a certain thing happens or is done. To allow such subscriptions after the corporation has been organized is not contrary to public policy. In such a case the subscriber does not become a shareholder, and therefore is not entitled to the rights nor subject to the liabilities of a shareholder, until the condition is performed according to its terms. His subscription is merely an agreement, or, according to some opinions, an offer, to become a shareholder when the condition has been fulfilled. Upon its fulfillment, without any further act or assent on his part, he becomes a shareholder and is liable on his subscription.[10]

Thus, where a subscription to stock in a railroad company is expressly made upon condition that the road shall be located upon a certain route, the location of the road upon that route is a condition precedent to any liability on the subscription. The subscriber does not become a shareholder at all until then, but when the road is so located the subscription becomes absolute and unconditional, and the subscriber becomes eo instanti a shareholder, with all the rights and privileges and subject to all the liabilities of the other shareholders.[11] So, a subscription to stock of a railroad company may be

[10] Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Webb v. Baltimore & E. S. R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396; Corey v. Morrill, 61 Vt. 598, 17 Atl. 840; Ashtabula & N. L. R. Co. v. Smith, 15 Ohio St. 328; Chase v. Railroad Co., 38 Ill. 215; Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. 318; Pittsburgh & C. R. Co. v. Stewart, 41 Pa. 54; Caley v. Philadelphia & C. C. R. Co., 80 Pa. 363; Hanover Junction & S. R. Co. v. Grubb, 82 Pa. 36; Montpelier & W. R. R. Co. v. Langdon, 46 Vt. 284; Reid v. Detroit Ideal Paint Co., 132 Mich. 528, 94 N. W. 3; Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536.

[11] McMillan v. Maysville & L. R. Co., 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181; Henderson & N. R. Co. v. Leavell, 16 B. Mon. (Ky.) 364; Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Baltimore & D. P. R. Co. v. Pumphrey, 74 Md. 86, 21 Atl. 559; New Albany & S. R. Co. v. McCormick, 10 Ind. 499, 71 Am. Dec. 337; Parker v. Thomas, 19 Ind. 213, 81 Am. Dec.

made upon condition that the road shall be put under contract for grading or construction between certain points,[12] or that it shall be completed in whole or in part, or completed and put in operation,[13] or that a contract shall be made for equipping and ironing it.[14] So, also, a condition may be that the corporation shall maintain a certain location of its plant for five years.[15] So a person may subscribe on condition that a certain amount of stock shall be subscribed. In such a case he does not become a shareholder, and is not liable on his subscription, until bona fide binding and absolute subscriptions to the amount specified and of the kind specified have been received; and, if some of the subscriptions relied upon to make up the required amount were conditional, it must be shown that the conditions have been performed, so that the subscriptions have become absolute.[16]

385. Such a condition only requires location of the road on the route designated. It does not require actual construction and completion of the road before calling for payment of subscriptions. Miller v. Pittsburgh & C. R. Co., 40 Pa. 237, 80 Am. Dec. 570. In New York it has been held that it is contrary to public policy to allow subscriptions, even after the organization of the corporation, to the capital stock of a railroad, turnpike, or other similar public service corporation, on condition that the road shall be located on a certain route, or that its station or depot shall be located at a particular point, as it was considered that the directors should be left free to so act in these respects as to best serve the interests of the public. They hold that such a subscription is void, and the subscriber does not become a shareholder on performance of the condition. Butternuts & O. Turnpike Co. v. North, 1 Hill (N. Y.) 518; Ft. Edward & Ft. M. Plank Road Co. v. Payne, 15 N. Y. 583; Craig v. Town of Andes, 93 N. Y. 405, 414. Most courts, however, sustain such a condition, at least if the company is not restricted from also locating lines, stations, or depots along other routes, or at other points, or otherwise doing whatever the public convenience may require, and many of them sustain such conditions without qualification. See the cases cited above. Even in New York, conditional subscriptions may be made, after organization, for the stock of ordinary private corporations. Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536.

[12] Connecticut & P. R. R. Co. v. Baxter, 32 Vt. 805.

[13] Paducah & M. R. Co. v. Parks, 86 Tenn. 554, 8 S. W. 842; Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897; Lesher v. Karshner, 47 Ohio St. 302, 24 N. E. 882; Webb v. Baltimore & E. S. R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396.

[14] Brand v. Lawrenceville Branch R. R., 77 Ga. 506, 1 S. E. 255.

[15] Bobzin v. Gould Balance Valve Co., 140 Iowa, 744, 118 N. W. 40.

[16] Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. 318; Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536; Brand v. Lawrenceville Branch R. R., 77 Ga. 506, 1 S. E. 255; People's Ferry Co. v. Balch, 8 Gray (Mass.) 303; Troy & G. R. Co. v. Newton, 8 Gray (Mass.) 596; New York Exchange Co. v. De Wolf, 31 N. Y. 273; Johnson v. Schar, 9 S. D. 536, 70 N. W. 838; Alexander v. North Carolina Sav. Bank & Trust Co., 155 N. C. 124, 71 S. E. 69; post, p. 381. Of course void subscriptions, like subscriptions at common law by married women, cannot be considered in determining whether the

In Hollander v. Heaslip, it was recently held that where subscriptions to the stock of a proposed corporation were conditioned on the obtaining of bona fide subscriptions for one-half of the stock before the corporation was organized and commenced business, which condition was also expressed in its charter, a subscriber, who made the initial payment on his stock on false representations by the directors that the condition had been fulfilled, cannot be held liable at suit of a receiver for the unpaid portion of his subscription, unless he has waived the condition or is estopped as against creditors of the corporation from insisting upon it.[17]

As stated above, in the case of a subscription upon condition precedent, the condition must be performed before any liability on the subscription will attach. And it must be performed according to its terms, and within the time limited, or within a reasonable time, where no time is specified.[18] A substantial performance, however, is sufficient.[19]

In some of the cases it is said that a conditional subscription which the corporation is authorized to receive is a mere continuing offer until the condition is performed; that the condition must be performed to constitute an acceptance of it; and that until then it may be withdrawn.[20] But other courts, more properly, it seems, hold that after acceptance or assent by the corporation to a conditional subscription, which it is authorized to take, the subscriber is bound until performance of the condition to await such performance; that he cannot withdraw the subscription unless the performance is unreasonably delayed.[21] If performance of the condition is unreasonably delayed, he may withdraw,[22] or perhaps the subscription would lapse without express withdrawal.[23] If a time is specified for performance of the condition, the subscription will lapse, and become void, if it is not performed within that time.[24]

A conditional subscription, which is not a present valid contract,

required amount has been subscribed. Hahn's Appeal (Pa.) 7 Atl. 482. Where the condition of a subscription to stock of a railroad company is that, in the judgment of the directors, a sufficient amount be subscribed to build the road, the condition is performed when the board of directors in good faith pass a resolution that sufficient stock has been subscribed, though they may be mistaken. Cass v. Pittsburg, V. & C. Ry. Co., 80 Pa. 31.

[17] 222 Fed. 808, 137 C. C. A. 1.

[18] Ticonic Water Power & Mfg. Co. v. Lang, 63 Me. 480.

[19] 1 Cook, Stock, Stockh. & Corp. Law, § 86; O'Neal v. King, 48 N. C. 517.

[20] Webb v. Baltimore & E. S. R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396.

[21] Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897.

[22] See Stevens v. Corbitt, 33 Mich. 458.

[23] See Blake v. Brown, 80 Iowa, 277, 45 N. W. 751.

[24] Ticonic Water Power & Mfg. Co. v. Lang, 63 Me. 480.

because the corporation has no authority at the time it is made to accept conditional subscriptions, will constitute a continuing offer to subscribe upon the specified conditions; and when those conditions are performed, if the offer be not before withdrawn, it will become an absolute and unconditional subscription.[25] The difference between such a subscription and a conditional subscription which the corporation is authorized to receive is that the former becomes a binding contract when accepted, though the subscriber does not become a shareholder, nor liable as such, until the condition is performed, while the latter does not become binding until the condition is performed, and may, at any time before then, be withdrawn.[26]

Subscriptions Prior to Incorporation

Subscriptions upon conditions precedent, made prior to procuring a special charter, or prior to the organization of the corporation under a general law, have been sustained in a few cases.[27] But the validity of such subscriptions is very doubtful, for they allow individuals to obtain charters from the government on subscriptions which may never become binding. Furthermore, they may operate as a fraud upon other persons who subscribe absolutely, and on the faith of the other subscriptions, and upon creditors who trust the corporation on the faith of such subscriptions. It might be argued that, on principle, these same objections should apply also to conditional subscriptions subsequent to incorporation; but, as we have seen, the law is otherwise, and makes a distinction.

It has been held, and may perhaps be regarded as established law, that where the charter or enabling act, under which it is proposed to organize a corporation, requires a certain amount of stock to be subscribed before corporate powers can be exercised, persons subscribing for stock prior to organization of the corporation, and for the purpose of organization, cannot attach conditions, but their subscriptions must be absolute and unconditional. The commissioners or other agents have no power to receive subscriptions dependent upon conditions precedent. As was said by the Pennsylvania court, "the commissioners who are appointed to receive subscriptions are not the accredited agents of the corporation, for it is not yet in being, but are rather the agents of the public, acting under limited and definite powers, which every one is bound to know; and, if he be misled by representations which such agents have no right to make, it is his own folly. Any other rule would lead to the procurement

[25] Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897.

[26] Armstrong v. Karshner, supra.

[27] See Montpelier & W. R. R. Co. v. Langdon, 46 Vt. 284; People's Ferry Co. v. Balch, 8 Gray (Mass.) 303. Cf. Sherrod v. Duffy, 160 Mich. 488, 125 N. W. 366, 136 Am. St. Rep. 451.

from the commonwealth of valuable charters without any absolute capital for their support, and thus give rise to a system of speculation and fraud which would be intolerable." [28] So, in Burke v. Smith,[29] it was said by Mr. Justice Strong, speaking of the invalidity of conditional subscriptions prior to organization of a railroad corporation: "When a company is incorporated under general laws, * * * * and the law prescribes that a certain amount of stock shall be subscribed before corporate powers shall be exercised, if subscriptions, obtained before the organization was effected, may be subsequently rendered unavailable by conditions attached to them, the substantial requirements of the laws are defeated. The purpose of such a requisition is that the state may be assured of the successful prosecution of the work, and that creditors of the company may have, to the extent, at least, of the required subscription, the means of obtaining satisfaction of their claims. The grant of the franchise is, therefore, made dependent upon securing a specified amount of capital. If the subscriptions to the stock can be clogged with such conditions as to render it impossible to collect the fund which the state required to be provided before it would assent to the grant of corporate powers, a charter might be obtained without any available capital. Conditions attached to subscriptions, which, if valid, lessen the capital of the company, thus depriving the state of the security it exacted that the railroad would be built, and diminishing the means intended for the protection of creditors, are, therefore, a fraud upon the grantor of the franchise, and upon those who may become creditors of the corporation. They are also a fraud upon unconditional stockholders, who subscribed to the stock in the faith that capital sufficient would be obtained to complete the projected work, and who may be compelled to pay their subscriptions, though the enterprise has failed, and their whole investment has been lost. It is for these reasons that such conditions are denied any effect."

In New York it is held that a conditional subscription prior to such an incorporation is a nullity, and that no rights or liabilities at all can arise out of it.[30] In Pennsylvania it is held that the condition only is void, and that the subscription is to be treated as absolute, binding, and unconditional.[31]

[28] Caley v. Philadelphia & C. C. R. Co., 80 Pa. 363. And see Boyd v. Peach Bottom Ry. Co., 90 Pa. 169.

[29] 16 Wall. (U. S.) 390, 21 L. Ed. 361.

[30] Troy & B. R. Co. v. Tibbits, 18 Barb. (N. Y.) 297; General Electric Co. v. Wightman, 3 App. Div. 118, 39 N. Y. Supp. 420; Flaherty v. Cary, 62 App. Div. 116, 120, 70 N. Y. Supp. 951, affirmed 174 N. Y. 550, 67 N. E. 1082.

[31] Caley v. Philadelphia & C. C. R. Co., 80 Pa. 363; Boyd v. Peach Bottom Ry. Co., 90 Pa. 169; Pittsburgh & S. R. Co. v. Biggar, 34 Pa. 455; Bavington v. Pittsburgh & S. R. Co., 34 Pa. 358.

Conditions must be Expressed in the Writing

In Pennsylvania, because of the fact that the courts of law in that state have equitable jurisdiction, a written contract that is absolute on its face may be shown by parol evidence to have been conditional and oral conditions precedent may be shown to defeat a recovery on a written subscription that is absolute on its face.[32] And parol evidence has occasionally been held admissible to show a condition as to the delivery of a subscription.[33] In most, if not in all, of the other states the rule excluding parol evidence to vary a written contract will render oral conditions void, and a condition, to have any effect, must be expressed in the writing.[34] The only redress would lie in an action in equity to reform the instrument.

Waiver of Condition Precedent

Performance of a condition precedent in a subscription may be waived by the subscriber, and in such a case he cannot set up nonperformance to escape liability on the subscription.[35] And the waiver may not only be by an express agreement, either oral or written, but it will be implied from any conduct on his part which clearly shows an intention not to insist upon the condition. Thus, in the absence of special circumstances negativing an intent to waive a condition, a waiver will be implied if the subscriber, knowing, or with the means of knowing that the condition has not been complied with, acts as a shareholder, or pays his subscription.[36]

[32] See Miller v. Hanover Junction & S. R. Co., 87 Pa. 95, 30 Am. Rep. 349; Philadelphia & D. C. R. Co. v. Conway, 177 Pa. 364, 35 Atl. 716.

[33] Gilman v. Gross, 97 Wis. 224, 72 N. W. 885. Cf. Beard v. Boylan, 59 Conn. 181, 22 Atl. 152.

[34] 1 Thomp. Corp. § 1149; Masonic Temple Ass'n of Minneapolis v. Channell, 43 Minn. 353, 45 N. W. 716; Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; Fairfield County Turnpike Co. v. Thorp, 13 Conn. 173; Huster v. Newkirk Creamery & Ice Co., 42 Okl. 440, 141 Pac. 790, L. R. A. 1915A, 390.

[35] 1 Thomp. Corp. § 1336; O'Donald v. Evansville, I. & C. Straight Line R. Co., 14 Ind. 259; Slipher v. Earhart, 83 Ind. 173; Chamberlain v. Painesville & H. R. Co., 15 Ohio St. 225; Hutchins v. Smith, 46 Barb. (N. Y.) 235; Wood Harvester Co. v. Jefferson, 71 Minn. 367, 74 N. W. 149; Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189; Wright v. Agelasto, 104 Va. 159, 51 S. E. 191; post, p. 384.

[36] Cornell's Appeal, 114 Pa. 153, 6 Atl. 258; Mack's Appeal (Pa.) 7 Atl. 481. But see, contra, Atlantic Cotton Mills v. Abbott, 9 Cush. (Mass.) 423. The decision in this case is the result of the ruling in Massachusetts that a subscription raises no implied promise to pay, and that the express promise is collateral to it. That part payment of a subscription is a waiver of unperformed conditions precedent, see Cornell's Appeal, supra; Mack's Appeal, supra. Giving unconditional notes for the amount of a subscription is a waiver of a condition precedent in the subscription, if it appears from the dates on which they are payable, or from other circumstances, the perform-

SUBSCRIPTIONS UPON SPECIAL TERMS

110. Subscriptions upon special terms are absolute subscriptions, by virtue of which the subscriber becomes a shareholder, and liable on his subscription, without performance of the stipulations, the stipulations being merely terms of his contract of membership. They are sometimes called subscriptions upon conditions subsequent.

111. Subscriptions upon special terms are valid except

(a) Where the stipulations are ultra vires, or inconsistent with the charter or articles of incorporation.

(b) Where they operate as a fraud upon the other shareholders by subjecting the subscriber to lighter burdens, or giving him greater rights and privileges.

(c) Where they operate as a fraud upon the creditors of the corporation who contract with it on the faith of the capital stock being fully paid.

112. Only the managing agents of a corporation—as the directors—have power to accept subscriptions on special terms, but they may adopt or ratify such subscriptions taken without authority by commissioners prior to incorporation, or by other agents.

The distinction between conditional subscriptions or subscriptions upon conditions precedent, which we have considered in the preceding section, and subscriptions upon special terms, or as they are sometimes termed, subscriptions upon conditions subsequent, is a very important one. In the former, as we have seen, the subscriber does not become a shareholder at all, nor liable on his subscription, until the condition has been performed.[87] In the latter, liability on the subscription, and the right to membership, do not depend at all upon performance of the stipulations. The subscriber becomes a shareholder at once, with all the rights and liabilities of a shareholder, and the stipulations are merely terms of his contract of membership, for the breach of which he must seek his remedy against the corporation.[88] In Paducah & M. R. Co. v. Parks [89] a

ance of the condition was not intended to precede payment of the notes. Keller v. Johnson, 11 Ind. 337, 71 Am. Dec. 355. But it is otherwise if the circumstances under which the notes were given do not show an intention to waive the condition. Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385; Hawkins v. Citizens' Inv. Co., 38 Or. 544, 64 Pac. 320.

[87] Ante, p. 368.

[88] "A subscription on a condition subsequent contains a contract between

[89] 86 Tenn. 554, 8 S. W. 842.

subscription to stock in a railroad company provided that one-fourth should be paid when the road should be completed to a certain county line, the remainder "to be paid in four equal installments of four months as the work progresses through the county, provided the company establishes a depot on said road" at a certain point. It was held that completion of the road to the specified county line was a condition precedent to any liability on the subscription, being made so by express terms, but that the erection of the depot was an independent stipulation, and not a condition precedent to rights of membership and liability on the subscription. So, in Red Wing Hotel Co. v. Friedrich,[40] the defendants had subscribed for shares in a hotel company to be organized, the shares to be paid for at such times and in such amounts as the board of directors might from time to time require. The subscription provided that it was upon the condition that the hotel to be built by the company should be located on a certain block. It was held that the building of the hotel was not a condition precedent to the right of the corporation to assess the shares and collect the assessments, as it was evident that the parties intended that the hotel should be built with money realized on the subscriptions.[41]

Whether a particular stipulation in a subscription is a condition precedent or merely an independent stipulation or special term is purely a question of intention, and the intention is to be determined by considering, not only the words of the particular clause, but also the language of the whole contract, the situation of the parties, the nature of the act required, and the whole subject-matter to which it relates.[42] The courts lean strongly towards holding stipulations to

the corporation and the subscriber whereby the corporation agrees to do some act, thereby combining two contracts—one, the contract of subscription; the other, an ordinary contract of a corporation to perform certain specified acts. The subscription is valid, and enforceable whether the conditions are performed or not. The condition subsequent is the same as a separate collateral contract between the corporation and the subscriber, for breach of which an action for damages is the remedy." 1 Cook, Stock, Stockh. & Corp. Law, § 78, quoted with approval in Morrow v. Nashville Iron & Steel Co., 87 Tenn. 262, 10 S. W. 495, 3 L. R. A. 37, 10 Am. St. Rep. 658. And see 1 Mor. Priv. Corp. § 82. A condition subsequent is a valid consideration for a stock subscription, and, while not affecting the subscriber's liability to take and pay for his stock, gives him a right of action against the corporation for its failure to perform the condition. Bobzin v. Gould Balance Valve Co., 140 Iowa, 744, 118 N. W. 40.

[40] 26 Minn. 112, 1 N. W. 827.

[41] For other illustrations of special terms, as distinguished from conditions precedent, see Johnson v. Georgia M. & G. R. Co., 81 Ga. 725, 8 S. E. 531; American Building & Loan Ass'n v. Rainbolt, 48 Neb. 434, 67 N. W. 493.

[42] See Lane v. Brainerd, 30 Conn. 565; Johnson v. Georgia M. & G. R. Co., 81 Ga. 725, 8 S. E. 531.

be special terms, rather than conditions precedent. While the validity of conditional subscriptions is too firmly established to be now questioned, the courts do not favor them, and they will not hold a stipulation to be a condition precedent unless the intention to make it so is clear. This is proper, for, if a subscriber desires to make his liability dependent upon the performance of stipulations by the corporation, it is very easy for him to do so in express terms.[43] A stipulation certainly can never be considered a condition precedent when it appears that it was contemplated that the subscriber should vote at stockholders' meetings, or otherwise act as a shareholder.[44] And clearly, when a subscription is conditioned that the money acquired therefrom shall be expended in a certain way, the stipulation is a special term, and not a condition precedent, for the money cannot be expended until it has been paid.[45]

Validity of Subscriptions upon Special Terms

A corporation has no authority to receive subscriptions upon special terms where the stipulations are beyond its powers, or inconsistent with the charter or articles of incorporation. This is clear, and does not require the citation of authorities. Nor has it the power to receive a subscription upon such terms as will operate as a fraud upon the other shareholders by subjecting the subscriber to lighter burdens, or giving him greater rights and privileges, or as a fraud upon creditors of the corporation by withdrawing the capital. It is well settled, therefore, that an agreement between a corporation and a subscriber, by which the subscription is not to be payable, or is to be payable in part only, whether it be for the purpose of pretending that the amount of subscribed stock is really greater than it is, or for the purpose of preventing the predominance of certain shareholders, or for any other purpose, is illegal and void, and cannot be interposed as a defense in an action on the subscription.[46]

[43] Paducah & M. R. Co. v. Parks, 86 Tenn. 554, 8 S. W. 842.

[44] 1 Mor. Priv. Corp. § 89; Morrow v. Nashville Iron & Steel Co., 87 Tenn. 262, 10 S. W. 495, 501, 3 L. R. A. 37, 10 Am. St. Rep. 658.

[45] Henderson & N. R. R. v. Leavell, 16 B. Mon. (Ky.) 358. In Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181, there was a requirement in the charter of a railroad company that it should, within a certain time, expend a given sum in the construction of its road. The court held that this was not a condition precedent to liability on subscriptions. It would have been the same had the provision been expressly incorporated in the subscription. "It would be extremely inconsistent," it was said, "to say that the corporation must expend that sum in the construction of its road, and at the same time deny the right and power of collecting their subscriptions for that purpose."

[46] White Mountains R. Co. v. Eastman, 34 N. H. 124; Melvin v. Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199; Union Mut. Life Ins. Co. v. Frear Stone Mfg. Co., 97 Ill. 537, 37 Am. Rep. 129; Hickling v. Wilson, 104 Ill. 54; Bates

In these cases the stipulation itself only is void, and does not affect the subscription. The courts hold the subscriber to his subscription as if the unlawful agreement had not been made, as the only means of preventing fraud and protecting the other subscribers and creditors.[47] The familiar principle of equitable estoppel by conduct may be said to apply to such cases.[48] Thus an agreement between a corporation and a subscriber for stock that the subscriber might return the stock and receive back the consideration is not enforceable at the expense of other stockholders.[49] An agreement made between promoters of a corporation and a subscriber to its stock, that such subscriber is to have the stock for the sake of the influence of his name, and that he would not be required to pay his subscription, is void, and the corporation may enforce payment of the subscription notwithstanding such agreement.[50] So a secret agreement to release one set of subscribers to stock in a corporation is a fraud on the other subscribers.[51] A secret oral agreement between the subscriber and the promoter, whereby the promoter was to resell defendant's subscription, and the defendant was thereby to be discharged from liability under said subscription, was, as to the corporation and the other subscribers, a fraudulent agreement, and constitutes no defense to an action upon said subscription.[52]

An agreement that a subscriber need not pay at all, or that he need pay part only of his subscription, has been held void as against

v. Lewis, 3 Ohio St. 459; Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Meyer v. Blair, 109 N. Y. 600, 17 N. E. 228, 4 Am. St. Rep. 500; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834, 58 N. W. 440; Northrop v. Bushnell, 38 Conn. 498; Burke v. Smith, 16 Wall. (U. S.) 390, 21 L. Ed. 361; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Robinson v. Pittsburgh & C. R. Co., 32 Pa. 334, 72 Am. Dec. 792; Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181; Blodgett v. Morrill, 20 Vt. 509; Boney v. Williams, 55 N. J. Eq. 691, 38 Atl. 189; In re Tichenor-Grand Co. (D. C.) 203 Fed. 720. So, an agreement that a subscriber may withdraw the money paid for his shares, and cancel the subscription, is void, and the subscriber is "held bound to all the responsibilities of a bona fide subscriber." Melvin v. Lamar Ins. Co., supra; post, p. 404.

[47] See the cases above cited.

[48] Minneapolis Threshing Mach. Co. v. Davis, 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796, 12 Am. St. Rep. 701.

[49] Sarbach v. Kansas Fiscal Agency Co., 86 Kan. 734, 122 Pac. 113, Ann. Cas. 1913C, 415.

[50] York Park Bldg. Ass'n v. Barnes, 39 Neb. 834, 58 N. W. 440. Cf. Meyer v. Blair, 109 N. Y. 600, 17 N. E. 228, 4 Am. St. Rep. 500; Morgan v. Struthers, 131 U. S. 246, 9 Sup. Ct. 726, 33 L. Ed. 132. And see, Thompson v. Knight, 74 App. Div. 316, 77 N. Y. Supp. 599.

[51] Gast v. King, 27 Okl. 554, 112 Pac. 997.

[52] Huster v. Newkirk Creamery & Ice Co., 42 Okl. 440, 141 Pac. 790, L. R. A. 1915A, 390; Eichelberger v. Mann, 115 Va. 774, 80 S. E. 595.

creditors of the corporation, even though the corporation and all the other shareholders may be parties to it; but, if no rights of creditors intervene, and the subscription is not necessary to make up the amount of stock required by the charter, so that there is no fraud upon the state, the agreement is binding upon the corporation and the other shareholders,[53] though this seems open to criticism where the other shareholders are without notice. It was recently held in New York that a corporation's contract with a person entering its employ that, in consideration of the employé's subscription to stock, it would buy back the stock subscribed for in the event of the employé's leaving, is valid.[54]

Subject to the restrictions above stated, a corporation may accept subscriptions upon special terms. A railroad company may agree to build a depot at a certain place in order to procure subscriptions from the residents of that neighborhood.[55] It may be agreed that the stock may be paid for in work or in materials, provided the work or materials are an equivalent in value.[56] "In general, subscriptions to the capital stock of a corporation may be conditional as to the time, manner, or means of payment, or in any other way not prohibited by statute, or the rules of public policy, and not beyond the corporate powers of the corporation to comply with." [57]

Who may Receive Subscriptions on Special Terms

Only the managing agents of a corporation are authorized to receive subscriptions upon special terms. They cannot be received prior to incorporation by the commissioners appointed to receive subscriptions, unless such authority is expressly conferred upon them by the charter or articles of association.[58] But a subscription upon special terms, received by such agents without authority, may, if not withdrawn, be treated as a continuing offer to the corporation, and will become binding if accepted by the managing agents after the corporation has been organized.[59] An agent to solicit subscriptions, appointed by the managing agents of a corporation after its organization, cannot accept subscriptions upon special terms unless

[53] Winston v. Brooks, 129 Ill. 64, 21 N. E. 514, 4 L. R. A. 507.

[54] Strodl v. Farish-Stafford Co., 145 App. Div. 406, 130 N. Y. Supp. 35, reversing 67 Misc. Rep. 402, 122 N. Y. Supp. 609.

[55] Paducah & M. R. Co. v. Parks, 86 Tenn. 554, 8 S. W. 842.

[56] Post, p. 468.

[57] 1 Cook, Stock, Stockh. & Corp. Law, § 83. A contract by a corporation to sell shares with option to the buyer to return and receive back the price, no rights of creditors being involved, is valid. Vent v. Duluth Coffee & Spice Co., 64 Minn. 307, 67 N. W. 70. Cf. New Haven Trust Co. v. Gaffney, 73 Conn. 480, 47 Atl. 760.

[58] 1 Mor. Corp. § 83.

[59] 1 Mor. Corp. § 86.

authority to do so has been conferred upon him. If he does accept such a subscription, however, without authority, the managing agents may ratify his act, and render the subscription binding.

CONDITIONAL DELIVERY OF SUBSCRIPTION

113. If a subscription absolute in its terms is delivered in escrow, to take effect as a contract only upon the fulfillment of a condition—

(a) It does not take effect until the condition is fulfilled, if the delivery was to a stranger, and not to the corporation or its agent, and the condition may be shown by parol evidence.

(b) Most courts, perhaps, hold the rule to be the same where it was so delivered to the corporation or its agent; but some courts apply the rule governing deeds that there can be no delivery in escrow to the other party or his agent, and that in such case the oral conditions are void, and the delivery absolute.

(c) The subscriber may be estopped to set up the oral conditions to escape liability on his subscription, if others have subscribed and paid their subscriptions in the belief that his subscription was absolute, or if persons have contracted with the corporation in such belief.

A written subscription to stock, like other written instruments, may be delivered to some third person in escrow; that is, to take effect as a contract only on the happening of a contingency. In such a case it will not take effect until the condition is fulfilled. It is a well-settled rule that, to constitute a good delivery of a deed in escrow, the instrument must be delivered to some third person. If it is delivered to the other party or his agent, the condition is void, and the delivery absolute, for a delivery in fact outweighs verbal conditions.[60] Some courts have applied this rule to contracts not under seal, and have held that delivery of a written subscription to the agent of a corporation is an absolute delivery to the corporation. It has been so held where a subscription was delivered to the commissioners appointed to receive subscriptions,[61] and, it seems, where it was delivered to the promoter of a corporation, the promoter being regarded as the agent of the body of subscribers to take and hold subscriptions.[62] It has been held by most courts, however,

[60] Clark, Cont. (2d Ed.) 56, and cases there cited.

[61] Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

[62] Minneapolis Threshing Mach. Co. v. Davis, 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796, 12 Am. St. Rep. 701.

that where a contract absolute in its terms is not under seal, it is admissible to show by parol evidence that it was delivered, even when delivered to the other party or his agent, with the understanding that it should not be operative as a contract from its delivery, but only on the happening of a contingency.[63] And in these jurisdictions the rule must apply to subscriptions as well as to other simple contracts.[64]

Assuming that the rule last stated does not apply to subscriptions, the doctrine of equitable estoppel may prevent the subscriber from setting up the defense to defeat an action on his subscription. According to this doctrine, where a person, by his words or conduct, willfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief, so as to alter his own previous condition, he is estopped from denying the truth of such facts to the prejudice of the other. It has been held, therefore, that where a person subscribes to the stock of a proposed corporation, and delivers the subscription to the promoter, or other agent, and other persons, without notice of any oral condition attached to such delivery, also subscribe to the stock, and pay the same in, and in reliance on the subscriptions the corporation is organized, engages in its business, expends large sums of money, and contracts liabilities therein, such person, when sued for installments due on his stock subscriptions, will not be allowed to defeat a recovery by showing that he attached a secret oral condition to the delivery of his subscription.[65]

SUBSCRIPTION OF ENTIRE CAPITAL—DISTRIBUTION

114. There is an implied condition that the whole amount of stock specified in the charter, articles of association, contract of subscription, or fixed by the corporators or directors when authorized to settle the same, shall be actually taken by bona fide, binding, absolute, and unconditional subscriptions, before the subscribers shall be liable on their subscriptions. But

(a) The implication may be rebutted by the terms of the charter, articles of association, or contract of subscription.

[63] Westman v. Krumweide, 80 Minn. 313, 15 N. W. 255; Gilman v. Gross, 97 Wis. 224, 72 N. W. 885. Cf. Beard v. Boylan, 59 Conn. 181, 22 Atl. 152.

[64] Cass v. Pittsburg, V. & C. Ry. Co., 80 Pa. 31; Gilman v. Gross, supra.

[65] Minneapolis Threshing Mach. Co. v. Davis, 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796, 12 Am. St. Rep. 701. And see Gilman v. Gross, 97 Wis. 224, 72 N. W. 885.

(b) A subscriber may expressly or impliedly waive the condition.
(c) Statutes, in many states, have modified this common-law requirement.

115. Where stock is subscribed in excess of the authorized amount, and a distribution becomes necessary, the distribution is a condition precedent to liability on subscriptions.

Where the charter or articles of association fix the amount of the capital stock of the corporation, there is generally an implied condition that the full amount shall be actually taken before the subscribers shall be liable on their subscriptions.[66] The same implication arises where the contract of subscription fixes the amount of the capital stock.[67] And it arises where the amount is fixed by the corporators or board of directors, when they are authorized to settle the same. In such a case the amount of stock must be settled and subscribed.[68] The rule also applies where the charter authorizes the corporation, when organized under a fixed capital, to in-

[66] Anderson v. Railroad, 91 Tenn. 44, 17 S. W. 803; Salem Milldam Corp. v. Ropes, 6 Pick. (Mass.) 23; Stoneham Branch R. Co. v. Gould, 2 Gray (Mass.) 277; Penobscot R. Co. v. Dummer, 40 Me. 172, 63 Am. Dec. 654; Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257; Denny Hotel Co. of Seattle v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130; Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181; Hughes v. Antietam Mfg. Co. of Washington County, 34 Md. 316, 331; Bray v. Farwell, 81 N. Y. 600; Myers v. Sturgis, 123 App. Div. 470, 108 N. Y. Supp. 528, affirmed short 197 N. Y. 526, 90 N. E. 1162; New Hampshire Cent. R. R. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300; Read v. Memphis Gayoso Gas Co., 9 Heisk. (Tenn.) 545; Masonic Temple Ass'n of Minneapolis v. Channell, 43 Minn. 353, 45 N. W. 716; Anvil Min. Co. v. Sherman, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232; Exposition Ry. & Imp. Co. v. Canal St. E. Ry. Co., 42 La. Ann. 370, 7 South. 627; International Fair & Exposition Ass'n v. Walker, 88 Mich. 62, 49 N. W. 1086; Portland & F. R. Co. v. Spillman, 23 Or. 587, 32 Pac. 688; Hale v. Sanborn, 16 Neb. 1, 20 N. W. 97; Converse v. Gardner Governor Co., 174 Fed. 30, 98 C. C. A. 16. But see Schenectady & S. Plank Road Co. v. Thatcher, 11 N. Y. 102.

[67] See People's Ferry Co. v. Balch, 8 Gray (Mass.) 303; Troy & G. R. Co. v. Newton, 8 Gray (Mass.) 596; Atlantic Cotton Mills v. Abbott, 9 Cush. (Mass.) 423; Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536; Brand v. Lawrenceville Branch R. R., 77 Ga. 506, 1 S. E. 255; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. 318; Level Land Co. No. 3 v. Hayward, 95 Wis. 109, 69 N. W. 567. And see Audenried v. East Coast Milling Co., 68 N. J. Eq. 450, 59 Atl. 577; ante, p. 370.

[68] Anderson v. Railroad, 91 Tenn. 44, 17 S. W. 803; Troy & G. R. Co. v. Newton, 8 Gray (Mass.) 596; Proprietors of Cabot & West Springfield Bridge v. Chapin, 6 Cush. (Mass.) 50; Atlantic Cotton Mills v. Abbott, 9 Cush. (Mass.) 423; Haskell v. Worthington, 94 Mo. 560, 7 S. W. 481; Rockland, Mt. D. & S. Steamboat Co. v. Sewall, 80 Me. 400, 14 Atl. 939; World's Fair Excursion & Transportation Boat Co. v. Gasch, 162 Ill. 402, 44 N. E. 724.

crease it. When so increased, the amount fixed becomes the capital which must be subscribed before legal assessments can be made.[69] The condition need not be expressed. It arises by implication, "from the just and reasonable understanding of a subscriber that he is to be aided by other subscriptions"; and "the rule is supported also by public policy, in that corporate creditors have a right to rely on the belief that the full capital stock of the corporation has been subscribed." [70]

The implication may be rebutted by the terms of the charter, articles of association, or contract of subscription, as where the corporation is authorized to commence business before the whole capital stock is subscribed.[71] And a subscriber may expressly or im-

[69] Read v. Memphis Gayoso Gas Co., 9 Heisk. (Tenn.) 545. And see Eaton v. Pacific Nat. Bank, 144 Mass. 260, 10 N. E. 844; Winters v. Armstrong (C. C.) 37 Fed. 508. In Nutter v. Lexington & W. C. R. Co., 6 Gray (Mass.) 85, a railroad company voted to issue 600 additional shares for the purpose of raising money to pay off indebtedness, and to allow each stockholder to take one new share for every two shares held by him, provided he should, by a certain day, subscribe therefor, and pay a part of the amount, and give notes for the remainder. It was held that there was no implied condition that the whole 600 shares should be issued, and that the failure of the corporation to issue that amount was no ground for maintaining an action by a subscriber for some of such stock to recover back the money paid by him thereon, nor for defeating an action on the notes given by him.

[70] 1 Cook, Stock, Stockh. & Corp. Law, § 176. And see Stoneham Branch R. Co. v. Gould, 2 Gray (Mass.) 277; Denny Hotel Co. of Seattle v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130; Allman v. Havana R. & E. R. Co., 88 Ill. 521; Temple v. Lemon, 112 Ill. 51, 1 N. E. 268.

[71] Arkadelphia Cotton Mills v. Trimble, 54 Ark. 316, 15 S. W. 776; Schloss v. Montgomery Trade Co., 87 Ala. 411, 6 South. 360, 13 Am. St. Rep. 51; Anderson v. Railroad, 91 Tenn. 44, 17 S. W. 803; West v. Crawford, 80 Cal. 19, 21 Pac. 1123; Penobscot & K. R. Co. v. Bartlett, 12 Gray (Mass.) 244, 71 Am. Dec. 753; Willamette Freighting Co. v. Stannus, 4 Or. 261; Astoria & S. C. R. Co. v. Hill, 20 Or. 177, 25 Pac. 379; Port Edwards, C. & N. Ry. Co. v. Arpin, 80 Wis. 214, 49 N. W. 828; Mandel v. Swan Land & Cattle Co., 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313, 45 Am. St. Rep. 124; Oldham v. Mt. Sterling Imp. Co., 103 Ky. 529, 45 S. W. 779; Anglo-American Land, Mortgage & Agency Co. v. Dyer, 181 Mass. 593, 64 N. E. 416, 92 Am. St. Rep. 437. Where the corporation is authorized to begin business when a part of its capital stock is subscribed, subscription of that amount only is necessary before assessments can be made. Schenectady & S. Plank-Road Co. v. Thatcher, 11 N. Y. 102; Boston, B. & G. R. Co. v. Wellington, 113 Mass. 79; Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279, 62 N. W. 480. And see the other cases cited in this note. In Arkadelphia Cotton Mills v. Trimble, 54 Ark. 316, 15 S. W. 776, the articles of association provided that "the capital stock of said corporation shall be $50,000, of which $14,500 has been subscribed, * * * and the residue may be issued and disposed of as the board of directors may from time to time order and direct." The company had begun business before the defendant subscribed for his stock. It was held that the implied condition that no subscription shall be payable until the

pliedly waive the condition. A waiver will generally be implied if the subscriber consents to the letting of contracts, the creation of debt, or the doing of any corporate act involving the necessity of calling in the subscribed stock, unless the charter expressly forbids the doing of any corporate act until the requisite stock is taken.[72] So a waiver may be implied if a subscriber acts as a stockholder or officer of the corporation,[73] or pays installments on his subscription, knowing that the entire capital stock has not been subscribed.[74]

In many jurisdictions, the rule that such a condition will be implied has been modified by statutory enactment.[75]

It has been held even at common law that an assessment for the purpose of defraying preliminary expenses, as expenses incurred in obtaining the act of incorporation, and ascertaining the practicability and utility of the enterprise, is valid.[76]

It is almost too clear to require the citation of authority that subscriptions cannot be counted in order to make up the required amount, unless they are binding. Subscriptions, therefore, by married women, infants, and insane persons, which are void or voidable under the law of the particular jurisdiction, cannot be taken into consideration unless paid in.[77] Nor can ultra vires subscriptions

whole capital stock is subscribed did not arise. And see Nutter v. Lexington & W. C. R. Co., note 69, supra.

[72] Anderson v. Railroad, 91 Tenn. 44, 17 S. W. 803; Hamilton v. Clarion, M. & P. R. Co., 144 Pa. 34, 23 Atl. 53, 13 L. R. A. 779; Gibbons v. Ellis, 83 Wis. 434, 53 N. W. 701. See California Southern Hotel Co. v. Callender, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99; Converse v. Gardner Governor Co., 174 Fed. 30, 98 C. C. A. 16; Morgan v. Landstreet, 109 Md. 558, 72 Atl. 399, 130 Am. St. Rep. 531, 16 Ann. Cas. 1247.

[73] Masonic Temple Ass'n of Minneapolis v. Channell, 43 Minn. 353, 45 N. W. 716; Cornell's Appeal, 114 Pa. 153, 6 Atl. 258; Auburn Opera-House & Pavilion Ass'n v. Hill, 3 Cal. Unrep. 839, 32 Pac. 587; Macfarland v. West Side Imp. Ass'n., 56 Neb. 277, 76 N. W. 584; Doak v. Stahlman (Tenn. Ch. App.) 58 S. W. 741. There is no such waiver, however, from the fact that a subscriber, without knowledge that the requisite amount of stock had not been taken, on several occasions consented to and waived notice of stockholders' meetings, and on one occasion voted by proxy at a special meeting. Portland & F. R. Co. v. Spillman, 23 Or. 587, 32 Pac. 688. See International Fair & Exposition Ass'n v. Walker, 88 Mich. 62, 49 N. W. 1086.

[74] See Cornell's Appeal, 114 Pa. 153, 6 Atl. 258.

[75] Thus see Business Corporations Law N. Y. (Consol. Laws, c. 4) §§ 2, 3; Corporations Law N. J. (Act April 21, 1896 [P. L. p. 280]) § 8, subd. 4.

[76] Salem Milldam Corp. v. Ropes, 6 Pick. (Mass.) 23; Central Turnpike Corp. v. Valentine, 10 Pick. (Mass.) 142; Anvil Min. Co. v. Sherman, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232.

[77] Phillips v. Covington & Cincinnati Bridge Co., 2 Metc. (Ky.) 219; Appeal of Hahn (Pa.) 7 Atl. 482; ante, p. 345.

by a corporation be considered.[78] Unauthorized and unratified subscriptions by one as agent for another cannot be counted in those jurisdictions where it is held that the person assuming to act as agent does not himself become a shareholder.[79] It is otherwise where, as in some states, it is held that he does himself become a shareholder, and liable on the subscription.[80] Conditional subscriptions cannot be taken into consideration unless the conditions have been fulfilled, so that they have become absolute and unconditional; and the burden of showing this is on the corporation or creditors seeking to enforce the subscriptions.[81] Subscriptions by fictitious persons, or persons known to be insolvent, cannot be counted.[82] But apparent responsibility is all that can be required. A subscription cannot be avoided, nor an action thereon defeated, because of the financial irresponsibility of other subscribers for shares necessary to be subscribed, if the other subscriptions were taken in good faith from persons apparently responsible.[83] Whether a subscription upon special terms can be counted depends upon whether the terms reduce the amount to be paid upon the subscription below par, or for any other reason render the subscription invalid. If they do, they cannot be counted.[84] Some courts allow

[78] Denny Hotel Co. of Seattle v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130. Cf. Wood Harvester Co. v. Jefferson, 71 Minn. 367, 74 N. W. 149. The fact that subscriptions were ultra vires is not a defense to a subscriber in an action to collect assessments, where he stood by without objection, and does not show that such subscriptions were not paid, or that they were repudiated. McCoy v. World's Columbian Exposition, 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288; United States Vinegar Co. v. Foehrenbach, 148 N. Y. 58, 42 N. E. 403; ante, p. 183.

[79] Salem Milldam Corp. v. Ropes, 9 Pick. (Mass.) 187, 19 Am. Dec. 363; California Southern Hotel Co. v. Russell, 88 Cal. 277, 26 Pac. 105; ante, p. 306.

[80] See State ex rel. Page v. Smith, 48 Vt. 266, 284.

[81] Brand v. Lawrenceville Branch R. R., 77 Ga. 506, 1 S. E. 255; Oskaloosa Agri. Works v. Parkhurst, 54 Iowa, 357, 6 N. W. 547; Portland & F. R. Co. v. Spillman, 23 Or. 587, 32 Pac. 688; California Southern Hotel Co. v. Russell, 88 Cal. 277, 26 Pac. 105; Central Turnpike Corp. v. Valentine, 10 Pick. (Mass.) 142.

[82] Lewey's Island R. Co. v. Bolton, 48 Me. 451, 77 Am. Dec. 236. See Denny Hotel Co. of Seattle v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130.

[83] Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257; Salem Milldam Corp. v. Ropes, 9 Pick. (Mass.) 187, 19 Am. Dec. 363. It is otherwise if the corporation treats such subscriptions as invalid, and ignores them. Salem Milldam Corp. v. Ropes, supra.

[84] See New York Exchange Co. v. De Wolf, 31 N. Y. 273; Blodgett v. Morrill, 20 Vt. 509. In Rutland & B. R. Co. v. Thrall, 35 Vt. 536, the full amount of stock was subscribed, but subscriptions contained a provision that interest should be paid by the corporation on all sums assessed and paid in, from the time of payment until the plaintiff's road should be put in operation.

consideration of subscriptions entered into in good faith, payable in labor or materials, if the value of the labor or materials equals the amount of the subscription.[85] By the weight of authority, however, such subscriptions cannot be considered.[86]

The fact that the full amount of capital stock has been subscribed may be shown by the records of the corporation, subject, of course, to rebuttal by evidence to the contrary.[87] If the Legislature has appointed commissioners to take subscriptions, and made it their duty, when the required amount is raised, to notify a meeting of subscribers for the organization of the corporation, and, after organization, to certify the fact to the secretary of state, the certificate of the commissioners showing that the required amount of stock was subscribed is conclusive, and a subscriber cannot defeat an action on his subscription by alleging that some of the subscriptions were not bona fide.[88]

Excessive Subscription—Distribution

If more than the authorized amount of stock is subscribed, so that a distribution becomes necessary in order to determine who are stockholders, and the number of shares each subscriber is entitled to, a distribution is necessary before a subscriber can be held liable.[89] In the distribution of stock the commissioners act judicially, and all must be present to hear and consult, though a majority may decide. A distribution at a meeting of less than all of them is coram non judice and void.[90]

It was held that this provision did not amount to an agreement to pay back to the subscribers a part of the capital stock, so as to result in the whole stock not being subscribed.

[85] See Phillips v. Covington & Cincinnati Bridge Co., 2 Metc. (Ky.) 219.

[86] 1 Cook, Stock, Stockh. & Corp. Law, § 180; New York, H. & N. R. Co. v. Hunt, 39 Conn. 75 (compare Ridgefield & N. Y. R. Co. v. Brush, 43 Conn. 86); Troy & G. R. Co. v. Newton, 8 Gray (Mass.) 596.

[87] Penobscot R. Co. v. Dummer, 40 Me. 172, 63 Am. Dec. 654.

[88] Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181. Where the duty of determining as an existing fact the true amount of the stock subscription was imposed on the original incorporators, their decision that such amount had been subscribed before applying for a charter was conclusive, in an action on a subscription, in the absence of fraud. Louisiana Purchase Exposition Co. v. Kuenzel, 108 Mo. App. 105, 82 S. W. 1099.

[89] Burrows v. Smith, 10 N. Y. 550; Bristol Creamery Co. v. Tilton, 70 N. H. 239, 47 Atl. 591. Such excessive subscription must be affirmatively shown, in an action on a subscription, in order to put the corporation to proof of a distribution; the presumption being that no more than the authorized amount was subscribed. Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336, 346.

[90] Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

PAYMENT OF DEPOSIT

116. There is a conflict of opinion as to the effect of a failure to comply with a requirement in the charter or general law that a deposit, or percentage of each subscription, shall be paid at the time of subscribing.

(a) Where the subscription is prior to organization, it is held:

(1) In some states, that the provision is for the benefit of the public, and that noncompliance renders a subscription void.

(2) In other states, that the provision is for the benefit of the corporation, and may be waived by it, or that the subscriber cannot take advantage of his own wrong in failing to pay.

(b) Where the subscription is after incorporation, the provision will be construed as intended for the benefit of the corporation, unless, as in New York, the intention of the Legislature to the contrary is clear, and noncompliance is no defense in an action on the subscription.

It is often provided, both in general laws authorizing the formation of corporations and in special charters, that a deposit, or a certain percentage of subscriptions, shall be paid at the time of subscribing. There is a direct conflict of opinion as to the object of this provision, and the authorities, therefore, do not agree as to the effect of a failure to comply therewith on subscriptions. Some courts have thought that the object in the case of subscriptions prior to organization, is to insure bona fide subscriptions, and "to prevent the subscription list from being filled with the names of nominal subscribers, and the creatures of others," [91] and that the provision is intended not merely for the benefit of the corporation, but as a protection to the public, to prevent charters from being obtained fraudulently and by irresponsible persons. These courts hold that payment of the deposit in the case of subscriptions prior to incorporation is a condition precedent to the right of the subscriber to membership, and to his liability on his subscription; and that the condition, being imposed on grounds of public policy, and not merely for the benefit of the particular corporation, cannot be waived, either by the commissioners appointed to receive subscrip-

[91] President, etc., of Hibernia Turnpike Road v. Henderson, 8 Serg. & R. (Pa.) 219, 226, 11 Am. Dec. 593.

tions or by the corporation itself when organized.[92] Other courts hold either that the provision is intended for the benefit of the corporation, and may therefore be waived by it, or that it is the duty of the subscriber to pay, and that he cannot take advantage of his own wrong in failing to do so; and they therefore hold that failure to pay the deposit, while it would give the corporation a right to refuse to recognize the subscription, does not render it void, and cannot be set up to defeat an action by the corporation or its creditors against the subscriber.[93] The former of these views is supported by the weight of authority. Of course, if the Legislature clearly expresses the intention that there shall be no liability on the subscription if the deposit is not paid, the statute must be given this effect.

It would seem that a provision requiring payments by subscribers to the stock of a corporation that is already organized must be considered as intended for the benefit of the corporation only, and may be waived by it, and so it has been held.[94] Where a statute appointed commissioners to open books and receive subscriptions, and provided that when a certain amount should be subscribed they should certify that fact to the Governor, who should thereupon issue letters of incorporation, it was held that a provision in that

[92] Jenkins v. President, etc., of Union Turnpike Road, 1 Caines Cas. (N. Y.) 86; President, etc., of Highland Turnpike v. McKean, 11 Johns. (N. Y.) 98; Black River & U. R. Co. v. Clarke, 25 N. Y. 208; Beach v. Smith, 30 N. Y. 116; New York & O. M. R. Co. v. Van Horn, 57 N. Y. 473; President, etc., of Hibernia Turnpike Road v. Henderson, 8 Serg. & R. (Pa.) 219, 11 Am. Dec. 593; Boyd v. Peach Bottom Ry. Co., 90 Pa. 169; Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760. To-day, in New York, the statute is held not to apply to those who subscribe before the incorporation of the company. Yonkers Gazette Co. v. Taylor, 30 App. Div. 334, 51 N. Y. Supp. 969. But see Van Schaick v. Mackin, 129 App. Div. 335, 113 N. Y. Supp. 408.

[93] Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522, citing President, etc., of Union Turnpike Road v. Jenkins, 1 Caines (N. Y.) 381, which was reversed in Jenkins v. President, etc., of Union Turnpike Road, 1 Caines, Cas. (N. Y.) 86; Illinois River R. Co. v. Zimmer, 20 Ill. 654, relying on Wight v. Shelby R. Co., supra; Stuart v. Valley R. Co., 32 Grat. (Va.) 146, 166 (where no reasons are given nor authorities cited); Henry v. Vermillion & A. R. Co., 17 Ohio, 187 (dictum); Minneapolis & St. L. Ry. Co. v. Bassett, 20 Minn. 535 (Gil. 478), 18 Am. Rep. 376. Compare Vermont Cent. R. Co. v. Clayes, 21 Vt. 30 (distinguished in Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760).

[94] This distinction was expressly recognized in Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760, and was so decided in Oler v. Baltimore & R. R. R., 41 Md. 593, and Webb v. Baltimore & E. S. R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396. And see Montpelier & W. R. R. Co. v. Langdon, 46 Vt. 284. But see Black River & U. R. Co. v. Clarke, 25 N. Y. 208, and the other New York cases cited in note 92, supra, and note 96, post.

the commissioners at the time of subscribing only applied to subscriptions received by the commissioners, and that the corporation, after organization, could receive subscriptions without such payment.[95]

Under a New York statute, however, providing that "at the time of subscribing, every subscriber whose subscription is payable in money, shall pay to the directors ten per centum upon the amount subscribed by him in cash, and no such subscription shall be received or taken without such payment" (Laws 1892, c. 688, § 41), it has been uniformly held that a subscription to the stock of a corporation made after incorporation, does not constitute a binding contract unless followed by cash payment of the ten per centum upon the amount subscribed.[96] The subscription is otherwise wholly invalid and in no way binding upon the subscriber.[97]

Where payment of a deposit at the time of subscribing is required by the statute, payment not at the time, but subsequently, renders the subscription binding.[98] So, where a person subscribed for stock on the understanding that the first installment of 10 per cent. required to be paid at the time of subscribing should be paid in subsequent services, and he subsequently claimed more for such services actually rendered than such installment, and the corporation paid him the balance, it was held that the subscription was binding.[99] Payment is often expressly required to be made in money or cash, and, even in the absence of such an express requirement, the statute would be construed to mean payment in money or its equivalent. Payment by a note is not sufficient.[1] Giving a note is not a payment but constitutes only a promise to pay. A check may be received for the deposit in the usual course of business, and, if presented and paid, will be a compliance with the statute;[2] but the commissioners cannot receive indorsed checks if it is known that

[95] Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. 318. And see Southern Life Ins. & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448.

[96] South Buffalo Natural Gas Co. v. Bain, 9 Misc. Rep. 425, 30 N. Y. Supp. 264; General Electric Co. v. Wightman, 3 App. Div. 118, 39 N. Y. Supp. 420; Hapgoods v. Lusch, 123 App. Div. 23, 107 N. Y. Supp. 331. But as to those who subscribe prior to incorporation a different rule obtains in New York. Yonkers Gazette Co. v. Taylor, 30 App. Div. 334, 51 N. Y. Supp. 969.

[97] South Buffalo Natural Gas Co. v. Bain, supra; Hapgoods v. Lusch, supra.

[98] Black River & U. R. Co. v. Clarke, 25 N. Y. 208.

[99] Beach v. Smith, 30 N. Y. 116.

[1] Boyd v. Peach Bottom Ry. Co., 90 Pa. 169; Hapgoods v. Lusch, 123 App. Div. 23, 107 N. Y. Supp. 331. Compare Greenville & C. R. Co. v. Woodsides, 5 Rich. (S. C.) 145, 55 Am. Dec. 708.

[2] Rothchild v. Hoge (C. C.) 43 Fed. 97, 100.

the drawers have no funds, nor could a check be taken and held for the purpose of evading the statute.[3] And, in New York, checks have been rejected on the reasoning, applicable to notes also, that "such a transaction is not a payment but a promise." [4] The deposit may be paid in services which the company has a right to contract and pay for, as this is equivalent to payment in cash,[5] unless the statute forbids.

DELIVERY OF CERTIFICATE

117. A certificate of stock, being merely evidence of the ownership of shares, is not necessary to make a subscriber a stockholder, with all the rights, and subject to all the liabilities, of stockholders. Nor is delivery or tender of a certificate necessary before action on a subscription, unless made so by the express terms of the subscription.

A certificate of stock is merely evidence of the ownership of shares by the holder, and is not at all necessary to membership, even where issuance of certificates is required by the charter. As said by the Supreme Court of the United States: "Millions of dollars of capital stock are held without any certificate, or, if certificates are made out, without their ever being delivered. A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. It certifies to a fact which exists independently of itself.[6] In such a case, if the corporation refuses to issue a certificate to a subscriber, a court of equity might compel it to do so; but mere failure to issue or tender a certificate does not prevent a subscriber from becoming a shareholder, with all the rights, and subject to all the liabilities of shareholders.[7] Nor is the tender of a certificate necessary before

[3] Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

[4] Hapgoods v. Lusch, supra; Excelsior Grain Binder Co. v. Stayner, 25 Hun (N. Y.) 91; Durant v. Abendroth, 69 N. Y. 148, 25 Am. Rep. 158. Cf. Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

[5] Beach v. Smith, 30 N. Y. 116.

[6] Pacific Nat. Bank v. Eaton, 141 U. S. 227, 11 Sup. Ct. 984, 35 L. Ed. 702. And see, Morris v. Hussong Dyeing Mach. Co., 81 N. J. Eq. 256, 86 Atl. 1026; New York & Eastern Telegraph & Tel. Co. v. Great Eastern Tel. Co., 74 N. J. Eq. 221, 69 Atl. 528, affirmed Reynolds v. New York & Eastern Telegraph & Tel. Co., 75 N. J. Eq. 298, 78 Atl. 1135.

[7] Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128; Brigham v. Mead, 10 Allen (Mass.) 245; Wemple v. St. Louis, J. & S. R. Co., 120 Ill. 196, 11 N. E. 906; Kelly v. Killian, 133 Ill. App. 102; Walter A. Wood Harvester

bringing an action on a subscription.[8] Registry of a stockholder's name on the stock book opposite the number of shares for which he has subscribed confers title thereto, and makes him a stockholder without the issuance of certificates.[9] The parties may, however, expressly contract that the stock shall not be paid for until the certificate has been issued and delivered, and in such a case no action can be maintained by the corporation on the subscription until it has delivered or tendered a certificate.[10] The rule that a certificate need not be delivered or tendered in order to maintain an action on a subscription does not apply to the case of a sale of stock, but such a contract stands on the same footing as a contract of sale of any other property.[11]

Co. v. Robbins, 56 Minn. 48, 57 N. W. 317; GALBRAITH v. McDONALD, 123 Minn. 208, 143 N. W. 353, L. R. A. 1915A, 464, Ann. Cas. 1915A, 420, Wormser Cas. Corporations, 252; Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. 244; Beckett v. Houston, 32 Ind. 393, 398; Spear v. Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; Burr v. Wilcox, 22 N. Y. 551; Rutter v. Kilpatrick, 63 N. Y. 604; Webb v. Baltimore & E. S. R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396; New Albany & S. R. Co. v. McCormick, 10 Ind. 499, 71 Am. Dec. 337; Miller v. Wild Cat Gravel Road Co., 52 Ind. 51; Schaeffer v. Missouri Home Ins. Co., 46 Mo. 248; Business Men's Ass'n v. Williams, 137 Mo. App. 575, 119 S. W. 439; Fulgam v. Macon & B. R. Co., 44 Ga. 597; Chaffin v. Cummings, 37 Me. 76; Courtright v. Deeds, 37 Iowa, 503; Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110, Pacific Nat. Bank v. Eaton, 141 U. S. 227, 11 Sup. Ct. 984, 35 L. Ed. 702; W. A. Wood Harvester Co. v. Jefferson, 71 Minn. 367, 74 N. W. 149; Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314; Auld v. Caunt, 216 Mass. 381, 103 N. E. 933. A subscription right is assignable, though no stock has been issued. Manchester St. Ry. v. Williams, 71 N. H. 312, 52 Atl. 461.

[8] Cases above cited.

[9] Powell Bros. v. McMullan Lumber Co., 153 N. C. 52, 68 S. E. 926. And see Keystone Wrapping Mach. Co. v. Bromeier, 42 Pa. Super. Ct. 384.

[10] See Marson v. Deither, 49 Minn. 423, 52 N. W. 38; Courtright v. Deeds, 37 Iowa, 503; In re Hall (D. C.) 206 Fed. 850. Cf. Summers v. Sleeth, 45 Ind. 598, and Miller v. Wildcat Gravel Road Co., 52 Ind. 51.

[11] Marson v. Deither, 49 Minn. 423, 52 N. W. 38; Summers v. Sleeth, 45 Ind. 598; Fulgam v. Macon & B. R. Co., 44 Ga. 597. As to the distinction to be noted between sales of corporate stock, where a tender is necessary, and subscriptions to corporate stock, where it is ordinarily unnecessary, see, also, GALBRAITH v. McDONALD, 123 Minn. 208, 143 N. W. 353, L. R. A. 1915A, 464, Ann. Cas. 1915A, 420, Wormser Cas. Corporations, 252; Wemple v. St. Louis, J. & S. R. Co., 120 Ill. 196, 11 N. E. 906.

REMEDY OF CORPORATION ON SUBSCRIPTIONS

118. In most states a subscription to the capital stock of a corporation implies a promise to pay assessments, upon which the corporation may maintain assumpsit. In Massachusetts and several other states an express promise must be shown.

119. A corporation has no inherent power to forfeit or sell shares upon nonpayment of assessments; but the power is almost always expressly conferred. The power must be exercised in strict accordance with the charter or statute, or the forfeiture or sale will be invalid.

120. The fact that the corporation is given the remedy by forfeiture does not prevent it from maintaining assumpsit. The remedies are cumulative.

121. A forfeiture releases the subscriber from further liability, but it is otherwise where the charter provides for a sale of the shares, and leaves the subscriber liable for any deficiency.

Action to Recover Assessments

In several of the New England states, including Massachusetts, it is the settled doctrine that a mere subscription, or agreement to take shares in a corporation, though accepted and acted upon by the corporation after its organization, does not raise an implied promise on the part of the subscriber to pay assessments on the shares, so as to entitle the corporation to maintain assumpsit on the subscription; that to support such an action an express promise to pay must be shown; and that an agreement to take shares is not an express promise to pay assessments.[12] In these states, in the absence of an express promise, the only remedy of the corporation is that given it by the statute, generally to forfeit, or forfeit and sell, the shares

[12] Andover & Medford Turnpike Corp. v. Gould, 6 Mass. 40, 4 Am. Dec. 80; Mechanics' Foundry & Mach. Co. v. Hall, 121 Mass. 272; Katama Land Co. v. Jernegan, 126 Mass. 155; Kennebec & P. R. Co. v. Kendall, 31 Me. 470; Franklin Glass Co. v. Alexander, 2 N. H. 380, 9 Am. Dec. 92; dictum in Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181. But see Windsor Electric Light Co. v. Tandy, 66 Vt. 248, 29 Atl. 248, 44 Am. St. Rep. 838. Cf. Anglo-American Land & Mortgage & Agency Co. v. Dyer, 181 Mass. 593, 64 N. E. 416, 92 Am. St. Rep. 437. By subscribing to stock in a foreign corporation the subscriber subjects himself to the laws of the foreign country in respect to the powers and obligations of such corporation. Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co., 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782.

of delinquent shareholders. In most states the courts repudiate this doctrine, and it is held that the mere fact of subscription, where the subscription has been accepted by the corporation, raises an implied promise on the part of the subscriber to pay assessments, on the ground that there is a legal liability to pay them; and that, "whenever there is a legal liability, the law creates a promise upon which an action of assumpsit will lie." [13] It was said in a recent Alabama case: "That a subscription for stock implies a promise to pay for it, even though the subscription was before incorporation is the rule sustained by the great weight of authority." [14] As we have seen, there is a sufficient consideration for the promise in the interest acquired by the subscriber in the corporate franchises and property, and the right to share in the profits. In New York, the early cases [15] followed the rule generally; but the more recent decisions seem to follow the Massachusetts holding—that only where there has been an express promise does an action accrue to the corporation.[16] As said by Martin, J., of the New York Court of Appeals: "Unless so expressed in the instrument, the subscription is not an agreement to pay so much money, but is a contract by which the subscriber agrees to enter into the relation of a stockholder in the corporation. * * * Where there is such an agree-

[13] Instone v. Frankfort Bridge Co., 2 Bibb (Ky.) 576, 5 Am. Dec. 638; Hughes v. Antietam Mfg. Co. of Washington County, 34 Md. 316, 326; Windsor Electric Light Co. v. Tandy, 66 Vt. 248, 29 Atl. 248, 44 Am. St. Rep. 838; Dayton v. Borst, 31 N. Y. 435; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Rensselaer & Washington Plank Road Co. v. Barton, 16 N. Y. 457, note; Spear v. Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Griswold v. Board of Trustees of Peoria University, 26 Ill. 41, 79 Am. Dec. 361; Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 499, 506; Danbury & N. R. Co. v. Wilson, 22 Conn. 435; Miller v. Wild Cat Gravel Road Co., 52 Ind. 51; East Tennessee & V. R. Co. v. Gammon, 5 Sneed (Tenn.) 567; Bavington v. Pittsburgh & S. R. Co., 34 Pa. 358; Dexter & Mason Plank Road Co. v. Millerd, 3 Mich. 91; Carson v. Arctic Min. Co., 5 Mich. 288; American Alkali Co. v. Campbell (C. C.) 113 Fed. 398; Crawford v. Roney, 126 Ga. 763, 55 S. E. 499. A subscription payable partly in cash and party in stock of another corporation must be accepted according to its terms, and the corporation cannot retain the cash payment and maintain an action to recover the difference on an unpaid subscription. Southern Trust & Deposit Co. v. Yeatman, 134 Fed. 810, 67 C. C. A. 456.

[14] Planters' & Merchants' Independent Packet Co. v. Webb, 144 Ala. 666, 39 South. 562.

[15] See note 13, supra, for early New York cases there cited.

[16] Rochester & K. F. Land Co. v. Raymond, 158 N. Y. 576, 53 N. E. 507, 47 L. R. A. 246; Harris v. Wells, 57 Misc. Rep. 172, 108 N. Y. Supp. 1078, per Bischoff, J., affirmed 126 App. Div. 911, 110 N. Y. Supp. 1131, without opinion.

ment, effect must be given to it, but in its absence we think no such liability is to be implied." [17] Whatever may be thought of this reasoning as matter of principle, it seems to-day firmly imbedded in the law of several important states that a subscriber is not liable for a call unless he has made an express promise to pay the corporation for his shares.

Forfeiture and Sale of Shares

A corporation has no inherent power to forfeit or sell the shares of stock of a delinquent shareholder for nonpayment of assessments. That is not a common-law remedy, and can only be exercised when it is expressly conferred by the charter, or by some statute, or by agreement of the stockholders.[18] The power, however, is almost always conferred either to sell the shares to pay overdue assessments, or to forfeit them to the use of the corporation. It cannot be conferred by a by-law unless it is expressly authorized.[19]

In declaring a forfeiture of stock for nonpayment of assessments the corporation must adopt a course of proceeding reasonable and just to the stockholder. Reasonable notice to him that his stock will be forfeited, unless by a specified time the overdue assessments are paid, is necessary to effect a forfeiture.[20] In all cases the power to forfeit or sell must be exercised in the manner prescribed. And the proceedings by which the stock of a shareholder is declared forfeited must be strictly pursued.[21] A sale or forfeiture of shares without following the requirements of the charter or statute is just as invalid as if made without any power at all,[22] and an

[17] Rochester & K. F. Land Co. v. Raymond, supra. Cf. Lowville & B. R. R. Co. v. Elliott, 115 App. Div. 884, 101 N. Y. Supp. 328, affirmed short 196 N. Y. 545, 89 N. E. 1104.

[18] Budd v. Multnomah St. Ry. Co., 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169; Minnehaha Driving Park Ass'n v. Legg, 50 Minn. 333, 52 N. W. 898; In re Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429. And see Perrin v. Granger, 30 Vt. 595.

[19] Post, p. 572.

[20] Rutland & B. R. Co. v. Thrall, 35 Vt. 536; Germantown Passenger Ry. Co. v. Fitler, 60 Pa. 124, 100 Am. Dec. 546; Elizabeth City Cotton Mills v. Dunstan, 121 N. C. 12, 27 S. E. 1001, 61 Am. St. Rep. 654. And see Crissey v. Cook, 67 Kan. 20, 72 Pac. 541.

[21] Raisch v. M. K. & T. Oil Co., 7 Cal. App. 667, 95 Pac. 662.

[22] Budd v. Multnomah St. Ry. Co., 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169; Portland, S. & P. R. Co. v. Graham, 11 Metc. (Mass.) 1; Germantown Passenger Ry. Co. v. Fitler, 60 Pa. 124, 100 Am. Dec. 546; Schwab v. Frisco Min. & Mill. Co., 21 Utah, 258, 60 Pac. 940. Although a forfeiture be irregular or defective in form, it will be held sufficient as against creditors of the corporation, if the corporation and the stockholder, with knowledge of the defects, have acquiesced in it. Crissey v. Cook, 67 Kan. 20, 72 Pac. 541. As where a private sale is made, instead of a sale at public auction, as required by the statute. Portland, S. & P. R. Co. v. Graham, supra.

invalid sale may constitute a conversion of the shares for which the corporation will be liable in damages.[23] In Budd v. Multnomah St. Ry. Co.[24] a statute provided that a corporation might make by-laws for the sale of stock for nonpayment of assessments, and it was held that a sale without a valid by-law authorizing it was invalid, and constituted a conversion of the shares. In this case the board of directors had passed a resolution ordering these particular shares to be sold, but it was held that this was not a by-law, because directed only against a particular shareholder.[25] Under a statute requiring that forfeiture of corporate stock for nonpayment of subscription must be by action of the board of directors, a forfeiture made at what purported to be a meeting of the board of directors by less than a quorum thereof, was held ineffective, and could not be enforced.[26] A sale of shares after a valid tender of the amount due for assessments is unauthorized and void, and a suit in equity may be maintained to set the same aside, and restrain a transfer of the shares to the purchaser.[27] To authorize a forfeiture or sale of shares for nonpayment of assessments, the assessments must be valid. A sale for nonpayment of several assessments, one of which is invalid, is void.[28] The measure of damages for conversion of shares by illegally selling them for nonpayment of assessments is not the full value of the shares, but their value less the amount of unpaid calls due thereon.[29]

If a corporation follows the provisions of its charter relating to the forfeiture of stock, its right to forfeit at the end of the time limited is perfect, and a stockholder who is in default can claim no further delay nor any other notice than that prescribed and given. When a forfeiture is regularly declared in accordance with the charter, equity will not relieve against it.[30]

Action and Forfeiture as Cumulative Remedies

The fact that the corporation is given the right to proceed against delinquent shareholders by forfeiture of their shares, or by forfeiture and sale of them, does not prevent it from maintaining assumpsit for assessments, either on an express promise, or on the implied

[23] Budd v. Multnomah St. Ry. Co., 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

[24] 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

[25] As to the validity of by-laws, see post, p. 572.

[26] In re Election of Directors of New York & Westchester Town-Site Co., 145 App. Div. 623, 130 N. Y. Supp. 414.

[27] Mitchell v. Vermont Copper Min. Co., 67 N. Y. 280.

[28] Stoneham Branch R. Co. v. Gould, 2 Gray (Mass.) 277.

[29] Budd v. Multnomah St. Ry. Co., 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

[30] Germantown Pass. Ry. Co. v. Fitler, 60 Pa. 124, 100 Am. Dec. 546.

promise which arises in most states. The statutory remedy is merely cumulative, unless it is clearly made exclusive, and the corporation may proceed in either way.[31]

Whether assumpsit can be maintained after resorting to the statutory remedy depends upon the nature of the statutory remedy. If, under the charter, the stock of a delinquent shareholder is merely forfeited to the use of the corporation—that is, reclaimed by it to its own use—on his failure to pay an assessment, the charter having, in effect, made the issue of the stock, not absolute, but in the nature of a conditional sale, the remedy by action is taken away.[32] And when forfeiture is made an alternative, and not a cumulative, remedy, the same result follows.[33] The reason is that such a forfeiture necessarily involves a total loss of interest in the thing forfeited by the party in default, and a resumption by the corporation of the entire consideration of the debtor's promise. The stock forfeited vests absolutely and beneficially in the company, and the debtor can have no benefit from it or its proceeds, though the corporation might afterwards sell it for more than was due from him.[34]

Where, however, the security reserved by the charter to the corporation is less than forfeiture; where it is simply a power of sale to pay unpaid assessments, with the right reserved to the debtor to any surplus that may remain, so that the issue of the stock is absolute, and not conditional, and the security is in the nature of a mortgage or pledge—a sale of stock for nonpayment of assessments does not take away the company's right of action, but it may maintain an action for a deficiency after applying the proceeds of the stock.[35] An unsuccessful attempt to follow the remedy by for-

[31] Instone v. Frankfort Bridge Co., 2 Bibb (Ky.) 576, 5 Am. Dec. 638; Worcester Turnpike Corp. v. Willard, 5 Mass. 80, 4 Am. Dec. 39; Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 499, 506; Goshen & Minisink Turnpike Road, President, etc., of, v. Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Hughes v. Antietam Mfg. Co. of Washington County, 34 Md. 316, 326; Tar River Nav. Co. v. Neal, 10 N. C. 520, 535; Grays v. Lynchburg & S. Turnpike Co., 4 Rand. (Va.) 578, 583; Nashua Sav. Bank v. Anglo-American Land Mortgage & Agency Co., 108 Fed. 764, 48 C. C. A. 15; Campbell v. American Alkali Co., 125 Fed. 207, 61 C. C. A. 317.

[32] Small v. Herkimer Mfg. & Hydraulic Co., 2 N. Y. 330; Mills v. Stewart, 41 N. Y. 384; Allen v. Montgomery R. Co., 11 Ala. 437; Rutland & B. R. Co. v. Thrall, 35 Vt. 536.

[33] Edinburgh L. & N. Ry. Co. v. Hebblewhite, 6 Mees. & W. 707; Giles v. Hutt, 3 Exch. 18; Great Northern Ry. Co. v. Kennedy, 4 Exch. 417.

[34] In Carson v. Arctic Min. Co., 5 Mich. 288. And see Small v. Herkimer Mfg. & Hydraulic Co., 2 N. Y. 330.

[35] Carson v. Arctic Min. Co., 5 Mich. 288.

feiture and sale could not bar an action to recover assessments. The shares not being sold the liability of the shareholder on his promise would remain.[36] In some charters it is expressly provided that, if the shares of a delinquent stockholder shall not sell for a sum sufficient to pay his assessments, with interest and charges of sale, he shall be held liable to the corporation for any deficiency. Of course, in such a case, a forfeiture and sale does not preclude an action for a deficiency.[37]

Not only does a forfeiture of shares by a corporation for nonpayment of assessments put an end to any liability of the shareholder to the corporation on his subscription, as shown above, but it relieves him from liability to existing or future creditors of the corporation if it becomes insolvent, provided there is no fraud or collusion.[38] But a forfeiture by collusion between the shareholder and directors will not release him.[39]

CALLS

122. A "call" is a declaration officially made by the corporation that all or a certain prescribed portion of a subscriber's stock subscription is then required to be paid for. If the time of payment of a subscription is fixed by the charter, statute, or subscription, no call is necessary to render the subscriber liable. But a call is essential to liability where it is expressly required by the charter, statute, or subscription, or, by the weight of authority, where the time of payment is left to the directors or stockholders. A call is not necessary after repudiation of the subscription. A call becomes a fixed debt at the time it is made.

123. Calls to be valid, must be made

(a) In the manner prescribed.

(b) By the person or board designated. If no person is designated, the power vests in the board of directors.

(c) And must operate uniformly upon all the shareholders.

[36] Instone v. Frankfort Bridge Co., 2 Bibb (Ky.) 576, 5 Am. Dec. 638.

[37] Danbury & N. R. Co. v. Wilson, 22 Conn. 435, 456. And see Mandel v. Swan Land & Cattle Co., 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313, 45 Am. St. Rep. 124.

[38] Mills v. Stewart, 41 N. Y. 384. And see Allen v. American Bldg. & Loan Ass'n, 49 Minn. 544, 52 N. W. 144, 32 Am. St. Rep. 574; Carpenter v. American Bldg. & Loan Ass'n, 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 345.

[39] 1 Cook, Stock, Stockh. & Corp. Law, §§ 127, 128. See Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273.

124. The term "assessment," though often used synonymously with the term "call," properly signifies statutory payments levied by the corporation upon the holders of its shares over and beyond the par value thereof. When the charter or subscription requires notice of assessments, the requirement must be complied with; but, in the absence of any such requirement, notice is not necessary. Proof of actual notice obviates objections to the form or manner of the notice.

125. Interest runs on assessments from the time they are payable.

Necessity for Call

Where, by the charter, statute, or terms of the subscription itself, the subscription is payable immediately, or where it is payable at a stated time or times, or within a certain time, and that time has elapsed, no call is necessary to render the subscriber liable to an action thereon.[40] Where, however, the contract of subscription, or the charter, or statute, or articles of association, or a valid by-law existing at the time of subscription, which always form a part of the contract of subscription, expressly make the subscription payable on call by the directors or majority of the stockholders, the subscription does not become payable, and no action can be maintained upon it, until a valid call is made in accordance with the provision; and by the weight of authority the same rule applies where the charter and contract of subscription are silent as to the time of payment.[41] No call is necessary after the subscriber has repudiated his subscription.[42]

[40] Ruse v. Bromberg, 88 Ala. 619, 7 South. 384; New Albany & S. R. Co. v. Pickens, 5 Ind. 247; Phœnix Warehousing Co. v. Badger, 67 N. Y. 294; Mountain Timber Co. v. Case, 65 Or. 417, 133 Pac. 92.

[41] North & S. St. R. Co. v. Spullock, 88 Ga. 283, 14 S. E. 478; Glenn v. Howard, 65 Md. 40, 3 Atl. 895; Ruse v. Bromberg, 88 Ala. 619, 7 South. 384; Seymour v. Sturgess, 26 N. Y. 134; Banet v. Alton & S. R. Co., 13 Ill. 504; Spangler v. Indiana & Q. C. Ry. Co., 21 Ill. 276; Holt v. Holt Electric Storage Co. (C. C.) 79 Fed. 597; New England Fire Ins. Co. v. Haynes, 71 Vt. 306, 45 Atl. 221, 76 Am. St. Rep. 771. See Williams v. Taylor, 120 N. Y. 244, 24 N. E. 288. In North & S. St. R. Co. v. Spullock, supra, a contract of subscription provided that the subscription should be paid "in such installments and at such times as may be decided by a majority of the stockholders or board of directors, or a trustee empowered for the purpose by a majority of the stockholders." In a suit on the subscription it was not shown that the stockholders, directors, or trustee had ever provided in what installments the subscription should be paid, or fixed any time or times for such payment, or made any call for payment; and it was therefore held that a judgment of nonsuit

[42] Cass v. Pittsburg, V. & C. Ry. Co., 80 Pa. 31.

Validity of Call

Assessments and calls for unpaid subscriptions, to be valid, must be made in a proper manner, and by the proper authority. If the charter or an authorized by-law prescribes a particular mode for making them, that mode must be followed. So if it specifies who shall exercise the power, the provision must be regarded, and a call or assessment made by any other authority will be ineffectual.[43] A strict compliance by the corporation with statutory provisions, governing the recovery of a personal judgment for an assessment, is essential.[44] Generally, the power is conferred upon the board of directors, and when this is the case it must be exercised by them, and in their official capacity as a board. By the weight of authority, they cannot delegate the power to others,[45] but it has been held that they may ratify an exercise of the power by others.[46] Sometimes the power is conferred upon the whole body of shareholders. If the charter is silent as to who shall exercise the power, it will devolve upon the directors, since they are the proper persons to perform such ordinary corporate acts.[47]

Where calls are required to be made by the board of directors,

was proper. In Seymour v. Sturgess, supra, the by-laws of a corporation declared that no call for stock should be made, except upon the vote and by the direction of at least five of the directors. It was held that one who became a subscriber after the enactment of the by-law was entitled to the benefit of it, as it constituted a part of his contract, and that there was no liability on his subscription in the absence of such a call. In Glenn v. Howard, supra, the question arose whether recovery on a call for an unpaid subscription, which, by the terms of the charter, was payable "as required by the president and directors," not made until after discharge of the subscriber in bankruptcy, was barred by such discharge. The court held that if the call had been made before the discharge so as to become a debt provable in the bankruptcy proceedings, it would have been barred by the discharge, but that since there was no debt so provable before the call, and since the call was not made until after the discharge, it was not barred. Where it was provided that the directors might require payment of the sums subscribed at such times and in such proportions as they should deem best, but that no assessment should exceed $10 on a share, it was held that the directors were not prevented from laying several assessments, not exceeding $10 each, by one vote. Rutland & B. R. Co. v. Thrall, 35 Vt. 536.

[43] People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440; Moses v. Tompkins, 84 Ala. 613, 4 South. 763.

[44] National Parafine Oil Co. v. Chappellet, 4 Cal. App. 505, 88 Pac. 506.

[45] 1 Cook, Stock, Stockh. & Corp. Law, § 110; Rutland & B. R. Co. v. Thrall, 35 Vt. 536; Silver Hook Road v. Greene, 12 R. I. 164; Banet v. Alton & S. R. Co., 13 Ill. 504.

[46] Rutland & B. R. Co. v. Thrall, supra; Read v. Memphis Gayoso Gas Co., 9 Heisk. (Tenn.) 545.

[47] 1 Cook, Stock, Stockh. & Corp. Law, § 109; Budd v. Multnomah St. Ry. Co., 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

the board, to make a valid call, must be legally constituted.[48] It is not enough that the call is made by directors de facto, for the rule that the acts of directors de facto cannot be questioned collaterally is only for the protection of third persons dealing with the corporation, and is not applicable as between the stockholders and the directors.[49] To constitute a valid assessment, in the absence of any special requirement in the charter, all that is necessary is that there shall be some act or resolution of the directors, in their official capacity as a board, legally constituted, which shows a clear intention to render due and payable a part or all of the unpaid subscriptions.[50]

A call, to be valid, must operate uniformly upon all the shareholders. One of them cannot legally be required to pay in a larger proportion of his subscription, or to pay at an earlier day, than the others, unless his contract expressly permits it.[51] Of course, the existence of debts against the corporation is not necessary to a valid assessment.[52] Where several assessments have been made, the directors may abandon or waive one that is void, and sue for those that are valid.[53] The necessity for a call on unpaid subscriptions is to be determined by the board of directors, when the power to make calls is vested in them, and the propriety of their determination on this point cannot be questioned by the shareholders.[54] A subscriber may waive a call or informalities in making it.[55] Thus, where a subscriber for stock which is payable in installments

[48] People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440; Moses v. Tompkins, 84 Ala. 613, 4 South. 763.

[49] Moses v. Tompkins, 84 Ala. 613, 4 South. 763; People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440; Schwab v. Frisco Min. & Mill. Co., 21 Utah, 258, 60 Pac. 940.

[50] Budd v. Multnomah St. Ry. Co., 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169. Cf. North Milwaukee Town Site Co. No. 2 v. Bishop, 103 Wis. 492, 79 N. W. 785, 45 L. R. A. 174.

[51] Great Western Tel. Co. v. Burnham, 79 Wis. 47, 47 N. W. 373, 24 Am. St. Rep. 698; Pike v. Bangor & C. S. L. R. Co., 68 Me. 445; 1 Mor. Corp. § 154; 1 Cook, Stock, Stockh. & Corp. Law, § 114. "But, if some shareholders," says Mr. Morawetz, "have already contributed more than others, it would be not only the right, but the duty, of the directors to make calls upon the other shareholders in such amounts as to equalize the contributions of all." 1 Mor. Corp. § 154.

[52] Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257.

[53] Read v. Memphis Gayoso Gas Co., 9 Heisk. (Tenn.) 545.

[54] Budd v. Multnomah St. Ry. Co., 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169; Fitzgerald's Estate v. Union Sav. Bank, 65 Neb. 97, 90 N. W. 994; Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co., 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782; Campbell v. American Alkali Co., 125 Fed. 207, 61 C. C. A. 317.

[55] Graebner v. Post, 119 Wis. 392, 96 N. W. 783, 100 Am. St. Rep. 890.

on call is present by proxy at a meeting at which it is voted to make the call, and there is a general agreement to consider the call as made, he is deemed to have actual notice of the call and to have waived formal notice.[56]

A call cannot be made, except for preliminary expenses,[57] until the corporation is sufficiently organized to enter upon the transaction of business, unless there is some express provision in the charter or contract of subscription authorizing it to be made before then, for until then it cannot be necessary. Thus, where a subscriber agreed to pay for his stock at such times and in such installments as the same might be called for by the corporation, and a statute declared that the corporation should not transact business until half of its capital stock should be subscribed, it was held that no call could be made until the condition of the statute should be fulfilled.[58] It would be otherwise if no particular amount of stock were required to be subscribed before the corporation could begin operations.[59]

Notice and Demand

Where the charter or subscription requires notice or demand as a condition precedent to suits to recover installments of stock, and there is no waiver of the condition, the prescribed notice must be given, or the prescribed demand made, or an action on a subscription cannot be maintained.[60] But, in the absence of such a requirement, no notice or demand is necessary. The subscribers must take notice of the acts of the directors as to calls.[61] Unless notice by publication is allowed by the charter or subscription, notice in a paper to which defendant is not a subscriber is not sufficient.[62] Nor would notice in any paper be sufficient unless it were shown that the subscriber read it, and so had actual notice. The fact that notice is not given in the way prescribed by the charter or statute,

[56] Crook v. International Trust Co., 32 App. D. C. 490.

[57] Salem Milldam Corp. v. Ropes, 6 Pick. (Mass.) 23; Central Turnpike Corp. v. Valentine, 10 Pick. (Mass.) 142; Anvil Min. Co. v. Sherman, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232.

[58] Anvil Min. Co. v. Sherman, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232, collecting cases; ante, p. 381.

[59] Id.

[60] Rutland & B. R. Co. v. Thrall, 35 Vt. 536; Banet v. Alton & S. R. Co., 13 Ill. 504; Spangler v. Indiana & Q. C. Ry. Co., 21 Ill. 276; North Milwaukee Town-Site Co. No. 2 v. Bishop, 103 Wis. 492, 79 N. W. 785, 45 L. R. A. 174. Cf. Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co., 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782. As to the statute of limitations, post, p. 743.

[61] Heaston v. Cincinnati & Ft. W. R. Co., 16 Ind. 275, 79 Am. Dec. 430.

[62] Lake Ontario, A. & N. Y. R. Co. v. Mason, 16 N. Y. 451, 463.

as by mail or publication, will not invalidate a call, if actual notice is shown. Proof of actual notice obviates all such objections.[63]

Interest

An unpaid subscription bears interest from the time the subscriber is in default; that is, from the time he should pay the same. For the call is a fixed debt from the time it is made. Where it is payable at once, and without call, interest commences to run at once. Where it is payable on call, interest runs from the time fixed for payment in the call.[64] If notice of the assessment is required, interest runs, not from the date of the call, but from the time notice is given.[65]

ASSIGNMENT OF UNPAID SUBSCRIPTION

126. Where liability on a subscription has become fixed by a valid call, or where no call is necessary, it may be assigned by the corporation like any other debt.

Where the whole amount of an unpaid subscription has been regularly called in by the corporation, it stands like any other liquidated demand, in favor of the corporation, and the debt may be assigned by the corporation, even before judgment, to the same extent as it could assign any other debt.[66] The assignment, in such a case, like all assignments of choses in action, is subject to equities, and cannot deprive the debtor of any rights as a stockholder which he would possess if no assignment had been made.[67] Where a subscription is made payable without the necessity for a call, it may be assigned at any time.

[63] Jones v. Sisson, 6 Gray (Mass.) 288; Schenectady & Saratoga Plank-Road Co. v. Thatcher, 11 N. Y. 102. And see Lexington & W. C. R. Co. v. Chandler, 13 Metc. (Mass.) 311; Elizabeth City Cotton Mills v. Dunstan, 121 N. C. 12, 27 S. E. 1001, 61 Am. St. Rep. 654; Crook v. International Trust Co., 32 App. D. C. 490.

[64] Gould v. Town of Oneonta, 71 N. Y. 298; Hawkins v. Citizens' Inv. Co., 38 Or. 544, 64 Pac. 320; McCoy v. World's Columbian Exposition, 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288; Jackson Fire & Marine Ins. Co. v. Walle, 105 La. 89, 29 South. 503; May v. Ullrich, 132 Mich. 6, 92 N. W. 493. So, where the comptroller of the currency orders the receiver of a suspended national bank to collect unpaid subscriptions, interest runs from the date of the order. Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168, 307.

[65] Hambleton v. Glenn, 72 Md. 331, 20 Atl. 115. Interest is not recoverable on a note given to pay for stock when the note does not so provide, and there is no agreement to pay it, and no call has been made. Seattle Trust Co. v. Pitner, 18 Wash. 401, 51 Pac. 1048.

[66] Wells v. Rodgers, 50 Mich. 294, 15 N. W. 462. [67] Id.

RELEASE AND DISCHARGE OF SUBSCRIBER

127. A subscriber may be released in whole or in part from his contract by the corporation with the consent of all the other shareholders; but he cannot withdraw and surrender his shares without the consent of the corporation; nor can he do so with the consent of the corporation, unless all the other subscribers consent; nor can he do so with the consent both of the corporation and all the other subscribers, if the amount due from him is required to pay corporate debts.

128. Violation of or noncompliance with its charter by a corporation, whereby its charter has become subject to forfeiture, does not release a subscriber.

129. Alteration or amendment of the charter of a corporation by the Legislature with the corporation's consent, will release a dissenting subscriber, except

(a) Where the amendment is immaterial, as regards its effect on the contract between the subscriber and the corporation.

(b) Where it is authorized by a provision in the charter or in a general law.

130. Abandonment of its business and franchises by a corporation will release a subscriber

(a) If the abandonment is complete and final, and

(b) If no rights of creditors intervene.

131. A subscriber is released by forfeiture of his stock to the corporation for nonpayment of assessments, but not by a sale of his shares to pay assessments, where, under the charter, he is liable for any deficiency.

132. A subscriber is released by a valid transfer of his shares, whereby the transferee takes his place, and assumes his liability as a shareholder.

Withdrawal and Release—Reduction of Shares

We have, in another place, considered the right of a subscriber to revoke or withdraw his subscription before it is accepted by the corporation, and we have seen that the right of revocation exists until such acceptance, except where the subscription is a step authorized by statute in the process of forming the corporation.[68] We come now to the question whether a subscriber whose offer

[68] Ante, p. 839.

has been accepted by the corporation, so as to create a contract, can withdraw, and thereby avoid liability on his subscription. It is clear that he cannot do so without the consent of the corporation —the other party to the contract. He cannot, merely by announcing his withdrawal, or withdrawal in part, from the company, and surrendering his shares, or some of them, absolve himself from liability or further liability on his subscription.[69] It follows that an assignment of his stock or a part of it to a fictitious person will not release him.[70] And he cannot withdraw from his contract, or reduce his shares, even with the consent of the corporation, if all of the other subscribers do not consent. The board of directors has no power to discharge the contract of the shareholder.[71] Nor can he withdraw or reduce his shares by virtue of an agreement between him and the corporation, made at the time of subscribing, for the corporation has no power to make such an agreement with a subscriber either at the time of subscribing or afterwards. Such an agreement would be a fraud upon the other subscribers.[72] A subscriber may, however, withdraw entirely, and surrender his shares, or reduce the number of shares subscribed for, with the consent both of the corporation and of all the other shareholders, if in doing so he inflicts no injury upon the creditors of the corporation.[73] But he cannot be permitted to do so after debts have been incurred which there are no means to pay other than the capital stock subscribed, for the capital stock, as against creditors, cannot be squandered or given away.[74] And where a subscriber is sued

[69] Ante, p. 339; Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344.

[70] Muskingum Valley Turnpike Co. v. Ward, 13 Ohio, 120, 42 Am. Dec. 191.

[71] Cartwright v. Dickinson, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. Rep. 910; Wills v. Nehalem Coal Co., 52 Or. 70, 96 Pac. 528. A subscriber cannot obtain a cancellation of his subscription, except by the unanimous consent of the other subscribers. Shelby County R. Co. v. Crow, 137 Mo. App. 461, 119 S. W. 435.

[72] Melvin v. Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199; White Mountains R. Co. v. Eastman, 34 N. H. 124; Hughes v. Antietam Mfg. Co. of Washington County, 34 Md. 316, 330; Gill v. Balis, 72 Mo. 432; Chouteau Ins. Co. v. Floyd, 74 Mo. 286; Cartwright v. Dickinson, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. Rep. 910; Jackson Fire & Marine Ins. Co. v. Walle, 105 La. 89, 29 South. 503; Huster v. Newkirk Creamery & Ice Co., 42 Okl. 440, 141 Pac. 790, L. R. A. 1915A, 390; ante, p. 377.

[73] Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74; Scottish Security Co.'s Receiver v. Starks, 117 Ky. 609, 78 S. W. 455; Cartwright v. Dickinson, supra. The validity of the cancellation of a subscription to the stock of a corporation whose chief office is in the state is governed by its laws, though the incorporation was under the laws of another state. Scottish Security Co.'s Receiver v. Starks, supra.

[74] Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Potts

by a creditor or receiver of the corporation on his original subscription, and claims in defense that the number of his shares was reduced, or that he withdrew, it is incumbent on him to show that it was at a time when it might lawfully be done.[75] Even if a subscriber can claim a discharge on the ground that he offered to pay for his stock, and the officers of the corporation refused to receive payment, or to issue him a certificate, he cannot do so unless he treats it as a discharge. If he does not so treat it, but continues active in the company's business until it becomes insolvent, he will be liable.[76] As part of a bona fide compromise of a dispute, a subscriber may always be released.[77]

Violation of Charter by Corporation—Mismanagement by Officers and Agents

Failure of a corporation, after it has been organized, to comply with the provisions of its charter, or acts done in excess of its powers and in violation of its charter, whereby the charter has become subject to forfeiture at the instance of the state, cannot be set up by a shareholder to defeat an action on his subscription, either by the corporation itself or by its creditors, for, as has been shown in a previous chapter, it is exclusively for the state to determine whether it will exercise its prerogative of forfeiting or annulling the charter.[78] Nor does the mere mismanagement of the

v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135; Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Phœnix Warehousing Co. v. Badger, 67 N. Y. 294; Bouton v. Dement, 123 Ill. 142, 14 N. E. 62; post, p. 687. It is a good defense to an action by the receiver of a corporation against a stockholder for balance claimed to be due on his stock, that, after the time limited for payment under the call of the directors, the stockholders and the corporation, then a going concern, being in dispute over the amount due on the stock, both surrendered part of their claim, and he made a payment to it of a certain sum on agreement that it was to be in full of all claims on the stock; such a compromise being good against creditors of the corporation. New Haven Trust Co. v. Nelson, 73 Conn. 477, 47 Atl. 753.

[75] Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74. An agreement with the corporation by which the subscriber paid to it less than the full amount of his subscription in full satisfaction is not a defense, when there is no consideration for the release. World's Fair Excursion & Transportation Boat Co. v. Gasch, 162 Ill. 402, 44 N. E. 724. And see United Growers Co. v. Eisner, 22 App. Div. 1, 47 N. Y. Supp. 906.

[76] Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135.

[77] New Albany v. Burke, 11 Wall. 96, 20 L. Ed. 155.

[78] Ante, p. 299; Mississippi, O. & Red River R. Co. v. Cross, 20 Ark. 443; Central Plankroad Co. v. Clemens, 16 Mo. 359; Agricultural Branch R. Co. v. Winchester, 13 Allen (Mass.) 29; Little v. Obrien, 9 Mass. 423; Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181; Milford & Chillicothe Turnpike Co. v. Brush, 10 Ohio, 111, 36 Am. Dec. 78; Cravens v. Eagle Cotton

affairs of the corporation by its officers and agents warrant the withdrawal therefrom of stockholders, and the repudiation of the obligations assumed by them as such.[79]

Such misconduct furnishes no reason why the subscriber shall not carry out his own contract. The shareholders' correct remedy in such cases is by suit for injunction,[80] or, in a proper case, by suit to hold the officers who are guilty of the wrongful acts liable to the corporation.[81]

Alteration or Amendment of Charter

It is well settled that an amendment of the charter of a corporation subsequent to subscriptions to its capital stock, whereby the objects and purposes of the corporation are materially enlarged or changed, will release from liability a subscriber who does not assent thereto, though the corporation and the other shareholders consent, unless the amendment was authorized by some provision in the charter or in the general laws.[82] In Proprietors of Union Locks and Canals v. Towne,[83] the original charter of a corporation empowered it to render the Merrimac river navigable between certain points, and for that purpose to purchase land, not exceeding six acres, and to collect tolls for forty years not averaging over twelve per cent. on the capital invested. After the defendant had subscribed for shares, an amendatory act was passed, on the petition of the corporation, abolishing all limitation upon the amount and duration of the toll collected, and authorizing the corporation to purchase and hold one hundred acres of land. The defendant did not assent to this alteration, and it was therefore held that he was not liable on his subscription. By his subscription it was said, in effect, the defendant entered into a special contract with the corporation, the terms of which contract were limited by the specific provisions, rights, and liabilities, detailed in the act of incor-

Mills Co., 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298; McCoy v. World's Columbian Exposition, 87 Ill. App. 605, affirmed 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288; Chetlain v. Republic Life Ins. Co., 86 Ill. 220; United States Vinegar Co. v. Foehrenbach, 148 N. Y. 58, 42 N. E. 403; Cartwright v. Dickinson, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. Rep. 910.

[79] American Building & Loan Ass'n v. Rainbolt, 48 Neb. 434, 67 N. W. 493; Oldham v. Mt. Sterling Imp. Co., 103 Ky. 529, 45 S. W. 779.

[80] Ante, p. 205; post, p. 482.

[81] Post, p. 482.

[82] Proprietors of Union Locks & Canals v. Towne, 1 N. H. 44, 8 Am. Dec. 32; Hartford & N. H. R. Co. v. Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354; Middlesex Turnpike Corp. v. Locke, 8 Mass. 268; note, 7 Columbia Law Rev. 598–601; ante, p. 260; post, p. 565.

[83] 1 N. H. 44.

poration; and, to make a change in this contract, the assent of both parties was indispensable.[84]

An act altering the charter of a corporation, and accepted by the corporation, does not release a dissenting subscriber from liability on his subscription, where the corporation has been enjoined from proceeding under the amendment, at the suit of another dissenting shareholder, and has, in effect, abandoned the act, and proceedings under it.[85]

If alteration or amendment of the charter is authorized by a provision therein or in the general laws, as explained in another chapter,[86] this provision is a part of the subscriber's contract, and an alteration or amendment in accordance with the provision will not, according to the weight of authority, discharge him from liability.[87] And it is well settled that a subscriber will not be discharged by immaterial alterations or amendments, under any circumstances, though there is considerable diversity of opinion as to what alterations are immaterial.[88] An amendment of a charter extending the time for construction of a railroad, it has been declared, is not fundamental.[89] It is held in some states that a subscriber will not be discharged by a material alteration made in order to facilitate the execution of the object for which the corporation was originally established, and which is beneficial to him, or clearly not prejudicial. As to this, however, there is much diversity of opinion. The question is considered in treating of the power of the corporation to bind dissenting stockholders.[90]

Loss or Abandonment of Business, Property, or Franchises by a Corporation

Abandonment of its business, property, or franchises by a corporation will release a subscriber from further liability on his subscription, where there are no debts for the payment of which unpaid subscriptions must be enforced. But such abandonment is no de-

[84] This subject will be considered at some length in a subsequent chapter, where we shall call attention to points on which the decisions are in conflict. See post, p. 565.

[85] Rutland & B. R. Co. v. Thrall, 35 Vt. 536.

[86] Ante, p. 269.

[87] Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336, 348; Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897; Nugent v. Putnam County, 19 Wall. 241, 22 L. Ed. 83; Illinois River R. Co. v. Zimmer, 20 Ill. 654; Schenectady & Saratoga Plank-Road Co. v. Thatcher, 11 N. Y. 102; Fairfax v. Bloch, 130 La. 761, 58 South. 563. But see Kenosha, R. & R. I. R. Co. v. Marsh, 17 Wis. 13.

[88] Post, p. 565.

[89] Taggart v. Western Maryland R. Co., 24 Ind. 563, 89 Am. Dec. 760 note.

[90] Post, p. 565.

fense where it is sought to enforce subscriptions for the benefit of creditors.[91] To release a shareholder, the abandonment must be complete and final, and no rights of creditors must intervene. In McMillan v. Maysville & L. R. Co.[92] it was therefore held that a subscriber to stock in a railroad company was not released from liability on his subscription by the facts that the company had suspended operations on its road, that it would require large additional expenditure of money and labor to complete its construction, and that the means of the company were wholly inadequate to accomplish its object. "The defendant," it was said, "could only be absolved from liability for the payment of his stock by alleging and proving a final abandonment of the work by the company, and also that its payment was not necessary for the purpose of satisfying any existing demand against the corporation."

Mere delay in prosecuting the work for which the corporation was organized is not an abandonment, and will not discharge subscribers. Thus the mere failure of a railroad company to complete its road and extend it to the terminus named in the charter will not release a subscriber on the ground that it has abandoned the completion of its road, where there has been no formal or legal abandonment of that part of the road.[93] And a subscriber to the capital stock cannot defeat his liability on such subscription "by showing that the corporation was not, at the time of trial, actively engaged in the business for which it was organized." [94]

A sale of the corporate property, and a suspension of business for the time being, will not relieve a stockholder from responsibility on his stock subscription.[95]

It is well settled that neither the failure of a railroad company to complete its road nor the nonuser of a part of it constitutes a defense to a suit on a subscription to its capital stock, unless such failure or nonuser violates some condition to that effect expressed in the subscription.[96] A shareholder is not released from liability for his unpaid subscription by the fact that the property and franchises of the corporation have been sold under foreclosure of a mortgage thereon, for the unpaid subscriptions continue part of the assets of the corporation for the benefit of all the stockholders and

[91] Phœnix Warehousing Co. v. Badger, 67 N. Y. 294.

[92] 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181.

[93] Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294.

[94] Huster v. Newkirk Creamery & Ice Co., 42 Okl. 440, 141 Pac. 790, L. R. A. 1915A, 390.

[95] Milwaukee Smelting & Refining Co. v. Lindenberger, 142 Wis. 273, 124 N. W. 272.

[96] Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897.

of creditors.[97] Clearly, a sale of its property by a railroad company or other corporation, under a power conferred upon it by the provisions of its charter or of a law in force at the time of a subscription, does not release a subscriber, for such provisions form a part of his contract.[98]

Forfeiture of Shares

A subscriber, who has forfeited his shares for nonpayment of assessments, where the charter provides for a forfeiture, and not merely for a sale which will leave him liable for a deficiency, is released from any further liability, either to the corporation or to its creditors. Upon such a forfeiture he ceases to be a shareholder for any purpose. This question has been considered in a previous section.[99]

Transfer of Shares

Shares of stock are transferable by the holder without the consent of the other shareholders or of the corporation; and the effect of the transfer, provided it is valid, so that the transferee takes the transferror's place, and assumes his liability, is, in most jurisdictions, to release the transferror from any further liability as a shareholder. This question will be dealt with more at length in a subsequent section.[1]

ESTOPPEL OF SUBSCRIBER

133. A person who subscribes for stock in a corporation, and takes part in its organization or management, is generally estopped to deny the validity of his subscription.

We have seen in a previous chapter that one who subscribes for stock in a corporation after its organization or attempted organization is estopped to deny its corporate existence, and to say that it has not been legally organized, for the purpose of defeating an action on his subscription; since by contracting with the alleged corporation he admits its corporate existence.[2] We have also seen that this rule has no application to one who subscribes for stock previous to and in anticipation of incorporation, and who has not, by his subsequent acts acquiesced in the mode of incorporation, but

[97] Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294.

[98] Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897. Cf. South Georgia & F. R. Co. v. Ayres, 56 Ga. 230.

[99] Ante, p. 394.

[1] Post, p. 517.

[2] Ante, pp. 112–113, and note 49.

that in such a case it is an implied condition of his subscription that the proposed corporation shall be legally and regularly organized; and, if it is not, he may set it up as a defense to a suit on his subscription.[3] If, however, a subscriber to stock in a corporation to be formed takes active part in its organization, or in its management after organization, he cannot be heard to say that it was not legally organized when sued upon his subscription either by the corporation or by its creditors.[4] These questions all relate to estoppel to deny the legality of organization and existence of the corporation.

A subscriber may also be estopped to deny the validity of his subscription. It may be laid down as a general rule that one who subscribes for stock in a corporation, and takes part in its organization or management, cannot defeat an action on his subscription by showing that in subscribing he failed to comply with the formalities prescribed by the charter or by statute, or that the subscription was for any other reason invalid.[5]

[3] Id. [4] Id.

[5] Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; President, etc., of Centre & K. Turnpike Road Co. v. President, etc., of McConaby, 16 Serg. & R. (Pa.) 140; Nickum v. Burckhardt, 30 Or. 464, 47 Pac. 788, 48 Pac. 474, 60 Am. St. Rep. 822; Allen v. Rand, 77 Minn. 110, 79 N. W. 606, 46 L. R. A. 618.

CHAPTER XI

MEMBERSHIP IN CORPORATIONS (Continued)

134. Right of Members to Inspect Books and Papers of Corporation.
135. Right to Vote at Meetings.
136–137. Profits and Dividends.
138–140. Increase of Capital Stock.
141. Shareholders' Right to Preference.
142–145. Preferred Stock.
146–148a. Watered and Bonus Stock.
149–151a. Actions by Stockholders for Injuries to Corporation—Interference in Management.
152. Expulsion of Members.

RIGHT OF MEMBERS TO INSPECT BOOKS AND PAPERS OF CORPORATION

134. A stockholder has the right to inspect the books and papers of the corporation, either personally or by an agent, provided he does so for a proper purpose, and at a proper time, and at a proper place after due request. And, if the right is denied him, it may be enforced by a writ of mandamus either to the corporation or to the custodian of the books and papers; or the stockholder may maintain an action for any damages sustained.

At common law, the right of inspection is not absolute, so that it can be exercised for curiosity, or for speculative purposes, or vexatiously. By statute, however, in some states, an unlimited right has been conferred.

It was originally held in England that the right of inspection could be exercised, against the will of the managing officers of a corporation, only where there was a specific dispute about some corporate matter between the stockholder and the management.[1] This doctrine has been modified by statute in England,[2] and was never adopted in this country, the cases which go furthest in that direction merely holding that a dispute as to the alleged mismanagement of the corporation is enough to entitle the stockholder to an examination of the accounts to see whether there is ground for

[1] King v. Masters and Wardens of Merchant Tailors' Co., 2 Barn. & Adol. 115.

[2] St. 8 & 9 Vict. c. 16, §§ 117, 119; St. 25 & 26 Vict. c. 89, Table A 78.

an action.[3] It is not necessary that there should be any particular dispute to entitle the stockholder to exercise this right. It is enough that, acting in good faith for the protection of the corporation and his own interests, he desires to ascertain the condition of the corporation's business.[4] This right of a stockholder to inspect the corporate books and records rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders who really are the owners of the property.[5] The stockholders should have a right to ascertain whether the managers are faithful, honest, and intelligent in the performance of their duties.[6]

It is now settled that any stockholder[7] of a corporation is entitled to inspect the books and papers of the company for proper purposes and at proper times at a proper place.[8] If the right is wrongfully denied him by the corporation or its officers, he may in a proper case maintain an action for any damages which he may have sustained thereby,[9] or he may enforce his right by petition for

[3] Commonwealth v. Phœnix Iron Co., 105 Pa. 111, 51 Am. Rep. 184; Phœnix Iron Co. v. Commonwealth, 113 Pa. 563, 6 Atl. 75.

[4] Guthrie v. Harkness, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. Ed. 130, 4 Ann. Cas. 433; In re Steinway, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461; State v. Pacific Brewing & Malting Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; Varney v. Baker, 194 Mass. 239, 80 N. E. 524, 10 Ann. Cas. 989; Powelson v. Tennessee Eastern Electric Co., 220 Mass. 380, 107 N. E. 997.

[5] Wight v. Heublein, 111 Md. 649, 75 Atl. 507.

[6] Varney v. Baker, supra; Wight v. Heublein, supra.

[7] The person demanding inspection must be a stockholder at the time. State v. Whited & Wheless, 104 La. 125, 28 South. 922. The right is purely a personal one, depending on the ownership of stock. In re Hastings, 120 App. Div. 756, 105 N. Y. Supp. 834. An executor, owning as such half of the capital stock of a corporation and sole legatee of decedent, is the only one personally interested, and is entitled to the right of inspection. In re Hastings, 128 App. Div. 516, 112 N. Y. Supp. 800, affirmed 194 N. Y. 546, 87 N. E. 1120. A holder of a small amount of stock has the same right as the owner of a large amount. Richmond v. Hill, 148 Ill. App. 179.

[8] Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 117 N. W. 893; State ex rel. English v. Lazarus, 127 Mo. App. 401, 105 S. W. 780; People v. Consolidated Fire Alarm Co., 142 App. Div. 753, 127 N. Y. Supp. 348; Kuhbach v. Irving Cut Glass Co., 220 Pa. 427, 69 Atl. 981, 20 L. R. A. (N. S.) 185. The inspection should not be made unnecessarily to interfere with the corporation's work. The business hours of a corporation are reasonable and proper hours in which to inspect its books. Clawson v. Clayton, 33 Utah, 266, 93 Pac. 729.

[9] Legendre v. New Orleans Brewing Ass'n, 45 La. Ann. 669, 12 South. 837, 40 Am. St. Rep. 243. The error of the secretary in refusing to permit inspection is not of itself ground for damages against the corporation. Legendre v. New Orleans Brewing Ass'n, supra. Cf. Fuller v. Alexander Hollander & Co., 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456. An action

a writ of mandamus to compel the corporation or the officer having charge of the books and papers to permit an inspection,[10] or he may sue for the penalty where one is prescribed by statute.[11] The writ may issue against the officer having the custody of the books, on his refusal to allow an inspection, and the corporation is not a necessary party.[12] That corporate books are in another state is no defense to an alternative writ of mandamus to produce them for inspection.[13]

In the case of a partnership, every partner has an absolute and unrestricted right to examine the books and papers of the firm; but the right of stockholders of a corporation in this respect is not unlimited.[14] However, a by-law vesting in the directors the discretion of denying a stockholder the right to inspect and making their decision final, is unreasonable and unlawful.[15] By the weight of authority, at common law, the court will not issue a writ of mandamus to compel the corporation to allow an inspection, unless the petitioner shows some good reason for making an examination.

for damages lies against the officers. Bourdette v. Steward, 52 La. Ann. 1333, 27 South. 724; Id., 107 La. 258, 31 South. 630.

[10] Lyon v. American Screw Co., 16 R. I. 472, 17 Atl. 61; Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274; People v. Throop, 12 Wend. (N. Y.) 183; Cockburn v. Union Bank of Louisiana, 13 La. Ann. 289; Foster v. White, 86 Ala. 467, 6 South. 88; Stone v. Kellogg, 165 Ill. 192, 46 N. E. 222, 56 Am. St. Rep. 240; In re Steinway, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461; State v. Pacific Brewing & Malting Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; Fuller v. Alexander Hollander & Co., 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456; Neubert v. Armstrong Water Co., 211 Pa. 582, 61 Atl. 123; Varney v. Baker, 194 Mass. 239, 80 N. E. 524, 10 Ann. Cas. 989. The court may compel officers of a national bank in liquidation on expiration of its charter to exhibit books, papers, and assets to the stockholders. Tuttle v. Iron Nat. Bank, 170 N. Y. 9, 62 N. E. 761. As to cases where equity will grant relief, see Coquard v. National Linseed Oil Co., 171 Ill. 180, 49 N. E. 563; Trimble v. American Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912; Maeder v. Buffalo Bill's Wild West Co. (C. C.) 132 Fed. 280. In Ohio the remedy is by injunction. Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707.

[11] Lewis v. Brainerd, 53 Vt. 519; Henry v. Babcock & Wilcox Co., 196 N. Y. 302, 89 N. E. 942, 134 Am. St. Rep. 835.

[12] Swift v. State, 7 Houst. (Del.) 338, 6 Atl. 856, 40 Am. St. Rep. 127; People v. Throop, 12 Wend. (N. Y.) 183; Foster v. White, 86 Ala. 467, 6 South. 88; State v. Bergenthal, 72 Wis. 314, 39 N. W. 566. In some jurisdictions a proceeding by bill in equity is authorized by statute. Thus, see POWELSON v. TENNESSEE EASTERN ELECTRIC CO., 220 Mass. 380, 107 N. E. 997, Wormser Cas. Corporations, 264.

[13] State v. Jessup & Moore Paper Co. (Del.) 72 Atl. 1057.

[14] See Lyon v. American Screw Co., supra. As to a director's right of access to all the corporate books, see Lawton v. Bedell (N. J. Ch.) 71 Atl. 490.

[15] State v. Jessup & Moore Paper Co. (Del.) 72 Atl. 1057.

The writ will not be issued to enable a stockholder to make an examination for the purpose of accomplishing purely personal or speculative ends, nor will it be issued "at the caprice of the curious or suspicious";[16] but the petitioner must show a specific and a proper purpose.[17] This rule sufficiently protects the stockholder in all his substantial rights, and at the same time prevents an undue interference with the company in the conduct of its affairs. If a stockholder shows no good cause for a writ of mandamus, he is not injured by its refusal, and a company should not be hampered by frivolous and vexatious demands by one who may have secured stock in hostility to its interests.[18] A sound judgment will be exercised to determine whether the petitioner is acting for an honest and reasonable purpose, not adverse to the interests of the corporation.[19] "In issuing the writ of mandamus the court will exercise a sound discretion and grant the right under proper safeguards to protect the interests of all concerned. The writ should not be granted for speculative purposes or to gratify idle curiosity or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes."[20] A stockholder showing a prima facie case of fraud, and for the purpose of obtaining information to enable him to file a bill to obtain relief against the fraud, is entitled to an inspection.[21] And the mere fact that he is hostile to and on bad terms with the officers of

[16] Commonwealth v. Phœnix Iron Co., 105 Pa. 111, 51 Am. Rep. 184.

[17] Lyon v. American Screw Co., supra; People v. Lake Shore & M. S. R. Co., 11 Hun (N. Y.) 1, affirmed in Sage v. Same, 70 N. Y. 220; Commonwealth v. Phœnix Iron Co., supra; Phœnix Iron Co. v. Commonwealth, 113 Pa. 563, 6 Atl. 75; State v. Einstein, 46 N. J. Law, 479; Commonwealth v. Empire Pass. Ry. Co., 134 Pa. 237, 19 Atl. 629. "The right," said the Pennsylvania court, "is not to be exercised to gratify curiosity, or for speculative purposes, but in good faith, and for a specific, honest purpose, and where there is a particular matter in dispute, involving and affecting seriously the rights of the relator as a stockholder." Phœnix Iron Co. v. Commonwealth, supra. In Commonwealth v. Empire Pass. Ry. Co., supra, it was held that mandamus would not lie to compel a corporation to allow a stockholder to make a list of the other stockholders, in order that they might be induced to join him in a suit which he proposed to institute against the corporation, and to share with him the expense of such suit. It must appear that the right which the relator seeks to exercise is germane to his status as a stockholder. O'Hara v. National Biscuit Co., 69 N. J. Law, 198, 54 Atl. 241.

[18] Lyon v. American Screw Co., supra.

[19] Varney v. Baker, 194 Mass. 239, 80 N. E. 524, 10 Ann. Cas. 989. And see, POWELSON v. TENNESSEE EASTERN ELECTRIC CO., 220 Mass. 380, 107 N. E. 997, Wormser Cas. Corporations, 264.

[20] Guthrie v. Harkness, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. Ed. 130, 4 Ann. Cas. 433, per Justice Day.

[21] Phœnix Iron Co. v. Commonwealth, 113 Pa. 563, 6 Atl. 75.

the corporation does not deprive him of the right.[22] But a stockholder has no right of inspection where his purpose in making the examination is improper, or hostile to the interests of the corporation.[23] Thus it has been held that not even a director of a corporation has the right to examine its letter files for the purpose of making memoranda for the benefit of a new and rival company in the organization of which he is interested, and that the secretary, in forcibly taking them from him, is not guilty of an assault and battery.[24]

One holding stock in different corporations which are competitors is entitled to inspect the books of any of the corporations, provided his purposes are reasonable.[25] So, also, the fact that a stockholder manufactures musical instruments similar to those manufactured by the corporation, does not affect his rights as owner of 43 per cent. of the corporation's stock to examine its books, under a claim that the company was being mismanaged.[26] But the right of a stockholder to inspect the books will be controlled, so as to safeguard the corporation from revealing its secret process in the manufacture of its product, where the stockholder is the active manager of a competitor.[27]

It has been said, in effect, that a stockholder is entitled to inspection, though his only object is to ascertain whether the affairs of the corporation have been properly conducted by the directors or managers, and that he need not first show that there has been mismanagement, or even that there are grounds for suspecting it.[28]

[22] Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274.

[23] State v. Middlesex Banking Co., 87 Conn. 483, 88 Atl. 861.

[24] Heminway v. Heminway, 58 Conn. 443, 19 Atl. 766. See, also, In re Coats, 73 App. Div. 178, 76 N. Y. Supp. 730; People v. Keeseville, A. C. & L. C. R. Co., 106 App. Div. 349, 94 N. Y. Supp. 555.

[25] State ex rel. English v. Lazarus, 127 Mo. App. 401, 105 S. W. 780; Furst v. Rawleigh, 154 Ill. App. 522; Hodder v. George Hogg Co., 223 Pa. 196, 72 Atl. 553.

[26] People v. Ludwig & Co., 126 App. Div. 696, 111 N. Y. Supp. 94.

[27] State ex rel. English v. Lazarus, supra.

[28] "Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained in some way without the books that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right, in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the record of their transactions as trustees for the stockholders." Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274, 278. See, also, State v. Pacific Brewing & Malting Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707; Varney v. Baker, supra.

By the better opinion, however, mere suspicion, without grounds therefor, does not entitle him to a writ of mandamus.[29]

The right of inspection need not be exercised by the stockholder personally; but may be exercised by an agent, as by a clerk, or an attorney, or an expert accountant. The right is personal in the sense that only a stockholder possesses and can enjoy it, but the inspection and examination may be made by another for him; otherwise it would often be unavailing.[30] Transcripts may be made from the books for subsequent use,[31] and the stockholder may avail himself of stenographic assistance in making these.[32]

Often the right of inspection is expressly given by statute or by constitution, or by the charter or by-laws of the corporation, and under some provisions the right is broader than at common law. In Alabama the Code declares that "the stockholders of all private corporations have the right of access to, of inspection and examination of, the books, records, and papers of the corporation, at reasonable and proper times." Code 1886, § 1677. Under such a statute it was held by the Alabama court that any stockholder has an absolute right of inspection, subject only to the express limitation that the right shall be exercised at reasonable and proper times, and to an implied limitation that it shall not be exercised from idle curiosity, or for improper or unlawful purposes. In other respects the right is absolute. "The shareholder is not required to show any reason or occasion rendering an examination opportune or proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purposes. If he has reason to believe that they are improper or illegitimate, and refuses the inspection on this ground, he assumes the burden to prove them as such." [33] In some states, under the

[29] See cases cited in note 17, supra.

[30] Foster v. White, 86 Ala. 467, 6 South. 88; State v. Bienville Oil Works Co., 28 La. Ann. 204; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707; State v. Citizens' Bank of Jennings, 51 La. Ann. 426, 25 South. 318 (executrix); POWELSON v. TENNESSEE EASTERN ELECTRIC CO., 220 Mass. 380, 107 N. E. 997, Wormser Cas. Corporations, 264.

[31] State ex rel. Haeusler v. German Mutual Life Ins. Co. of St. Louis, 169 Mo. App. 354, 152 S. W. 618; Varney v. Baker, supra.

[32] State ex rel. Haeusler v. German Mutual Life Ins. Co. of St. Louis, supra; State ex rel. Johnson v. St. Louis Transit Co., 124 Mo. App. 111, 100 S. W. 1126.

[33] Foster v. White, 86 Ala. 467, 6 South. 88. For other cases in which the right was expressly given, in absolute terms, by a statute, or by the charter or by-laws, see Cotheal v. Brouwer, 5 N. Y. 562; People v. Pacific Mail S. S. Co., 50 Barb. (N. Y.) 280; State v. Bergenthal, 72 Wis. 314, 39 N. W. 566; Winter v. Baldwin, 89 Ala. 483, 7 South. 734. See, also, Cobb v. Lagarde,

statute, it is even held that the right is absolute, irrespective of the stockholder's purpose or motive.[84] In Illinois the statute declares that "every stockholder in such corporation shall have the right at all reasonable times, by himself or by his attorney, to examine the records and books of account of the corporation." Hurd's Rev. St. 1913, c. 32, § 13. The Supreme Court of Illinois held that where the right to inspect is thus conferred in absolute terms, the motive in demanding an inspection is immaterial, as is also the fact that the stockholder desires the information to injure the corporation, the court saying: "A clear legal right given by a statute cannot be defeated by showing an improper motive. If this were so, the stockholder would be driven from a certain definite right given him by the statute, to the realm of uncertainty and speculation." [85] On the other hand, it was recently held in New York, by a court divided three to two, that the writ of mandamus could be withheld, in the judicial discretion, where the stockholder's purpose was sinister, though the statute recognized an absolute right in the stockholder. The majority conceded that the stockholder would be entitled to recover the statutory penalty, but refused to aid by issuing the writ.[86]

Sometimes, by statute, a corporation is made liable to a penalty for refusal to allow a stockholder to inspect its books, and officers or agents who are guilty of such refusal are subjected to a criminal prosecution. No damage need be shown to entitle a stockholder to recover the penalty, for it is imposed as a punishment for the violation of duty, and its recovery is not dependent upon any pecuniary loss.[87] It is settled that the motives of a stockholder, how-

129 Ala. 488, 30 South. 326; Stone v. Kellogg, 165 Ill. 192, 46 N. E. 222, 56 Am. St. Rep. 240; State v. New Orleans Gaslight Co., 49 La. Ann. 1556, 22 South. 815; Weihenmayer v. Bitner, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707; Johnson v. Langdon, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156. The statute applies to national banks. Winter v. Baldwin, supra.

[84] Venner v. Chicago City R. Co., 246 Ill. 170, 92 N. E. 643, 138 Am. St. Rep. 229, 20 Ann. Cas. 607; Wight v. Heublein, 111 Md. 649, 75 Atl. 507; Clawson v. Clayton, 33 Utah, 266, 93 Pac. 729.

[85] Venner v. Chicago City R. Co., supra.

[86] PEOPLE EX REL. BRITTON v. AMERICAN PRESS ASS'N, 148 App. Div. 651, 133 N. Y. Supp. 216, Wormser Cas. Corporations, 266. And see State v. Monida & Yellowstone Stage Co., 110 Minn. 193, 124 N. W. 971, 125 N. W. 676. In Massachusetts, the court has as yet not decided whether the stockholder's statutory right is absolute. See POWELSON v. TENNESSEE EASTERN ELECTRIC CO., 220 Mass. 380, 107 N. E. 997, Wormser Cas. Corporations, 264.

[87] Kelsey v. Pfaudler Process Fermentation Co., 51 Hun, 636, 3 N. Y. Supp.

ever improper and wrongful, constitute no answer to an action by him to recover the penalty prescribed by statute where the statute confers an absolute right upon the stockholder.[88]

RIGHT TO VOTE AT MEETINGS

135. A stockholder has a right to vote at corporate meetings.

This right will be considered at length when we come to treat of the management of the corporation, and of stockholders' meetings.

PROFITS AND DIVIDENDS

136. A dividend is a fund which the corporation has set apart from its profits to be divided among its members.

137. The chief rules in relation to profits and dividends are as follows:

(a) A stockholder has no legal right to a share of the profits of the corporate business until a dividend is declared.

(b) But when a dividend is lawfully and fully declared, he acquires, as against the corporation, an absolute legal right to his share; and the declaration of the dividend cannot be revoked.

(c) A dividend can lawfully be declared only out of the surplus or net profits. The capital cannot be distributed.

(d) Whether a dividend shall be declared, even where there are profits, rests within the sound discretion of the directors; and they will be controlled in the exercise of this discretion at the suit of stockholders only where they abuse it, and act fraudulently, oppressively, or unreasonably.

(e) All who are stockholders at the time the dividend is declared are entitled to share therein in proportion to their stock, without regard to when the dividend was earned, or when they became stockholders; and the directors cannot discriminate between them.

723. The right to recover the penalty for such refusal is not waived by subsequently calling again, and making an examination. Id. The refusal must be willful. Lozier v. Saratoga Gas, Electric Light & Power Co., 59 App. Div. 390, 69 N. Y. Supp. 247. See, also, Kirkman v. Carlstadt Chemical Co., 36 Misc. Rep. 822, 74 N. Y. Supp. 865; Cox v. Paul, 175 N. Y. 328, 67 N. E. 586.

[88] Henry v. Babcock & Wilcox Co., 196 N. Y. 302, 89 N. E. 942, 134 Am. St. Rep. 835. Cf. PEOPLE EX REL. BRITTON v. AMERICAN PRESS ASS'N, supra, Wormser Cas. Corporations, 266.

(f) It is generally for the directors to determine how and when the dividend shall be payable.
  (1) They may make it payable in money or in property. If no mode of payment is specified, it is payable in lawful money.
  (2) They may pay it by issuing new stock, when authorized to increase the capital stock, and thus retain the surplus in the business. This is called a stock dividend.

(g) The corporation may set off against his share of the dividend a debt due by the owner of stock at the time it is declared.

(h) When a dividend has been declared,
  (1) A stockholder may maintain assumpsit against the corporation as for money had and received.
  (2) Or, in some cases, he may sue in equity.
  (3) Demand is necessary before suit.
  (4) Interest and the statute of limitations begin to run from the time of demand.
  (5) Mandamus will not lie to compel payment.
  (6) If a specific fund is set aside by the corporation for the payment of a dividend declared, a trust fund for the benefit of the stockholders is thereby created.

(i) Before a dividend has been declared
  (1) No action, as for a debt, can be maintained by a stockholder to recover a share of the profits.
  (2) But he may maintain a suit in equity to compel the corporation to declare and pay a dividend if it is wrongfully withheld.
  (3) Mandamus is not a proper remedy.

(j) If a dividend is wrongfully declared and paid, when there are no surplus profits,
  (1) The directors are not personally liable to the corporation or to creditors in the absence of a statute, if they acted in good faith, and without negligence.
  (2) But they are liable if they acted fraudulently or negligently.
  (3) The property or funds wrongfully distributed may be followed and recovered by the corporation or by creditors in the hands of any one who is not an innocent purchaser or recipient for value.

If the business of a corporation is successful, and profits are realized, it sets apart from time to time, from these profits, a fund to be divided among its members in proportion to the amount of their

shares. This fund is called a dividend. The term, as applied to corporate stock, has a technical, but well understood, meaning. It indicates "corporate funds derived from the business and earnings of the corporation, appropriated by a corporate act to the use of and to be divided among the stockholders." [39] "Dividends" and "profits" are not synonymous terms. Dividends are paid out of the profits, but they can exist only where they have been declared or set apart by the directors out of the profits. Profits are not dividends until, as expressed in the above quotation, they are "appropriated by a corporate act" to be divided among the shareholders. In Hyatt v. Allen [40] the plaintiff sold to the defendant stock in a corporation, reserving "all profits and dividends of and upon such stock" up to a certain time. A dividend having been partly earned before the time specified, but not declared until afterwards, it was held that the plaintiff was not entitled to any part of it under the reservation in the contract, for there was no dividend until it was declared.

Until dividends are declared, the surplus profits are part of the assets of the company, and do not belong to the stockholders individually, nor is there any debt due from the corporation to them, even though the circumstances are such that a dividend ought to be declared.[41] It follows that, where a corporation becomes insolvent before its surplus fund has been set apart for the stockholders by declaring a dividend, the surplus, as well as the capital stock, must, if necessary, be applied to satisfy its debts, to the exclusion of any claim by the stockholders.[42] So, until a dividend has been declared, the stockholders cannot maintain an action against the corporation to recover their proportion of a surplus as a debt, their remedy being by suit in equity to compel the directors to declare and pay a dividend.[43]

It was said in an Alabama case that "dividends unpaid are assets of the company and liable for its debts," [44] but this is not true if

[39] Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449.

[40] 56 N. Y. 553, 15 Am. Rep. 449.

[41] Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 496, 2 L. R. A. 648; Scott v. Eagle Fire Co., 7 Paige (N. Y.) 198; Phelps v. Farmers' & Mechanics' Bank, 26 Conn. 269; Hill v. Atoka Coal & Mining Co. (Mo.) 21 S. W. 508; Pyle v. Gallaher, 6 Pennewill (Del.) 407, 75 Atl. 373; In re Goetz's Estate, 236 Pa. 630, 85 Atl. 65; Guthrie's Trustee v. Akers, 157 Ky. 649, 163 S. W. 1117.

[42] Scott v. Eagle Fire Co., 7 Paige (N. Y.) 198.

[43] Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; post, p. 432, and cases there cited.

[44] Curry v. Woodward, 44 Ala. 305.

the dividend has been declared. It is only true of surplus profits not resolved to be used for dividends. When the directors of a corporation have lawfully declared a dividend from profits earned and received, the right of the stockholders to payment becomes vested, and there is a debt due them from the corporation; or, if money or other property equal to the amount of the dividend is specifically set apart as a fund appropriated to the payment of the dividend, the share of each stockholder therein is thereby severed from the common funds of the corporation, and becomes his individual property.[45] When a dividend is declared, the right of the stockholders thereto becomes vested, and the board of directors cannot afterwards, without their consent, revoke its action in declaring the dividend, and refuse to pay it.[46] Nor can insolvency of the corporation arising after the dividend has been declared and set apart defeat the right of the stockholders to their shares as against creditors.[47] To give the shareholders a vested right therein, the dividend must have been fully declared. Therefore it has been held in Massachusetts that, where the fact that a dividend has been voted by the directors is not made public, nor communicated to the stockholders, and no fund is set apart for payment, the vote may be rescinded.[48] The Missouri appellate court has recently expressly repudiated the Massachusetts holding, saying: "The decision of that case can only be sustained upon the theory that the declaration of the dividend did not create a debt to the stockholders, for if a debt was thereby created, it is preposterous to say that such debt can be canceled by the action of the debtor without the consent of the creditor. In fact, we understand the opinion, inasmuch as

[45] Beers v. Bridgeport Spring Co., 42 Conn. 17; King v. Paterson & H. R. R. Co., 29 N. J. Law, 82, affirmed 29 N. J. Law, 504; Le Roy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657; In re Le Blanc, 14 Hun (N. Y.) 8; Id., 75 N. Y. 598; SEARLES v. GEBBIE, 115 App. Div. 778, 101 N. Y. Supp. 199, affirmed 190 N. Y. 533, 83 N. E. 1131, Wormser Cas. Corporations, 272; Ford v. Easthampton Rubber Thread Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. Rep. 462; Wheeler v. Northwestern Sleigh Co. (C. C.) 39 Fed. 347; In re Severn-Wye & Severn Bridge Co., 74 Law Times (N. S.) 219; Hunt v. O'Shea, 69 N. H. 600, 45 Atl. 480; Stanwood v. Sterling Metal Co., 107 Ill. App. 569; Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707.

[46] Beers v. Bridgeport Spring Co., 42 Conn. 17. Cf. Albany Fertilizer & Farm Improvement Co. v. Arnold, 103 Ga. 145, 29 S. E. 695.

[47] Le Roy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657; In re Le Blanc, 14 Hun (N. Y.) 8; Id., 75 N. Y. 598. Even if no fund has been set apart for the payment of the dividend, the stockholders may share ratably with the general creditors of the corporation, provided the dividend was legally declared. Lowne v. American Fire Ins. Co., 6 Paige (N. Y.) 482.

[48] Ford v. Easthampton Rubber Thread Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. Rep. 462.

it is there asserted that 'the passage of the vote did not constitute an actual contract of the corporation with the stockholder,' as holding that the declaration of the dividend did not create a debt; and if this be its holding, it stands out boldly, single and alone in this country, against an unbroken line of cases." [49] The Massachusetts and Missouri courts seem to understand the term "declaration" in quite different senses; the one requiring publication, so to speak, of the vote of the directors, whereas the other regards the vote per se of the directors as amounting to the declaration of the dividend, thereby creating a debt on the part of the corporation to the stockholders in the amount of their respective shares thereof.

When Dividend May be Declared

There are varying statutory or constitutional provisions in a number of states expressly restricting the right to pay dividends. Thus it is provided in some states that no dividend shall be paid except out of net profits properly applicable thereto, and which shall not in any way impair or diminish the capital; or except from surplus profits, arising from the business of the corporation; or if the payment of it will leave insufficient funds to meet the liabilities of the corporation, or will diminish the amount of its capital stock, etc. The object of these provisions is to prevent a corporation from paying dividends when there are no available funds, and to prevent it from impairing its capital by distributing any part of it among the stockholders. The statutes generally impose penalties on the directors for violating their provisions to which they are not liable at common law; but the principle upon which they are based, and the prohibition which they express, are fully recognized by the common law. Even at common law, dividends can lawfully be declared only out of the surplus or net profits.

The terms "net profits" or "surplus profits" mean that which remains as the clear gain of the corporation after deducting the capital invested, the expenses incurred, and the losses sustained.[50] A cash dividend is declarable out of surplus assets only, not reaching the capital.[51] As a rule, dividends cannot be declared out of borrowed money, for borrowed money is not profits;[52] but money might be borrowed temporarily for the purpose of paying div-

[49] McLaran v. Crescent Planing Mill Co., 117 Mo. App. 40, 93 S. W. 819.

[50] Park v. Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162; Main v. Mills, 6 Biss. 98, Fed. Cas. No. 8,974. See Miller v. Bradish, 69 Iowa, 278, 28 N. W. 594; Hubbard v. Weare, 79 Iowa, 678, 44 N. W. 915.

[51] Bishop v. Bishop, 81 Conn. 509, 71 Atl. 583; Fricke v. Angemeier, 53 Ind. App. 140, 101 N. E. 329.

[52] Davis v. Flagstaff Silver Mining Co. 2 Utah, 74, 88.

idends, if the corporation has used its current profits to make improvements for which it might have borrowed money.[53] "The net income of a corporation for dividend purposes cannot be determined until all taxes, depreciation, maintenance and up-keep expenditures have been deducted. Otherwise the dividend is not paid from the earnings but by a depreciation of the capital account." [54] Provision should always be made for renewal of plant and machinery.[55] Provision should also be made for future and contingent claims as well as all present indebtedness.[56] There should be considered "the result of the whole accounts fairly taken for the year, capital, as well as profit and loss." [57] A corporation, however, need not be entirely free from debt before declaring a dividend, since debts often represent investments in machinery or other property and do not necessarily show that the corporation has made no net profit.[58] In a recent case in New York, a corporation having a capital stock of $10,000 declared a dividend of 120 per cent. on it appearing that it had a surplus of over $13,000 in assets, the resolution for the dividend providing that creditors entitled to $9,000 should first be paid. The court held that before payment of such indebtedness a stockholder could not maintain an action for his share of the dividend.[59]

"Profits" consist of earnings actually received. It has, therefore, been held that interest accrued, but not payable, and interest accrued, but not paid, though secured by safe mortgages, and drawing interest, are not "surplus profits," within the meaning of a statute prohibiting a corporation from paying dividends except from surplus profits.[60]

The capital stock of an insurance company is not the primary fund for the payment of losses which may accrue upon existing risks, but premiums received for insurance and the interest on the capital stock constitute the primary and natural fund for the payment of the debts and losses of the company. Therefore the unearned premiums received by an insurance company on which the risks are still running are not surplus profits of the company, out of

[53] Excelsior Water & Mining Co. v. Pierce, 90 Cal. 131, 27 Pac. 44.

[54] People v. State Board of Tax Com'rs, 128 App. Div. 13, 17, 112 N. Y. Supp. 392, modified 196 N. Y. 39, 57, 89 N. E. 581.

[55] People v. Stevens, 203 N. Y. 7, 22, 96 N. E. 114.

[56] Crawford v. Roney, 130 Ga. 515, 61 S. E. 117; In re Haas Co., 131 Fed. 232, 65 C. C. A. 218.

[57] Foster v. New Trinidad Lake Asphalt Co., L. R. [1901] 1 Ch. Div. 208.

[58] O'Shields v. Union Iron Foundry, 93 S. C. 393, 76 S. E. 1098.

[59] Tepfer v. Rival Gas & Electric Fixture Supply Co., 136 App. Div. 942, 121 N. Y. Supp. 1149, affirming (Sup.) 117 N. Y. Supp. 959.

[60] People v. San Francisco Sav. Union, 72 Cal. 199, 13 Pac. 498.

which dividends can be legally declared, without leaving a sufficient surplus on hand to meet the probable losses upon risks then assumed and not yet terminated, independent of the capital stock of the company.[61]

In deciding whether a dividend was rightfully or wrongfully made, the transaction must be viewed from the standpoint of that time, and not in the light of subsequent events. Notes or overdrafts, for instance, by persons then considered perfectly solvent, should not be considered as losses because they afterwards proved to be such.[62]

The directors of a corporation cannot lawfully diminish the capital required to enable the corporation to do business, either by directly distributing a part of it among the stockholders, or by indirectly doing so by distributing funds as dividends when there are no surplus profits. It would be a fraud upon creditors of the corporation, who deal with it on the faith of its capital stock, to divert the same by distribution among the stockholders as a dividend.[63] Though a corporation may agree to pay interest on certificates of stock paid in, if it is paid out of the surplus profits,[64] an agreement to pay interest cannot be enforced where the corporation has no means or resources from which payment can be made, except its capital stock.[65] It would seem clear that if land in which the capital of a corporation is invested, or a part of it, is taken under the power of eminent domain, the money received as compensation therefor will take the place of the land as part of the capital, and cannot be distributed as dividends.[66] A sum paid in on capital stock does not become profit, and liable to distribution as profits, on the stock being forfeited for nonpayment of the balance due thereon.[67]

In the case of a mining corporation, the profits subject to distribution are the net proceeds of its mining operations, without any deduction for decrease in value of the mine by reason of the ore being taken out. And the same principle applies to all corporations or-

[61] De Peyster v. American Fire Ins. Co., 6 Paige (N. Y.) 486; Scott v. Eagle Fire Co., 7 Paige (N. Y.) 198; Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165. Indeed, it was held in the case last cited that the safest and only allowable principle to act upon in such cases is to exclude such premiums altogether from the computation of profits.

[62] Main v. Mills, 6 Biss. 98, Fed. Cas. No. 8,974.

[63] See Reid v. Eatonton Mfg. Co., 40 Ga. 98, 104, 2 Am. Rep. 563; Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; post, p. 701.

[64] McLaughlin v. Detroit & M. Ry. Co., 8 Mich. 100.

[65] Painesville & H. R. Co. v. King, 17 Ohio St. 534.

[66] See Heard v. Eldredge, 109 Mass. 258, 12 Am. Rep. 687.

[67] Gratz v. Redd, 4 B. Mon. (Ky.) 178, 187.

ganized for the purpose of utilizing a wasting property—a property that can be used only by consuming it—as a mine, a lease, or a patent. Such a corporation is not to be considered as having distributed its capital merely because it has distributed the net proceeds of its operations, though the value of the property constituting its capital is necessarily thereby decreased.[68] Except in such cases, however, before profits can lawfully be set apart and paid out as a dividend, a proper sum must be set aside to represent the wear and tear upon the plant and property of the corporation, so that a fund will be created for the purpose of repairing and renewing the property when it shall become necessary.[69] And allowance from the gross receipts should likewise be made for interest charges, betterments, taxes, and cost of up-keep.[70]

Where a corporation reduces its capital stock under statutory authority, it cannot distribute among the stockholders an amount equal to the difference between the original capital stock and the reduced capital stock, without regard to the present value of its property. The reduced amount becomes the amount which it is bound to provide as capital, and which it is prohibited from depleting by payments to stockholders. It must therefore retain property actually equal in value to the amount of the reduced capital over and above its debts. If it does this, and a surplus remains, this may lawfully be distributed among the stockholders.[71]

[68] Excelsior Water & Mining Co. v. Pierce, 90 Cal. 131, 27 Pac. 44. See Bond v. Barrow Haematite Steel Co., [1902] 1 Ch. 353.

[69] Davison v. Gillies, 16 Ch. Div. 347; Dent v. Tramways Co., 16 Ch. Div. 344. And see Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203. In some states, as New Jersey, statutes require a dividend when there is a fund applicable after deducting "working capital." As to what is "working capital," see In re Rogers, 161 N. Y. 108, 113, 55 N. E. 393; Bassett v. United States Cast Iron Pipe & Foundry Co., 74 N. J. Eq. 668, 70 Atl. 929, affirmed 75 N. J. Eq. 539, 73 Atl. 514.

[70] People v. State Board of Tax Com'rs, 128 App. Div. 13, 17, 112 N. Y. Supp. 392, modified 196 N. Y. 39, 57, 89 N. E. 581; People v. Stevens, 203 N. Y. 7, 22, 96 N. E. 114; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. Ed. 793. And see, Belfast & M. R. Co. v. City of Belfast, 77 Me. 445, 1 Atl. 362.

[71] Seeley v. New York Nat. Exch. Bank, 8 Daly, 400; Id., 78 N. Y. 608; Strong v. Brooklyn Crosstown R. Co., 93 N. Y. 426. "The surplus, if any, which a corporation reducing the amount of its capital, under the act of 1878, is at liberty to pay to its stockholders, must, in every case, be ascertained, and depends upon the result of an examination into its affairs, and not upon the difference between the original amount of capital and the reduced amount; and whenever, by sales of property, or by means of earnings, or otherwise, the corporation comes in possession of funds which are in excess of the reduced amount fixed as capital, it can distribute that amount without violating any law." Strong v. Brooklyn Crosstown R. Co., supra. A cor-

Discretion of the Directors as to Declaring Dividend

When a corporation has a surplus, whether a dividend shall be declared, and, if declared, how much it shall be, and when and where it shall be payable, rests largely in the discretion of the directors; and in the exercise of their discretion they will not be controlled or interfered with by the courts, unless they act fraudulently, oppressively, or unreasonably.[72] The stockholders of a corporation are not entitled, as a matter of absolute right, to the payment of a dividend whenever the earnings of the corporation in any year exceed its liabilities. Though there may be a large surplus, the board of directors may, if, in their opinion, the interests of the corporation make it necessary or advisable, expend the same in improvements, or in extending the business of the corporation, if the business as extended is within its powers; or may, under some circumstances, retain it as a surplus fund, instead of dividing it among the stockholders. And whether they will do so is generally for them to decide.[73] At the same time, they should "bear in mind that the only sure benefit to the stockholders to be derived from the successful prosecution of the corporate business must come from the distribution of dividends in cash, and that the piling up of

poration, on reducing its capital stock, may distribute a portion of its assets and retain the balance as its property. When the surplus is invested in stock of railway companies, the stock itself may be distributed. Continental Securities Co. v. Northern Securities Co., 66 N. J. Eq. 274, 57 Atl. 876. The right to unpaid stock dividends does not pass with an assignment of the shares. Redhead v. Iowa Nat. Bank, 127 Iowa, 572, 103 N. W. 796.

[72] Post, p. 432; Williams v. Western Union Tel. Co., 93 N. Y. 162, 192; Hunter v. Roberts, Throp & Co., 83 Mich. 63, 47 N. W. 131; Jackson's Adm'rs v. Newark Plank Road Co., 31 N. J. Law, 277; Belfast & M. L. R. Co. v. City of Belfast, 77 Me. 445, 1 Atl. 362, 366; New York, L. E. & W. R. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363; Wolfe v. Underwood, 96 Ala. 329, 11 South. 344; Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; Burden v. Burden, 159 N. Y. 287, 54 N. E. 17; Morey v. Fish Bros. Wagon Co., 108 Wis. 520, 84 N. W. 862; Trimble v. American Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912; Stevens v. United States Steel Corp., 68 N. J. Eq. 373, 59 Atl. 905; Knapp v. S. Jarvis Adams Co., 135 Fed. 1008, 70 C. C. A. 536; Schell v. Alston Mfg. Co. (C. C.) 149 Fed. 439; Bernier v. Griscom-Spencer Co. (C. C.) 161 Fed. 438, and cases hereafter cited.

[73] New York, L. E. & W. R. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363; Pratt v. Pratt, Read & Co., 33 Conn. 446; Smith v. Prattville Co., 29 Ala. 503; State v. Baltimore & O. R. Co., 6 Gill (Md.) 363; McNab v. McNab & Harlin Mfg. Co., 62 Hun, 18, 16 N. Y. Supp. 448, affirmed 133 N. Y. 687, 31 N. E. 627. Directors are not required to declare dividends on common stock, as well as on preferred, when there are profits enough therefor, where it is not for the interest of the corporation, though such profits may afterwards be absorbed by dividends on the preferred stock. Stevens v. United States Steel Corp., 68 N. J. Eq. 373, 59 Atl. 905.

a surplus which remains undistributed may in the end go wholly to future creditors of the corporation." [74] This holds especially true where the stock is that of a close corporation whose stock has ordinarily no market value. But the mere existence of "a large amount of surplus" is not enough to warrant court intervention,[75] though in a Louisiana case where the corporation showed a large surplus a dividend of $50,000 was ordered declared.[76] The ultimate test is the good faith and reasonableness of the corporate management.[77]

Directors will not be allowed to abuse their discretion as to declaring dividends, and to use their power illegally, wantonly, or oppressively. They must act reasonably and in good faith. If the right to a dividend is clear, and there are funds from which it can properly be made, a court of equity will interfere to compel the company to declare it.[78] Under the general equity powers, chancery "is not without control over a corporation where the directors roll their profits into their business year after year until the great snowball has been magnified twenty diameters." [79]

Who are Entitled to Dividends

The profits of a corporation are to be distributed pro rata among those who are its stockholders at the time when the dividend is declared, no matter when the profits may have been earned, and with-

[74] Raynolds v. Diamond Mills Paper Co., 69 N. J. Eq. 299, 60 Atl. 941.

[75] Trimble v. American Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912.

[76] Crichton v. Webb Press Co., 113 La. 167, 36 South. 926, 67 L. R. A. 76, 104 Am. St. Rep. 500.

[77] McNab v. McNab & Harlin Mfg. Co., 62 Hun, 18, 16 N. Y. Supp. 448, affirmed 133 N. Y. 687, 31 N. E. 627. But the courts are loath to interfere. Rollins v. Denver Club, 43 Colo. 345, 96 Pac. 188, 18 L. R. A. (N. S.) 733.

[78] Fougeray v. Cord, 50 N. J. Eq. 185, 24 Atl. 499; reversed Laurel Springs Land Co. v. Fougeray, 50 N. J. Eq. 756, 26 Atl. 886. Belfast & M. L. R. Co. v. City of Belfast, 77 Me. 445, 1 Atl. 362, 367; Pratt v. Pratt, Read & Co., 33 Conn. 446; Beers v. Bridgeport Spring Co., 42 Conn. 17; Scott v. Eagle Fire Co., 7 Paige (N. Y.) 198; Hiscock v. Lacy, 9 Misc. Rep. 578, 30 N. Y. Supp. 860; Storrow v. Texas Consol. Compress & Mfg. Ass'n, 87 Fed. 612, 31 C. C. A. 139; Griffing v. A. A. Griffing Iron Co., 61 N. J. Eq. 269, 48 Atl. 910; Anderson v. W. J. Dyer & Bro., 94 Minn. 30, 101 N. W. 1061. Where the officers of a close manufacturing corporation, whose stock has no recognized market value, vote increases in their salaries while pursuing a policy of expanding the business by the use of the profits for that purpose, to the exclusion of dividends, a court of equity has power to compel the restoration of excessive amounts so withdrawn, and to adjust the salaries to a reasonable basis. Raynolds v. Diamond Mills Paper Co., 69 N. J. Eq. 299, 60 Atl. 941; post, p. 433.

[79] Raynolds v. Diamond Mills Paper Co., supra; Laurel Springs Land Co. v. Fougeray, supra.

out regard to the length of time particular members may have been stockholders.[80] And it is also settled that the directors in declaring dividends have no right to discriminate between stockholders, unless the contract under which particular shares were issued gives them the right.[81] "The dividends must be general on all the stock, so that each stockholder will receive his proportionate share. The directors have no right to declare a dividend on any other principle. They cannot exclude any portion of the stockholders from an equal participation in the profits of the company." [82]

A person who becomes a stockholder without limitations in his contract, even immediately before a dividend is declared, is entitled to share therein, and the directors cannot exclude him. In Jones v. Terre Haute & R. R. Co.[83] the plaintiff, who held bonds of the defendant corporation, by their terms convertible into stock, surrendered them, and received stock therefor. Shortly afterwards the directors declared a dividend. It was held that the plaintiff was entitled to his proportionate share, and that the board of directors could not discriminate against him.

A stockholder in a corporation has no legal title to a share in the profits until a dividend is declared. Until then a transfer of his shares will carry with it the right to share in the profits already earned, and dividends subsequently declared will belong to the transferee.[84] It is otherwise with a dividend declared before the

[80] Goodwin v. Hardy, 57 Me. 143, 99 Am. Dec. 758; March v. Eastern R. Co., 43 N. H. 515; Jones v. Terre Haute & R. R. Co., 57 N. Y. 196; Boardman v. Lake Shore & M. S. Ry. Co., 84 N. Y. 157; Hill v. Newichawanick Co., 8 Hun (N. Y.) 459; Id., 71 N. Y. 593; Phelps v. Farmers' & Mechanics' Bank, 26 Conn. 269; Clark v. Campbell, 23 Utah, 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716; Zinn v. Germantown Farmers' Mut. Ins. Co., 132 Wis. 86, 111 N. W. 1107. "This rule," says Morawetz, "is based on reasons of convenience, amounting almost to a necessity. It would be practically impossible to apportion the earnings of a corporation, whose shares are constantly changing hands, so as to give each holder a proportionate part of the profits earned while he was owner of the shares." 1 Mor. Corp. § 162.

[81] Jones v. Terre Haute & R. R. Co., 57 N. Y. 196; Ryder v. Alton & S. R. Co., 13 Ill. 516; Stoddard v. Shetucket Foundry Co., 34 Conn. 542; Hill v. Atoka Coal & Mining Co. (Mo.) 21 S. W. 508; Redhead v. Iowa Nat. Bank, 127 Iowa, 572, 103 N. W. 796.

[82] Ryder v. Alton & S. R. Co., supra. Where the directors, in declaring a dividend, wrongfully except a particular stockholder, the exception is void and of no effect. Hill v. Atoka Coal & Mining Co., supra.

[83] 57 N. Y. 196.

[84] Post, p. 520; Boardman v. Lake Shore & M. S. Ry. Co., 84 N. Y. 157, 177; Jermain v. Lake Shore & M. S. R. Co., 91 N. Y. 483; Phelps v. Farmers' & Mechanics' Bank, 26 Conn. 269; March v. Eastern R. Co., 43 N. H. 515; Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412. But, if the purchaser of stock fails to comply with his contract to purchase, he loses the

transfer, but not paid. In the absence of a special agreement to the contrary, it belongs to the transferror, and does not pass by the transfer; and the fact that the dividend is payable at a future day, or that no time for payment is fixed, can make no difference.[85] The reason is because, upon the declaration of the dividend, it becomes a debt owing by the corporation to the transferror, irrespective entirely of when it is payable. So a legatee of shares is not entitled to a dividend thereon declared before, but payable after, the death of the testator. The dividend forms part of the corpus of the estate and passes to the executor.[86] So, where the owner of stock by will directs the income of his estate to be paid to his widow, and dies after a dividend has been declared, but before it is payable, the dividend goes to the executors as part of his estate, and is not payable to the widow as income.[87]

Where, by the terms of a certificate of stock, the shares are transferable only on the books of the company, the corporation will be protected by a payment of dividends to the person who appears on the books as the owner of shares, if it has no notice of any transfer, and will not be liable after such payment to a person to whom the shares were transferred before the dividends were declared, but who neglected to have the transfer entered on the books.[88] If the corporation has notice of the transfer, it will be liable to the transferee or his assignee for dividends subsequently declared, though the transfer is not registered, and an action may be maintained against it therefor without suing to compel it to register the transfer.[89]

right, not only to the stock, but also to dividends declared after the sale. Phinizy v. Murray, 83 Ga. 747, 10 S. E. 358, 6 L. R. A. 426, 20 Am. St. Rep. 342. The right to dividends not yet declared need not be separately assigned. It passes as an incident to the stock. See the cases above cited—particularly, Boardman v. Lake Shore & M. S. Ry. Co., supra. And see Kaufman v. Charlottesville Woolen Mills Co., 93 Va. 673, 25 S. E. 1003; Louisville & N. R. Co. v. Hart County, 116 Ky. 186, 75 S. W. 288, 77 S. W. 361.

[85] Wheeler v. Northwestern Sleigh Co. (C. C.) 39 Fed. 347; Hill v. Newichawanick Co., 8 Hun (N. Y.) 459; Id., 71 N. Y. 593; Hopper v. Sage, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. Rep. 771; In re Kernochan, 104 N. Y. 618, 11 N. E. 149; Bright v. Lord, 51 Ind. 272, 19 Am. Rep. 732. Contra, Burroughs v. North Carolina R. Co., 67 N. C. 376, 12 Am. Rep. 611.

[86] De Gendre v. Kent, L. R. 4 Eq. 283; Wheeler v. Northwestern Sleigh Co., supra.

[87] In re Kernochan, 104 N. Y. 618, 11 N. E. 149.

[88] Post, p. 531; Brisbane v. Delaware, L. & W. R. Co., 94 N. Y. 204; Cleveland & M. R. Co. v. Robbins, 35 Ohio St. 483.

[89] Robinson v. National Bank of New Berne, 95 N. Y. 637; Hill v. Atoka Coal & Mining Co. (Mo.) 21 S. W. 508; Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412; Central Nebraska Nat. Bank v. Wilder, 32 Neb. 454, 49 N. W. 369; Guarantee Co. of North America v. East Rome Town Co., 96 Ga. 511, 23 S. E. 503, 51 Am. St. Rep. 150; Armour v. East Rome Town

In a recent case in Oregon it was held that a corporation which had paid a dividend on stock to a person appearing on its books as owner, after the corporation had received due notice of the transfer of the stock to a third party, was liable to said party for the amount of the dividend, though at the time the dividend was declared the corporation had no notice and had placed the amount of the dividend, to the shareholder's credit on its books.[90] The pledgee of stock, whose name appears on the books of the corporation, or whose rights are known to the corporation, is entitled to dividends subsequently declared, as between himself and the corporation, and the corporation will be liable to him therefor if it pays them to the pledgor.[91] The reason is because a pledgee is entitled to receive all increase and "increment of the thing pledged," but only as further security, to be applied on the debt and to be accounted for to the pledgor later.[92]

How Payable

If there is no statutory or charter requirement that dividends shall be paid in cash, it is within the discretion of the directors whether they shall be made payable in cash, or in property, or whether they shall declare a stock dividend when authorized to increase the capital stock.[93] If a dividend is made payable in cash, or payable generally, the corporation from the time of the declaration of the dividend becomes a debtor, and must discharge the debt, as it is bound to discharge all its other debts, in lawful currency.[94]

Stock Dividends

Where a corporation has the power to increase its capital stock, and has assets from which it may legally declare a dividend, it may, if its interests so require, hold back such assets, and issue stock

Co., 98 Ga. 458, 25 S. E. 504; Ashton v. Zella Min. Co., 134 Cal. 408, 66 Pac. 494.

[90] Steel v. Island Milling Co., 47 Or. 293, 83 Pac. 783.

[91] Boyd v. Conshohocken Worsted Mills, 149 Pa. 363, 24 Atl. 287. See, also, as to the right of a pledgee of stock to dividends: Fairbank v. Merchants' Nat. Bank of Chicago, 132 Ill. 120, 22 N. E. 524; Central Nebraska Nat. Bank v. Wilder, 32 Neb. 454, 49 N. W. 369; Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412; Guarantee Co. of North America v. East Rome Town Co., 96 Ga. 511, 23 S. E. 503, 51 Am. St. Rep. 150; Armour v. East Rome Town Co., 98 Ga. 458, 25 S. E. 504; Hunt v. Laconia & L. St. Ry., 68 N. H. 561, 39 Atl. 437; George R. Barse Live-Stock Co. v. Range Valley Cattle Co., 16 Utah, 59, 50 Pac. 630.

[92] Booth v. Consolidated Fruit Jar Co., 62 Misc. Rep. 252, 114 N. Y. Supp. 1000.

[93] Williams v. Western Union Telegraph Co., 93 N. Y. 162, 192.

[94] Williams v. Western Union Telegraph Co., 93 N. Y. 162, 192; Scott v. Central R. & Banking Co. of Georgia, 52 Barb. (N. Y.) 45; Ehle v. Chittenango Bank, 24 N. Y. 548.

therefor, instead of distributing the assets among the stockholders by declaring a dividend payable in money.[95] This is called a stock dividend. It is not in the ordinary sense a dividend, a "dividend" being a distribution of the profits to stockholders as the income from their investment, while a "stock dividend" is merely an increase in the number of shares, such increase representing the same property that was represented by the smaller number of shares.[96] Such a dividend, if stock is issued only to the extent of the surplus profits, and the amount paid in as the capital stock of the corporation remains, is not a violation of the prohibition against reducing or withdrawing the capital stock by distribution among stockholders.[97] "A stock dividend is lawful when an amount of money or property equivalent in value to the full par value of the stock distributed as a dividend has been accumulated and is permanently added to the capital stock of the corporation." [98] A dividend declared out of the surplus, payable in shares of the capital stock of another corporation, is not a stock dividend, since the mere fact that a dividend may take the shape of certificates of stock does not necessarily make it a "stock dividend." [99]

Set-Off against Debt Due to Corporation

A corporation may retain dividends, and apply them upon debts due to it from stockholders at the time the dividend is declared.[1] This right does not rest upon any idea that the corporation has a lien, but it is the right of set-off, for the dividend is a debt owing by the corporation to the stockholder.[2] If shares are assigned, and notice of the assignment is given to the corporation before the dividend is declared, the right to the dividend passes to the assignee, and the corporation cannot set off a debt to it from the assignor, incurred before the assignment.[3] In New York it has been held that the corporation may exercise this right of set-off if the debt became due before notice of the assignment was given, though the dividend may not have been declared until after such notice.[4]

[95] Williams v. Western Union Telegraph Co., 93 N. Y. 162; Union & New Haven Trust Co. v. Taintor, 85 Conn. 452, 83 Atl. 697.

[96] Lancaster Trust Co. v. Mason, 152 N. C. 660, 68 S. E. 235, 136 Am. St. Rep. 851, citing 7 Words and Phrases, p. 6664.

[97] Williams v. Western Union Telegraph Co., supra.

[98] De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587.

[99] Gray v. Hemenway, 212 Mass. 239, 98 N. E. 789.

[1] Bates v. New York Ins. Co., 3 Johns. Cas. (N. Y.) 238; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Hagar v. Union Nat. Bank, 63 Me. 509; King v. Paterson & H. R. R. Co., 29 N. J. Law, 504.

[2] Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412.

[3] Gemmell v. Davis, supra.

[4] Bates v. New York Ins. Co., supra. Cf. Code Civ. Proc. N. Y. § 501.

Remedies of Stockholders

As has been seen, a dividend lawfully declared out of the surplus profits of a corporation becomes thereupon the individual property of the stockholders, to be received by them on demand. It becomes a debt owing by the corporation to each stockholder in his individual right. If, upon demand by a stockholder, the corporation refuses to pay him his share, he may maintain an action against it for money had and received to his use;[5] or, where a specific fund has been set apart by the corporation for the purpose of paying the dividend, by a suit in equity.[6] If no time is fixed for payment of the dividend, but it is made payable at such time as may be directed by the board of directors, it is to be paid within a reasonable time; and if the board refuses to pay, or fix a time for payment, a stockholder may enforce his rights in equity.[7] If the directors of a corporation, in making a distribution of dividends, omit to apportion a quota thereof to certain shares of stock, the owner of such shares may maintain assumpsit against the corporation for breach of the contract which the law implies from the relationship of the parties, that an equal distribution of dividends will be made.[8] A demand is necessary after a dividend has been declared, before an action can be brought by a stockholder against the corporation to recover his share.[9] And it follows that interest and the statute of limitations run from the time demand is made, and only from that time.[10]

[5] King v. Paterson & H. R. R. Co., 29 N. J. Law, 82, 87, affirmed 29 N. J. Law, 504; West Chester & P. R. Co. v. Jackson, 77 Pa. 321, 328; SEARLES v. GEBBIE, 115 App. Div. 778, 101 N. Y. Supp. 199, affirmed short 190 N. Y. 533, 83 N. E. 1131, Wormser Cas. Corporations, 272.

[6] Le Roy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657; Beers v. Bridgeport Spring Co., 42 Conn. 17; McLaran v. Crescent Planing Mill Co., 117 Mo. App. 40, 93 S. W. 819. Where the amount of the dividend has been segregated and is within the dominion of the directors who refuse to use it for the purpose intended, they are trustees of the fund and an action to reach it may be maintained against them in equity. SEARLES v. GEBBIE, supra, Wormser Cas. Corporations, 272.

[7] Beers v. Bridgeport Spring Co., 42 Conn. 17.

[8] Jackson's Adm'rs v. Newark Plank Road Co., 31 N. J. Law, 277; Hill v. Atoka Coal & Mining Co. (Mo.) 21 S. W. 508.

[9] Hagar v. Union Nat. Bank, 63 Me. 509; State v. Baltimore & O. R. Co., 6 Gill (Md.) 363, 387; Bank of Louisville v. Gray, 84 Ky. 565, 2 S. W. 168. Where a corporation refuses to pay a stockholder a dividend, a demand is not a condition precedent to the maintenance of an action. Redhead v. Iowa Nat. Bank, 127 Iowa, 572, 103 N. W. 796.

[10] State v. Baltimore & O. R. Co., supra; Bank of Louisville v. Gray, supra; Philadelphia, W. & B. R. Co. v. Cowell, 28 Pa. 329, 70 Am. Dec. 128; Cochran v. McGee (Ky.) 53 S. W. 519. Cf. Bills v. Silver King Min. Co., 106 Cal. 9, 39 Pac. 43. The statute, according to some cases, begins to run from the

The remedy of a stockholder who is wrongfully excluded from his right to share in a dividend is against the corporation.[11] He cannot follow the assets of the company into the hands of other stockholders, to whom dividends have been paid, and maintain an action against them for money had and received.[12]

An action cannot be maintained against a corporation by a stockholder for a dividend, as for a debt due, until the dividend has been declared, though there may be funds from which it is the duty of the directors to declare a dividend. "A right to a dividend from the profits of a corporation is no debt until the dividend is declared. Until that time the dividend is only something that may possibly come into existence, but the obligation on the part of the corporation to declare it cannot be treated as the dividend itself." [13]

If the directors unreasonably and wrongfully refuse or neglect to declare dividends when there are surplus profits out of which they may be declared, and there is no good reason for withholding them, a stockholder may maintain a suit in equity to compel them to declare and pay them.[14] Mandamus is not a proper remedy in such a case since the matter of declaration of dividends is discretionary with the board of directors.[15] Nor will mandamus lie to compel the payment of a dividend after it has been declared,[16] though there is a dictum in a New York case to the contrary, where the dividend was not only declared, but a specific fund to meet it was set aside.[17] It must be borne in mind in this connection that it is only in a clear and extreme case that the equity court will in-

time the dividend is payable. Re Severn & W. & S. Bridge R. Co., [1896] 1 Ch. 559; Winchester & L. Turnpike Co. v. Wickliffe's Adm'r, 100 Ky. 531, 38 S. W. 866, 66 Am. St. Rep. 356. Cf. In re Artizans' Land & M. Corp., [1904] 1 Ch. 796.

[11] Jones v. Terre Haute & R. R. Co., 57 N. Y. 196.

[12] Peckham v. Van Wagenen, 83 N. Y. 40, 38 Am. Rep. 392.

[13] Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156, per Cooley, J. And see State v. Baltimore & O. R. Co., 6 Gill (Md.) 363; Williston v. Michigan S. & N. I. R. Co., 13 Allen (Mass.) 400; Boardman v. Lake Shore & M. S. Ry. Co., 84 N. Y. 157; Hill v. Atoka Coal & Mining Co. (Mo.) 21 S. W. 508; In re Goetz's Estate, 236 Pa. 630, 85 Atl. 65.

[14] Fougeray v. Cord, 50 N. J. Eq. 185, 24 Atl. 499, reversed Laurel Springs Land Co. v. Fougeray, 50 N. J. Eq. 756, 26 Atl. 886; Pratt v. Pratt, Read & Co., 33 Conn. 446; Beers v. Bridgeport Spring Co., 42 Conn. 17; Scott v. Eagle Fire Co., 7 Paige (N. Y.) 198; Hiscock v. Lacy, 9 Misc. Rep. 578, 30 N. Y. Supp. 860; King v. Governor, etc., of Bank of England, 2 Barn. & Ald. 620; ante, p. 426.

[15] Rex v. Governor, etc., of Bank of England, 2 Barn. & Ald. 620.

[16] People v. Central Car & Mfg. Co., 41 Mich. 166, 49 N. W. 925.

[17] Le Roy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657.

terfere with the discretionary powers of the directors by compelling them to declare a dividend.[18]

When a dividend has been declared payable at a definite future time, but no fund has been set apart by the directors for the payment of the dividend, and the corporation meanwhile becomes insolvent, the stockholders, to the extent of their proportions of the dividend, share ratably with the creditors of the corporation in its property.[19] The setting apart of a specific fund to pay a dividend, however, has been held to give a preferential lien upon it to the stockholders, which they can enforce to the exclusion of the general creditors of the corporation.[20] As to such fund, "the stockholders are not required to go in pro rata with the general creditors for such unpaid dividends, but may proceed as against a trustee on account of such trust fund and recover the whole of their pro rata thereof." [21]

Remedies where Dividends are Unlawfully Paid

If the directors or trustees act in good faith, and without negligence, they are not liable to the corporation or to creditors, at common law, for declaring and paying dividends when they should not have done so, and thereby diminishing the capital stock.[22] But if they have been guilty of a fraudulent breach of trust, or of gross negligence, in paying dividends when they had no right to pay them, they are personally liable to creditors.[23] Their liability under statutes will, of course, depend upon a construction of the statutes. Generally, they are not liable if they act in good faith, and without negligence.[24]

[18] Ante, p. 426.

[19] Lowne v. American Fire Ins. Co., 6 Paige (N. Y.) 482; Ford v. Easthampton Rubber Thread Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. Rep. 462, semble.

[20] In re Le Blanc, 14 Hun (N. Y.) 8; Id., 75 N. Y. 598; Le Roy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657; Ford v. Easthampton Rubber Thread Co., supra, semble; McLaran v. Crescent Planing Mill Co., 117 Mo. App. 40, 93 S. W. 819. Cf. Hunt v. O'Shea, 69 N. H. 600, 45 Atl. 480; Lowne v. American Fire Ins. Co., 6 Paige (N. Y.) 482.

[21] McLaran v. Crescent Planing Mill Co., supra.

[22] Excelsior Petroleum Co. v. Lacey, 63 N. Y. 422; Lexington & O. R. Co. v. Bridges, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528; Stringer's Case, L. R. 4 Ch. App. 475; post, p. 646. Cf. Leeds Investment Co. v. Shepherd, L. R. 36 Ch. Div. 787.

[23] Gratz v. Redd, 4 B. Mon. (Ky.) 178, 195; Scott v. Eagle Fire Co., 7 Paige (N. Y.) 198; post, p. 646.

[24] As to the liability under the New York statute, see Rorke v. Thomas, 56 N. Y. 559; Excelsior Petroleum Co. v. Lacey, 63 N. Y. 422; Van Dyck v. McQuade, 86 N. Y. 38; post, p. 754.

If dividends are improperly declared and paid when there are no surplus profits, they may be reclaimed by the corporate creditors, or by a receiver or assignee acting for the benefit of the creditors.[25] In a Kentucky case it was held that dividends declared by the directors and received by the stockholders may be reclaimed by the directors if illegally declared under a misapprehension of the right to declare them, and that, if there be an assignment by the corporation to a trustee, such right to reclaim the dividends passes to the trustee if the terms of the assignment are sufficiently broad to embrace them.[26] In other cases the right of the receiver of a corporation as the representative of the creditors to recover unearned dividends paid to its stockholders out of the capital has been placed upon the ground that the capital is a trust fund for the benefit of creditors and that those to whom it has been refunded will be held trustees for their benefit.[27] Whatever may be thought of the reasoning, the result of these decisions seems sound on principle, for the stockholders have received, albeit in good faith, moneys to which they are not entitled and which in good conscience should be refunded by them. In the Supreme Court of the United States, however, it has been held that the receiver of a national bank, appointed after the bank has become insolvent, cannot recover a dividend paid out of the capital, where the stockholder receiving it acted in good faith, believing it to be paid out of profits, and where the bank was not insolvent at the time the dividend was declared and received; the court holding that the theory of a trust fund had no application to such a case.[28] If the capital stock of a corpora-

[25] Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165. And see Gratz v. Redd, 4 B. Mon. (Ky.) 178, 189, 191; Main v. Mills, 6 Biss. 98, Fed. Cas. No. 8,974; Grant v. Ross, 100 Ky. 44, 37 S. W. 263; Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310; Grant v. Southern Contract Co., 104 Ky. 781, 47 S. W. 1091; American Steel & Wire Co. v. Eddy, 130 Mich. 266, 89 N. W. 952; Cook, Corp. § 548; 10 Cyc. 549.

[26] Lexington Life, Fire & Marine Ins. Co. v. Page, supra. See, also, Grant v. Ross, supra; Bingham v. Marion Trust Co., 27 Ind. App. 247, 61 N. E. 29; Gager v. Paul, 111 Wis. 638, 87 N. W. 875. Cf. Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 41, 46 N. W. 310.

[27] Minnesota Thresher Mfg. Co. v. Langdon, supra; 10 Cyc. 549.

[28] McDonald v. Williams, 174 U. S. 397, 19 Sup. Ct. 743, 43 L. Ed. 1022. And see Lawrence v. Greenup, 97 Fed. 906, 38 C. C. A. 546; New Hampshire Sav. Bank v. Richey, 121 Fed. 956, 58 C. C. A. 294; Great Western Min. & Mfg. Co. v. Harris, 128 Fed. 321, 63 C. C. A. 51. The receiver may recover dividends paid when the bank was actually insolvent. Hayden v. Thompson, 71 Fed. 60, 17 C. C. A. 592; Hayden v. Brown (C. C.) 94 Fed. 15; Hayden v. Williams, 96 Fed. 279, 37 C. C. A. 479. See note, 8 Columbia Law Rev. 303–305.

tion is wrongfully paid away by the directors it may be pursued by creditors into the hands of any one who is not an innocent purchaser or recipient of the same for a valuable consideration.[29] If such a wrong is threatened, a creditor may maintain a bill in equity for an injunction,[30] since the fund to which the creditor looks for his security would thereby be impaired.

Same—Grants and Bequests of Income and Profits

When the owner of stock grants or bequeaths the income and profits to a person for life or for a term of years, difficult questions arise as to the right to dividends. On some point the courts do not agree, while on others the law is well settled.

A grant or bequest of the income or profits of an estate including shares of stock, does not entitle the grantee or legatee to dividends declared upon the stock before the grant or will takes effect, though they may not be payable until afterwards. Therefore, where the owner of stock left a will, by which he empowered his executors "to receive the rents, interest, and income" of so much of his estate as was given them in trust, including shares of stock, and apply the same to the use of his widow during her life, it was held that a dividend declared on the stock before his death, but not payable until afterwards, formed part of the estate, and went to the executors as such, and was not payable to the widow as income. "As soon," it was said, "as the profits in shares of stock are ascertained and declared, they cease to be the property of the company, and the owner of the shares becomes entitled to the dividend. It at once forms part of his estate. The fact that they are made payable at a future time is immaterial. The dividend to which the life tenant may be entitled as income can only be that which the company may declare after that relation is acquired. In this case the dividend represented profits or income, but had become a debt before the will took effect." [31]

Perhaps by the weight of authority, ordinary dividends declared after the grant or bequest takes effect, though earned before, go to

[29] Gratz v. Redd, supra. And see Reid v. Eatonton Mfg. Co., 40 Ga. 98, 104, 2 Am. Rep. 563.

[30] Reid v. Eatonton Mfg. Co., supra; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. Ed. 793; Coquard v. National Linseed Oil Co., 171 Ill. 480, 49 N. E. 563.

[31] In re Kernochan, 104 N. Y. 618, 11 N. E. 149. And see De Gendre v. Kent, L. R. 4 Eq. 283; Wheeler v. Northwestern Sleigh Co. (C. C.) 39 Fed. 347. But see, contra, Burroughs v. North Carolina R. Co., 67 N. C. 376, 12 Am. Rep. 611; Millen v. Guerrard, 67 Ga. 284, 44 Am. Rep. 720; In re Kane, 64 App. Div. 566, 72 N. Y. Supp. 333. A bequest of "dividends," it has been held, passes a dividend declared before, but payable after, the testator's death. Cogswell v. Cogswell, 2 Edw. Ch. (N. Y.) 231.

the grantee or legatee as income or profits.[32] In some states, however, the rule is otherwise; and it is held that: "When the stock of a corporation is by the will of a decedent given in trust, the incomes thereof for the use of a beneficiary for life, with remainder over, the surplus profits which have accumulated in the lifetime of the testator, but which are not divided until after his death, belong to the corpus of his estate; while the dividends of earnings made after his death are income, and are payable to the life tenant, no matter whether the dividend be in cash or script or stock." [33] And, as a rule, dividends which come, not from earnings, but from capital, as from a sale of a part of the property, will be regarded as part of the corpus of the estate, and will go to the remainderman.[34]

There is a direct conflict of opinion on the question whether, when a corporation, instead of declaring a dividend payable in cash, declares a stock dividend—that is, a dividend payable in stock—thereby increasing the capital stock, the new stock thus issued goes to the legatee or grantee of the income or profits, or forms part of the corpus of the estate, so as to go to the remainderman;[35] and the same difficulty and division of opinion exist where an extraordinary cash dividend is declared. The question arises in every case where the language of the will, in creating the trust, does not clearly manifest the testator's intention. Especially of recent years, many cases have arisen where the testator had not considered the possibility of enormous dividends being declared by corporations to effect their reorganization or in the division of accumulated profits made necessary by new statutes, changed circumstances, and

[32] King v. Follett, 3 Vt. 385. And see Appeal of Merchants' Fund Ass'n, 136 Pa. 43, 20 Atl. 527, 9 L. R. A. 421, 20 Am. St. Rep. 894.

[33] Smith's Estate, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237. In this case it was held that, where shares of stock are bequeathed in trust to pay the income to a certain person for life, with remainder over, profits realized from a sale by the trustees of extra shares of stock issued after testator's death, to them and other stockholders, in lieu of corporate profits applied to the improvement of the corporate property during testator's lifetime, should be distributed as capital, and not as income. And see Earp's Appeal, 28 Pa. 368, where there was an apportionment between a life beneficiary and the corpus of the estate of new stock representing profits earned partly before and partly after the testator's death. See, also, Cobb v. Fant, 36 S. C. 1, 14 S. E. 959.

[34] Heard v. Eldredge, 109 Mass. 258, 12 Am. Rep. 687; Vinton's Appeal, 99 Pa. 434, 44 Am. Rep. 116; In re Rogers, 161 N. Y. 108, 55 N. E. 393; Mercer v. Buchanan (C. C.) 132 Fed. 501; Brownell v. Anthony, 139 Mass. 442, 75 N. E. 746; Bulkeley v. Worthington Ecclesiastical Soc., 78 Conn. 526, 63 Atl. 531, 12 L. R. A. (N. S.) 785.

[35] See article, 19 Am. Law Rev. 737; and note, 13 Michigan Law Rev. 242–244.

modern rules and conditions.[36] In Massachusetts it is held that cash dividends, however large, unless from other sources than earnings,[37] are to be regarded as income, and go to the grantee or legatee of the income; and that stock dividends, however made, are to be regarded as an increase of the capital, and should be kept for the remainderman. In Minot v. Paine,[38] a leading case, the income of a trust fund, which included shares of stock in a corporation, was payable to a person for life, the capital then to be conveyed to another. It was held that shares of additional stock distributed to the trustee as a dividend on the original shares were to be regarded as an increase of the capital to be kept for the remainderman, and not as income, although such shares represented net earnings of the corporation.[39] The Massachusetts court takes unto itself, however, the right to determine whether a stock dividend is in effect a distribution of cash to be treated the same as a cash dividend. The same rule obtains in some other jurisdictions.[40] It is known as the "Massachusetts rule." Whether the distribution by a corporation of its earnings among its stockholders is an apportionment of stock or a division of profits depends entirely upon the substance and intent of the action of the corporation, as shown by its votes. Even when, at the time of the creation of new shares to be distributed among the old stockholders, a dividend is declared in cash to the same amount, the thing received by each stockholder, whether in stock or in cash, is to be deemed capital, and not income, if such appears, upon a view of the whole action of the cor-

[36] IN RE OSBORNE, 209 N. Y. 450, 458, 103 N. E. 723, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298, Wormser Cas. Corporations, 276.

[37] Heard v. Eldredge, 109 Mass. 258, 12 Am. Rep. 687; Gifford v. Thompson, 115 Mass. 478. Cf. Balch v. Hallet, 10 Gray, 402; Harvard College v. Amory, 9 Pick. 446; Reed v. Head, 6 Allen, 174.

[38] 99 Mass. 101, 96 Am. Dec. 705. In this case, the court said: "A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital."

[39] And see Atkins v. Albree, 12 Allen, 359; Boston Safe Deposit & Trust Co. v. Adams, 219 Mass. 175, 106 N. E. 590, and cases cited below.

[40] Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, where the question is considered at length, and the cases reviewed; Spooner v. Phillips, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461; Hotchkiss v. Brainerd Quarry Co., 58 Conn. 120, 19 Atl. 521; In re Brown, 14 R. I. 371, 51 Am. Rep. 397; Greene v. Smith, 17 R. I. 28, 19 Atl. 1081; Quinn v. Safe Deposit & Trust Co., 93 Md. 285, 48 Atl. 835, 53 L. R. A. 169; Hemenway v. Hemenway, 181 Mass. 406, 63 N. E. 919; Smith v. Dana, 77 Conn. 543, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51; Union & New Haven Trust Co. v. Taintor, 85 Conn. 452, 83 Atl. 697; De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587. See notes, 4 Columbia Law Rev. 130, 7 Columbia Law Rev. 344, 11 Columbia Law Rev. 556; 13 Michigan Law Rev. 242. See, also, D'Ooge v. Leeds, 176 Mass. 558, 57 N. E. 1025.

poration, to be the real character of the transaction.[41] In Rand v. Hubbell [42] a corporation voted to increase the number of shares of its capital stock, so as to allow each stockholder to increase the number of shares held by him by one-half, and commanded the directors to do whatever was required by law for that purpose. A vote of the directors, passed on the same day, declared that a dividend in cash should be payable to each stockholder at the time within which he was allowed by the vote of the corporation to take his new shares, and should be applied by him in payment for those shares, and directed the treasurer to issue such shares to old stockholders only. Each stockholder received a check for the amount of his dividend, and immediately exchanged the check for a certificate of the shares apportioned to the stock held by him. The checks were then destroyed. It was held that the stock thus issued constituted a stock dividend, and in the case of shares of old stock held by a trustee the new shares must be considered an addition to the capital of the trust fund. In favor of the Massachusetts rule, it is to be said that, although apparently arbitrary, it is easy of application.

In Pennsylvania and some other states, the Massachusetts rule is not recognized, but it is held that, where a corporation declares an extraordinary dividend out of the profits earned during the tenant's term, payable in additional shares, such shares go to the life tenant as income.[43] The rule thus laid down is that, irrespective of the nature of the dividend, whether cash or stock, if it is an extraordinary dividend, it shall be apportioned between the life tenant and the remainderman, according to the time of accumulation. That which accumulated during the life of the life tenant goes to

[41] Daland v. Williams, 101 Mass. 571; Leland v. Hayden, 102 Mass. 542; Rand v. Hubbell, 115 Mass. 461, 15 Am. Rep. 121; Gibbons v. Mahon, supra. And see IN RE OSBORNE, 209 N. Y. 450, 459, 103 N. E. 723, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298, Wormser Cas. Corporations, 276, commenting upon the Massachusetts rule.

[42] 115 Mass. 461, 15 Am. Rep. 121. Cf. Davis v. Jackson, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801.

[43] Earp's Appeal, 28 Pa. 368; Moss' Appeal, 83 Pa. 264, 24 Am. Rep. 164; Appeal of Philadelphia Trust, Safe-Deposit & Ins. Co. (Pa.) 16 Atl. 734; Smith's Estate, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237; In re Connolly's Estate, 198 Pa. 137, 47 Atl. 1125; In re Kemble's Estate, 201 Pa. 523, 51 Atl. 310; IN RE OSBORNE, 209 N. Y. 450, 103 N. E. 723, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298, Wormser Cas. Corporations, 276; Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189. And see Gilkey v. Paine, 80 Me. 319, 14 Atl. 205; Pritchett v. Nashville Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856; Simpson v. Millsaps, 80 Miss. 239, 31 South. 912; Lang v. Lang's Ex'r, 57 N. J. Eq. 325, 41 Atl. 705.

him, the rest goes to the corpus of the trust fund. Ordinary dividends on stock held in trust, under the Pennsylvania doctrine, belong to the tenant entitled to the income of the trust fund. "Where a corporation," said the Pennsylvania court, "having actually made profits, proceeds to distribute such profits among the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits." [44] This has been called the "American rule." [45] In favor of this rule, it is to be said that, although difficult to apply, it works a just result and is equitable in trying to carry out the supposed intent of the testator.

In New York, while the Massachusetts rule is repudiated, and regard is had to the substance, and not the form, of the transaction, it seemed until very recently that the life tenant was entitled to all dividends, whether stock or moneys, made out of profits, irrespective of whether they were earned during the tenant's term.[46] The case of In re Osborne [47] modified the New York doctrine. The question to be decided therein was whether the life tenant was entitled to the whole of a very large stock dividend declared, or whether it should be apportioned between the beneficiary of the life estate and the trust fund. The Court of Appeals held, one judge dissenting, that the part of such stock dividend which was earned after the creation of testator's trust should be awarded to the beneficiary of the life estate, and that the part earned before the creation of the trust should be retained as part of the capital of the trust fund. "The proposition decided by us in this case," said Chase, J., "is, that in all cases of extraordinary dividends, either of money or stock, sufficient of the dividend must be retained in the corpus of the trust to maintain that corpus unimpaired and the remainder thereof must be awarded to the life beneficiary." Despite the difficulty in many cases of apportioning the dividend, the court deemed it wiser and better to leave an apportionment to an equity tribunal, in preference to adhering to an unjust rule depending solely

[44] Moss' Appeal, 83 Pa. 264, 24 Am. Rep. 164.

[45] 1 Cook, Stock, Stockh. & Corp. Law, § 554.

[46] McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; Lowry v. Farmers' Loan & Trust Co., 172 N. Y. 137, 64 N. E. 796. Cf. Chester v. Buffalo Car Mfg. Co., 70 App. Div. 443, 75 N. Y. Supp. 428.

[47] 209 N. Y. 450, 103 N. E. 723, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298. See, also, In re Megrue's Estate, 53 N. Y. Law Journal, No. 88 (July 14, 1915), per Cohalan, S. Cf. Equitable Life Assur. Soc. of United States v. Union Pac. R. Co., 212 N. Y. 360, 371, 106 N. E. 92, L. R. A. 1915D, 1052.

upon simplicity and convenience of enforcement. The court said: "It should be held: (1) Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. (2) Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund."

In England the rule as early as 1799 was that an ordinary or usual dividend, whether paid in cash or in stock or in property, belongs to the life tenant, while an extraordinary or unusual cash or stock or property dividend belongs to the corpus of the estate.[48] But the rule as stated in the earlier English cases has been materially modified, and dividends of cash are now held to belong to the life tenant and stock dividends to the remainderman, subject, perhaps, to an examination of the circumstances in each case, in applying this rule.[49]

Whether, on the death of a person entitled to the income and profits of shares of stock for life, a dividend declared after his death in part out of profits earned by the corporation during his life may be apportioned between his estate and the remainderman, is not clear. In some jurisdictions this may be done by statute, and in some it has been done independently of any statute.[50] By the weight of authority, however, in the absence of statutory provision, the whole of such a dividend goes to the remainderman.[51] According to the well-settled rule, the estate of the life tenant is entitled to a dividend declared during his life, though not payable until afterwards.[52]

[48] 1 Cook, Stock. Stockh. & Corp. Law, §§ 556, 557, and cases there cited; Brander v. Brander, 4 Ves. Jr. 800; Smith's Estate, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237; McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230.

[49] Bouche v. Sproule, L. R. 12 App. Cas. 385; In re Osborne, supra.

[50] Ex parte Rutledge, Harp. Eq. (S. C.) 65, 14 Am. Dec. 696. In this case a person who was entitled for life to dividends on certain bank stock, "to be paid half-yearly as they shall be received from the bank," died just before a semiannual dividend was declared. It was held that the dividend should be apportioned, and the part which had accrued at the time of his death paid to his executor.

[51] 1 Cook, Stock, Stockh. & Corp. Law, § 558; In re Foote, 22 Pick. (Mass.) 299; In re Connolly's Estate, 198 Pa. 137, 47 Atl. 1125.

[52] Ante, p. 429.

When a corporation gives to its stockholders the right to subscribe to its new stock at a certain price, such a right is regarded as "principal," and goes to the remainderman, not to the life tenant.[53] It is an attribute of the ownership of the stock and hence an asset belonging to the corpus as distinguished from income. Thus, where trustees held shares of stock in a corporation which increased its capital stock, giving its stockholders the right to subscribe to the new stock to the amount of certain percentages of their old stock holdings at par, and the trustees exercised such right and subscribed for and purchased new stock, paying for the same out of the capital of the estate, the new stock so purchased was held to constitute part of the principal of the trust fund, and was not apportioned among the life beneficiaries and the remaindermen as in the case of extraordinary dividends.[54] Where the trustees are not in a position to make the subscriptions, but instead sell the right to subscribe, the proceeds realized from such sale of this right belong to and form a part similarly of the capital of the trust, and are not net income.[55]

INCREASE OF CAPITAL STOCK

138. A corporation cannot, directly or indirectly, increase its capital stock beyond the amount fixed by its charter, unless the power to do so is conferred upon it by the Legislature. Any attempted increase, in the absence of legislative sanction, is absolutely void, and the overissued stock is a nullity.

139. Where the power to increase its capital has been conferred upon a corporation, it must be exercised by vote of the stockholders, and not by the directors.

140. Where the stock of a corporation is increased, a person does not become a stockholder by merely subscribing therefor. He must pay for it.

[53] Robertson v. De Brulatour, 111 App. Div. 882, 98 N. Y. Supp. 15, affirmed 188 N. Y. 301, 80 N. E. 938; Richmond v. Richmond, 123 App. Div. 117, 108 N. Y. Supp. 298, affirmed 196 N. Y. 535, 89 N. E. 1111; Wright v. Wright, 53 N. Y. Law Jour. No. 106 (Aug. 4, 1915, per Phœnix Ingraham, Referee); De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930, 933, 63 L. R. A. 587; BALLANTINE v. YOUNG, 79 N. J. Eq. 70, 81 Atl. 119, Wormser Cas. Corporations, 283. Cf. IN RE OSBORNE, 209 N. Y. 450, 103 N. E. 723, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298, Wormser Cas. Corporations, 276, where the question related to a claim for dividends.

[54] Robertson v. De Brulatour, supra; Richmond v. Richmond, supra; Wright v. Wright, supra.

[55] Robertson v. De Brulatour, supra; BALLANTINE v. YOUNG, supra.

A corporation having a fixed capital divided into a fixed number of shares has no power of its own volition, or by any act of its officers or agents, to enlarge its capital or increase the number of shares into which it is divided, unless such power is expressly conferred upon it by its charter, or by an authorized amendment thereof. The power must be conferred upon it by the Legislature. Unless the power has been conferred upon it, every attempt to do so, either directly or indirectly, is void, and certificates issued in excess of the authorized capital are of no validity whatever.[56]

Where the charter of a corporation authorizes it to increase its capital stock, the exercise of the power effects so great and radical a change in the constitution of the corporation that it must be exercised by the stockholders. Corporate powers conferred upon directors refer only to the ordinary business transactions of the corporation, and it would be going far beyond the usual powers of directors to permit them to perform an act so fundamental in character as the increase of capital stock. It cannot, therefore, be exercised by the board of directors without the consent of the stockholders, unless such authority is conferred by the charter, or in a subsequent enabling act; and such subsequent enabling act would not bind the stockholders without their acceptance of it.[57]

Where a corporation is fully organized, and increases its capital stock under power conferred by its charter, subscriptions to the new stock do not stand on the same footing as a subscription made prior to and for the purpose of effecting organization. The latter makes the subscriber a stockholder before it is paid. In the case of stock issued by a corporation after it has been organized, it is different. To constitute a subscriber for the new stock a stockholder, something more than the mere subscription is necessary. The stock must be paid for.[58] The mere subscription to such stock, while it

[56] New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 49. In this case an officer of a corporation fraudulently issued certificates of stock in excess of the authorized capital. It was held that such certificates were void, and should be canceled at the suit of the corporation, but the corporation was held liable to persons defrauded thereby. See, also, Einstein v. Rochester Gas & Electric Co., 146 N. Y. 46, 40 N. E. 631; Cooke v. Marshall, 191 Pa. 315, 43 Atl. 314, '64 L. R. A. 413.

[57] Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90; Chicago City Ry. Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. Ed. 902; McNulta v. Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; Newport Cotton Mill Co. v. Mims, 103 Tenn. 465, 53 S. W. 736; Commercial Nat. Bank v. Weinhard, 192 U. S. 243, 24 Sup. Ct. 253, 48 L. Ed. 425.

[58] Baltimore City Pass. Ry. Co. v. Hambleton, 77 Md. 341, 26 Atl. 279; St. Paul, S. & T. F. R. Co. v. Robbins, 23 Minn. 439; Gould v. Town of Oneonta, 71 N. Y. 298. But see 1 Mor. Corp. § 61, criticizing these cases.

constitutes a valid contract on the part of the company to issue the stock to the subscriber upon his paying for it, and, on his part, to receive and pay for it, does not give him an interest in the company, nor vest in him the title to the stock.[59]

If the stock of a corporation is increased without authority, and certificates thereof issued, the increase and the certificates are void, and can neither confer any rights, nor impose any liabilities upon the holders, except where the persons seeking to enforce the liability are bona fide creditors of the corporation, who relied upon the validity of the stock, and as against whom the holders of such stock would be estopped to deny its validity in order to escape liability.[60] If there was no power at all to increase the stock, creditors are chargeable with notice of the want of power, and cannot claim to have been misled, and therefore no estoppel will arise.[61] It is otherwise if there was power to make the increase, but a mere failure to comply with the preliminaries prescribed by the statute.[62] It has been held that since the holder of shares of stock unlawfully issued does not become a stockholder in respect to these shares, he may recover back the money paid by him for them.[63]

SAME—SHAREHOLDERS' RIGHT TO PREFERENCE

141. The stockholders of a corporation are entitled to a preference over strangers, in proportion to their shares, in subscribing for an increase of the capital stock, and an action for damages will lie against the company if it deprives them of this right. This rule does not apply where the stock proposed to be issued is part of the original issue.

It is well settled that when the capital stock of a corporation is increased under a power conferred by its charter, each of the stockholders has the right to take a proportionate number of the new

[59] St. Paul, S. & T. F. R. Co. v. Robbins, supra.

[60] Sayles v. Brown (C. C.) 40 Fed. 8; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 49; Veeder v. Mudgett, 95 N. Y. 295.

[61] Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Ross-Meehan Brake-Shoe Foundry Co. v. Southern Malleable Iron Co. (C. C.) 72 Fed. 957; Clark v. Turner, 73 Ga. 1; Grangers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325.

[62] Veeder v. Mudgett, 95 N. Y. 295; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Peck v. Elliott, 79 Fed. 10, 24 C. C. A. 425, 38 L. R. A. 616; Palmer v. Bank of Zumbrota, 72 Minn. 266, 75 N. W. 380. And see Scott v. Deweese, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822.

[63] American Tube Works v. Boston Mach. Co., 139 Mass. 5, 29 N. E. 63; Reed v. Boston Mach. Co., 141 Mass. 454, 5 N. E. 852. And see Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347.

shares before they can be offered or issued to strangers. The stockholder has the legal right to subscribe for and take the same number of shares pro rata of the new stock that he held of the old. This prevents the tyranny of a majority. He may waive this pre-emptive right, but, if he does not, and is deprived of it, he may maintain an action against the company in assumpsit, and recover for the loss.[64] Exceptions to this rule exist where the new stock is issued in exchange for property or to effect a corporate consolidation and merger.[65] The measure of the damages to be recovered is the excess of the market value of the stock above the par value at the time of payment of the last installment, with interest on the excess.[66] This rule does not apply to original stock bought in by the corporation, or taken by it for debts due to it, and which is held as assets, and sold for the payment of liabilities, or for the general benefit.[67]

[64] Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90; Jones v. Morrison, 31 Minn. 140, 16 N. W. 854, collecting cases; Humboldt Driving Park Ass'n v. Stevens, 34 Neb. 528, 52 N. W. 568, 33 Am. St. Rep. 654; State v. Smith, 48 Vt. 266, 289; Jones v. Concord & M. R. R., 67 N. H. 119, 38 Atl. 120; Real Estate Trust Co. v. Bird, 90 Md. 229, 44 Atl. 1048; Way v. American Grease Co., 60 N. J. Eq. 263, 47 Atl. 44. Cf. Weidenfeld v. Northern Pac. R. Co., 129 Fed. 305, 63 C. C. A. 537; Snelling v. Richard (C. C.) 166 Fed. 635; STOKES v. CONTINENTAL TRUST CO., 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738, Wormser Cas. Corporations, 286. The directors may not provide that the new issue shall be sold to the one making the highest secret bid. Electric Co. of America v. Edison Electric Illuminating Co., 200 Pa. 516, 50 Atl. 164. And see Hammond v. Edison Illuminating Co., 131 Mich. 79, 90 N. W. 1040, 100 Am. St. Rep. 582. In STOKES v. CONTINENTAL TRUST CO., supra, the court said: "Otherwise the majority could deprive the minority of their proportionate power in the election of directors and of their proportionate right to share in the surplus, each of which is an inherent, pre-emptive and vested right of property." If the stockholder is so situated that he cannot subscribe himself, he is entitled to sell his rights to one who can. STOKES v. CONTINENTAL TRUST CO., supra.

[65] STOKES v. CONTINENTAL TRUST CO., 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738, Wormser Cas. Corporations, 286.

[66] Gray v. Portland Bank, supra. Where a corporation has made a new issue of stock to which existing stockholders were given the preferred right to subscribe their proportionate shares, such right is a substantial one and may be enforced in equity. Bates v. United Shoe Machinery Co. (D. C.) 206 Fed. 716.

[67] State v. Smith, 48 Vt. 266, 289; Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. 130; Curry v. Scott, 54 Pa. 270. In the last cited case, the court said: "But it is not to be admitted that an old stockholder had a right to subscribe to the untaken stock superior to the right of one who owned no stock. If this were so a first subscriber might compel all the remaining untaken stock to be sold, or, at least, would have a right to exclude any other person from subscribing."

PREFERRED STOCK

142. Preference or preferred shares of stock are shares which give the holders rights and privileges which are not given to the holders of common stock—usually the prior right to dividends to a certain amount.

143. A corporation may, in the absence of prohibition in its charter, provide for the issue of preferred stock, if it does so before any stock is issued; but, by the weight of authority, it cannot do so, in the absence of legislative authority, after common stock has been issued, without the unanimous consent of the holders of such common stock, as it would thereby interfere with their vested rights under their contracts.

144. It has been held that the Legislature may authorize a corporation to create preferred stock by amending the charter after common stock has been issued, where a provision in the Constitution or charter reserves to the state the right to repeal, alter, or amend.

145. The issue of preferred stock may take the form of a borrowing; but generally the subscribers or purchasers become stockholders, and not creditors, and they have the rights and are subject to the liabilities of stockholders. Thus:

(a) Their dividends are payable only out of the net earnings applicable to the payment of dividends, and creditors are entitled to be first paid.

(b) They are subject to the statutory liability for corporate debts, if the corporation becomes insolvent.

(c) They are entitled to vote at stockholders' meetings, and to all the other rights of stockholders, except in so far as the terms under which their preferred stock was issued may provide otherwise.

"Preferred stock" or "preference stock" is so called because the holders are given a preference of some sort over the ordinary stockholders. The ordinary stock is called "common stock." Generally, the preference consists in the right to receive dividends from the earnings of the company before the holders of the common stock can share in such earnings.[68] Sometimes the payment of the dividend is guaranteed, in which case the stock is called "guaranteed

[68] Totten v. Tison, 54 Ga. 139.

stock." [69] Preferred stock is usually issued in order to raise money for corporate purposes instead of borrowing the money on bond and mortgage, and the preference is given to facilitate its disposal. The mere characterization of stock as "preferred" discloses nothing of significance, since this term standing alone, means only stock that differs from other stock in having a preference of some sort attached to it, without expressing the nature of the preference. "Ordinarily the term 'preferred stock' is understood to designate such stock as is entitled to dividends from the income or earnings of the corporation before any other dividend can be paid. But, though this may be true, yet, to determine in each case the special properties and qualities it possesses, resort must be had to the statute or contract under which it was issued. 'Preferred stock takes a multiplicity of forms, according to the desire and ingenuity of the stockholders and necessities of the corporation itself.' It is a matter of contract or depends upon statute." [70] It follows that in resolving the rights of holders of preferred stock the question is always one of interpretation and construction.[71]

Power to Create Preferred Stock

Sometimes the power to issue preferred stock is expressly conferred by the charter of a corporation.[72] Where the charter does not expressly give the power, and does not prescribe how the shares shall be issued, but leaves the question to be determined by the corporation, and to be fixed by by-laws or otherwise, and there is no statutory prohibition in the way, a corporation may, before offering its stock, provide by its by-laws for the issuing of preferred stock, and then offer its stock to the public for subscription. Subscribers would then know what to expect, and would contract and be bound accordingly.[73] By the weight of authority, however, when this is not done, but, on the contrary, the stock is divided into equal shares, and is so subscribed for, no right to create preferred stock being reserved, the stockholders acquire a vested right under their contract to share equally in the earnings of the corporation, and in its property on dissolution; and this right cannot be im-

[69] Gordon's Ex'rs v. Richmond, F. & P. R. Co., 78 Va. 501.

[70] Scott v. Baltimore & O. R. Co., 93 Md. 475, 49 Atl. 327.

[71] Scott v. Baltimore & O. R. Co., supra; Will v. United Lankat Plantations Co., Limited, L. R. [1914] A. C. 11; Henry v. Great Northern Ry. Co., 1 De G. & J. 636; Equitable Life Assur. Soc. of United States v. Union Pac. R. Co., 212 N. Y. 360, 106 N. E. 92, L. R. A. 1915D, 1052.

[72] Belfast & M. L. R. Co. v. City of Belfast, 77 Me. 445, 1 Atl. 362.

[73] See Kent v. Quicksilver Min. Co., 78 N. Y. 159; Davis v. Proprietors of Second Universalist Meetinghouse, 8 Metc. (Mass.) 321; Hamlin v. Toledo, St. L. & K. C. R. Co., 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826.

paired without their consent by the subsequent creation and issue of preferred stock, unless it is done pursuant to a reserved power to amend, alter or repeal the charter, under valid legislative authority.[74] It has been recently held that, under the reserved power to amend, alter or repeal, a legislative amendment providing for the issuance of preferred stock on the consent of two-thirds of the holders of the corporation's capital stock is valid and constitutional, though the law at the time of the organization of the corporation required the unanimous consent of the stockholders to such an issuance.[75]

Some of the courts hold, and some seem to hold, that a corporation has the power to create and issue preferred stock on the ground that such a transaction is virtually a borrowing of money, and that corporations have the power to borrow money, and may do it in this way.[76] But such a transaction cannot, in any sense, be re-

[74] Kent v. Quicksilver Min. Co., 78 N. Y. 159; Campbell v. American Zylonite Co., 122 N. Y. 455, 25 N. E. 853, 11 L. R. A. 596; Ernst v. Elmira Municipal Imp. Co., 24 Misc. Rep. 583, 54 N. Y. Supp. 116. Cf. Wilcox v. Trenton Potteries Co., 64 N. J. Eq. 173, 53 Atl. 474; Andrews v. Gas Meter Co. [1897] 1 Ch. 361. And see Banigán v. Bard, 134 U. S. 291, 10 Sup. Ct. 565, 33 L. Ed. 932. "Shares of stock are in the nature of choses in action, and give the holder a fixed right in the division of the profits or earnings of a company so long as it exists, and of its effects when it is dissolved. That right is as inviolable as is any right in property, and can no more be taken away or lessened, against the will of the owner, than can any other right, unless power is reserved in the first instance, when it enters into the constitution of the right, or is properly derived afterwards from a superior lawgiver. The certificate of stock is the muniment of the shareholder's title, and evidence of his right. It expresses the contract between the corporation and its co-stockholders and himself; and that contract cannot, he being unwilling, be taken away from him, or changed as to him, without his prior dereliction, or under the conditions above stated." Kent v. Quicksilver Min. Co., supra. Such a transaction, not being within the corporate powers of the company, is not binding upon one who holds stock under an unregistered assignment in blank as security for a debt, though consented to by the registered owner. Unanimous consent of the shareholders is necessary in the absence of express and valid legislative authorization. Campbell v. American Zylonite Co., supra. But see, N. Y. Stock Corp. Law (Consol. Laws, c. 59), § 61, modifying the common-law rule and requiring only two-thirds consent.

[75] Hinckley v. Schwarzschild & Sulzberger Co., 45 Misc. Rep. 176, 91 N. Y. Supp. 893, affirmed 107 App. Div. 470, 95 N. Y. Supp. 357. But the common law rule prohibits the issue of preferred stock except by unanimous consent. Guinness v. Land Corporation, L. R. 22 Ch. Div. 349; Ernst v. Elmira Municipal Imp. Co., 24 Misc. Rep. 583, 54 N. Y. Supp. 116.

[76] See Hazlehurst v. Savannah, G. & N. A. R. Co., 43 Ga. 13. It was so held in West Chester & P. R. Co. v. Jackson, 77 Pa. 321, where it was said: "A corporation may issue new shares, and give them a preference, as a mode of borrowing money, where it has the power to borrow on bond and mortgage, as preferred stock is only a form of mortgage." In this case, how-

garded as a borrowing, except, perhaps, where the preferred stock is issued as security merely, and is redeemable by the corporation.[77] The issue of preferred stock is rather a method whereby a corporation obtains needed funds, without borrowing money or contracting a debt.[78] Nor can such a transaction be sustained under the power to make or alter by-laws, for "the power to make by-laws is to make such as are not inconsistent with the Constitution and the law, and the power to alter has the same limit, so that no alteration could be made which would infringe a right already given and secured by the contract of the corporation." [79]

In several cases it has been held that an act of the Legislature authorizing a corporation to issue preferred stock is valid, and not unconstitutional as impairing the obligation of the contracts between the corporation and existing stockholders, the issuing of preferred stock being regarded as a legitimate mode of raising money.[80] But, in the absence of the reserved power, such a holding seems unsound on principle, and misapprehends the usual status of the preferred stockholder.

Same—Laches and Estoppel of Stockholders

Stockholders who do not consent to the creation of preferred stock must not be guilty of laches in raising objection. If the corporation, by vote of a majority of the stockholders, determines to issue preferred shares, and puts the shares on the market, or offers them on subscription, shareholders who do not consent must assert their rights without delay, so as to prevent injury to innocent third persons who may take the shares from the corporation or by transfer from subscribers. If, with knowledge of the action of the corporation, actual or constructive, they acquiesce for an unreasonable

ever, provision was made for redemption of the stock, and attention was particularly called to this feature of the case by the court.

[77] "The idea of a borrowing is not filled out unless there is in the agreement therefor a promise or understanding that what is borrowed will be repaid or returned—the thing itself, or something like it, of equal value—with or without compensation for the use of it in the meantime. * * * The transaction is not to be looked upon as other than a preference of one class of stockholders to another—as giving to the first class a perpetual, inextinguishable, prior right to a portion of the earnings of the company before the other class might have anything therefrom." Kent v. Quicksilver Min. Co., 78 N. Y. 159. The issue of preferred stock may take the form of a borrowing, as where the stock is made redeemable, and is issued, like a bond, merely as security. See Totten v. Tison, 54 Ga. 139; post, p. 454, notes 1–3.

[78] Chaffee v. Rutland R. Co., 55 Vt. 110.

[79] Kent v. Quicksilver Min. Co., 78 N. Y. 159; post, p. 572.

[80] Rutland & B. R. Co. v. Thrall, 35 Vt. 536, 545; City of Covington v. Covington & Cincinnati Bridge Co., 10 Bush. (Ky.) 69.

time, they will be held to have assented, and will not be heard to complain.[81]

A person who takes preferred stock in a corporation may be estopped to deny the validity of its issue as against creditors. In Banigan v. Bard,[82] for instance, it was held that the holder of preferred stock in a corporation issued without statutory authority, who was active in passing the resolution authorizing its issue, and who voluntarily subscribed and paid for it, and held it for 28 months, voting upon it, and using it to obtain control of the corporation's affairs, could not, upon the insolvency of the corporation, assert its invalidity, and recover the money paid for it. So it has been held that persons who receive preferred stock, and for several years accept the interest guaranteed to be paid thereon, cannot raise the objection that the corporation had no power to issue the stock.[83]

Rights and Liabilities of Preferred Stockholders

The rights of holders of preferred stock will depend upon the construction of their contract with the corporation.[84] Generally, they are given the right to have dividends on their stock paid out of the earnings of the corporation before anything is paid to the holders of common stock. Sometimes they are given the right to certain dividends before payment of dividends on common stock, and, in addition to this, they are entitled to share in the remaining profits pro rata with the holders of the common stock. Thus, in a late Pennsylvania case, it was held that, in the absence of a contrary stipulation, preferred stockholders share with common stockholders in all profits distributed, after the latter have received an amount equal to the stipulated dividend on the preferred stock.[85] But where the articles of association provide that after the prescribed dividend is paid on the preferred stock, it is entitled "to no

[81] Kent v. Quicksilver Min. Co., 78 N. Y. 159, where relief was held to be barred by a delay of four years.

[82] 134 U. S. 291, 10 Sup. Ct. 565, 33 L. Ed. 932, affirming Bard v. Banigan (C. C.) 39 Fed. 13.

[83] Branch v. Jesup, 106 U. S. 468, 1 Sup. Ct. 495, 506, 27 L. Ed. 279. And see Breslin v. Fries-Breslin Co., 70 N. J. Law, 274, 58 Atl. 313. Contra, American Tube Works v. Boston Mach. Co., 139 Mass. 5, 29 N. E. 63.

[84] Of course, the charter and by-laws of the corporation in force at the time preferred stock is issued form a part of the contract between the corporation and holders of the preferred stock. See Belfast & M. L. R. Co. v. City of Belfast, 77 Me. 445, 1 Atl. 362; Pronick v. Spirits Distributing Co., 58 N. J. Eq. 97, 42 Atl. 586; Scott v. Baltimore & O. R. Co., 93 Md. 475, 49 Atl. 327.

[85] STERNBERGH v. BROCK, 225 Pa. 279, 74 Atl. 166, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877, Wormser Cas. Corporations, 295.

other or further share of the profits," an extra dividend declared by a corporation after it had paid the regular dividend on the preferred stock, belongs solely to the common stockholders and the preferred stockholders have no right to participate therein.[86] The question is largely one of construction of the particular constating instruments, such as the governing statute, by-laws, vote of shareholders, resolution of directors, etc.[87]

Ordinarily, a preferred stockholder is not to be regarded as a creditor of the corporation. He is a stockholder like the holders of common stock, the only difference being that he is entitled to a preference over them.[88] "He cannot be both creditor and debtor, by virtue of his ownership of stock." [89] And it is well established that dividends on preferred stock are payable only out of the net earnings, which are applicable to the payment of dividends. They are not payable absolutely and unconditionally, but only out of profits made by the company. The preference is limited to profits whenever earned.[90] "A dividend among preference stockholders

[86] Equitable Life Assur. Soc. of United States v. Union Pac. R. Co., 212 N. Y. 360, 106 N. E. 92, L. R. A. 1915D, 1052. And see Niles v. Ludlow Valve Mfg. Co., 202 Fed. 141, 120 C. C. A. 319, where it was held that preferred stockholders, who have regularly received the dividends provided for such stock by the certificate of incorporation, have no interest in the accumulated surplus earnings of the corporation. "The common stockholders bear substantially all the losses of adversity and are entitled to the gains of prosperity." See, also, Russell v. American Gas & Electric Co., 152 App. Div. 136, 136 N. Y. Supp. 602; Will v. United Lankat Plantations Co., Limited, L. R. [1914] A. C. 11.

[87] Will v. United Lankat Plantations Co., Limited, supra; Scott v. Baltimore & O. R. Co., supra; Equitable Life Assur. Soc. of United States v. Union Pac. R. Co., supra. But see STERNBERGH v. BROCK, supra.

[88] Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496; Belfast & M. L. R. Co. v. City of Belfast, 77 Me. 445, 1 Atl. 362; Taft v. Hartford, P. & F. R. Co., 8 R. I. 310, 5 Am. Rep. 575; Williston v. Michigan S. & N. I. R. Co., 13 Allen (Mass.) 400; Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C.) 82 Fed. 360; People v. St. Louis, A. & T. H. R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656; Hamblock v. Clipper Lawn Mower Co., 148 Ill. App. 618; Shaffer v. McCulloch, 192 Fed. 801, 113 C. C. A. 535; Spencer v. Smith, 201 Fed. 647, 120 C. C. A. 75; Boston Safe Deposit & Trust Co. v. Adams, 219 Mass. 175, 106 N. E. 590; Scott v. Baltimore & O. R. Co., 93 Md. 475, 49 Atl. 327.

[89] Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. Ed. 769. See, also, Hamlin v. Toledo, St. L. & K. C. R. Co., 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826; Chaffee v. Rutland R. Co., 55 Vt. 110.

[90] Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Chaffee v. Rutland R. Co., 55 Vt. 110; Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496; Taft v. Hartford, P. & F. R. Co., 8 R. I. 310, 5 Am. Rep. 575; St. John v. Erie Ry. Co., Fed. Cas. No. 12,226, affirmed 22 Wall. (U. S.) 136, 22 L. Ed. 743; Williston v. Michigan S. & N. I. R. Co., 13 Allen (Mass.) 400; Warren v. Queen & Co., 240 Pa. 154, 87 Atl. 595. Compare Gordon's Ex'rs v. Rich-

exclusively is understood to imply that the sum divided has been realized as profits, though the earnings do not yield a dividend to the stockholders in general." [91] Even a general guaranty of dividends on preferred stock is not a guaranty of payment in any event, but only in the event that dividends are earned.[92] An agreement to pay dividends on preferred stock absolutely and at all events is void.[93]

If the contract with preferred stockholders provides that the preferred shares shall be entitled to a dividend of a certain per cent. annually when earned, the dividends are cumulative, and the arrearages of one year are payable out of the earnings of subsequent years.[94] Thus, where preferred stockholders under the charter of a corporation are entitled to a fixed sum per annum, not limiting the sum to be paid to profits earned within a designated period, a preferred stockholder has a prior claim on subsequent dividends over the common stockholder, to make up any deficiency.[95] But the dividends may be made dependent upon the profits of each particular year, and in such a case they would not be cumulative.[96]

mond, F. & P. R. Co., 78 Va. 501. "An agreement to pay dividends on preferred stock out of the net earnings does not mean the net earnings of the corporation as it was when the preferred stock was issued. The corporation may, after the agreement, incur new obligations, which will diminish the net earnings applicable to such dividends." St. John v. Erie Ry. Co., 22 Wall. (U. S.) 136, 22 L. Ed. 743, affirming Fed. Cas. No. 12,226; Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. Ed. 769, affirming King v. Ohio & M. R. Co. (C. C.) 2 Fed. 36. In Dent v. Tramways Co., 16 Ch. Div. 344, a corporation had unlawfully paid dividends for several years without setting apart a fund to provide for repairs and renewals by reason of wear and tear. Afterwards they sought to make up this fund out of the profits of the current year, instead of paying dividends on preferred stock, which was entitled to dividends out of the profits of the particular year only. It was held that this could not be done.

[91] Per Cooley, J., in Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156.

[92] Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Taft v. Hartford, P. & F. R. Co., 8 R. I. 310, 5 Am. Rep. 575, and cases there cited; Williston v. Michigan S. & N. I. R. Co., 13 Allen (Mass.) 400; Field v. Lamson & Goodnow Mfg. Co., 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136.

[93] Warren v. Queen & Co., 240 Pa. 154, 87 Atl. 595.

[94] Henry v. Railway Co., 3 Jur. (N. S.) 1133; Boardman v. Lake Shore & M. S. Ry. Co., 84 N. Y. 157; Hazeltine v. Belfast & M. L. R. Co., 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330; Jermain v. Lake Shore & M. S. Ry. Co., 91 N. Y. 483. And see Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Cotting v. New York & N. E. Co., 54 Conn. 156, 5 Atl. 851.

[95] Fidelity Trust Co. v. Lehigh Valley R. Co., 215 Pa. 610, 64 Atl. 829, 7 Am. Cas. 613.

[96] New York, L. E. & W. R. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363.

Ordinarily preferred stock is entitled to no preference over other stock in relation to capital; but where there is an express agreement giving such a preference, not prohibited by local law or by the charter, it is binding upon the common stockholders.[97]

If the payment of dividends on preferred stock is made dependent upon the profits of each particular year, "as declared by the board of directors," the holders of such stock are not entitled of right to dividends payable out of the net profits accruing in any particular year, unless the directors formally declare, or ought to declare, a dividend payable out of such profits; and whether a dividend should be declared in any year is a matter belonging, in the first instance, to the directors to determine with reference to the condition of the company's property and affairs as a whole. The circumstances may justify them in expending money on improvements instead of declaring a dividend.[98]

Being stockholders, the owners of preferred shares are subject to all the liabilities of stockholders, including the statutory liability for corporate debts.[99]

The ownership of preferred stock, as a general rule, carries with it the right to vote upon the same at any meeting of the holders of the capital stock. But to this rule there may be exceptions. It is competent for a corporation in issuing certificates of preferred stock to stipulate therein that the holders shall not be entitled to vote the same at stockholders' meetings, and the stipulation will be binding upon them.[1] Such a provision affects only the two classes of stockholders, and does not concern the public or violate any rule of public policy.[2]

Preferred stock may be issued in such a way, and under such terms, as to make the transaction strictly a borrowing; and the holders of the stock may therefore become creditors of the corpora-

[97] Hamlin v. Toledo, St. L. & K. C. R. Co., 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155. In England it has been held that preferred and common stockholders share equally, on the winding up of the corporation, in the division of its capital. In re London India Rubber Co., L. R. 5 Eq. Cas. 519. Cf. In re Bangor Slab Co., L. R. 20 Eq. Cas. 59.

[98] New York, L. E. & W. R. Co. v. Nickals, supra, reversing Nickals v. New York, L. E. & W. R. Co. (C. C.) 15 Fed. 575. While it is largely a matter of discretion with the directors whether to declare a dividend, the court will not allow them to oppress holders of preferred stock by refusing to declare a dividend when the profits and nature of the business clearly warrant a dividend. Storrow v. Texas Consol. Compress & Mfg. Ass'n, 87 Fed. 612, 31 C. C. A. 139.

[99] Railroad Co. v. Smith, 48 Ohio St. 219, 31 N. E. 743.

[1] Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496.

[2] People ex rel. Browne v. Koenig, 133 App. Div. 756, 118 N. Y. Supp. 136.

tion, and not stockholders.[3] Though unusual, this is perfectly possible. In such a case the dividends might be payable, like the claims of other creditors, out of the gross earnings,[4] and the holders of the stock would not be subject to the statutory liability for debts of the corporation. "The relation of the holder of preferred stock is, in some of its aspects, similar to that of a creditor; but he is not a creditor, save as to dividends, after the same are declared. Nor does he sustain a dual relation to the corporation. He is either a stockholder or a creditor. He cannot, by virtue of the same certificate, be both. If the former, he takes a risk in the concerns of the company, not only as to dividends and a proportion of assets on the dissolution of the company, but as to the statutory liability for debts in case the corporation becomes insolvent. If the latter, he takes no interest in the company's affairs, is not concerned in its property or profits as such, but his whole right is to receive agreed compensation for the use of the money he furnishes, and the return of the principal when due. Whether he is the one or the other depends upon a proper construction of the contract he holds with the company." [5]

[3] In Totten v. Tison, 54 Ga. 139, preferred stock secured by first mortgage bonds was issued in order to procure money, under an agreement that the stock might be redeemed by the corporation, or converted into common stock, at the end of two years, at the option of the holders. At the end of the two years, the corporation being unable to redeem the shares, the certificates were surrendered by the holders, and exchanged for the mortgage bonds. The holders of the certificates never took any part or voted at stockholders' meetings, nor were they entered on the books of the corporation as stockholders. In a contest between creditors over the assets of the corporation, after insolvency, it was held that the holders of these bonds were entitled to claim as creditors. The court recognized the general rule that preferred stockholders are not in the position of creditors, but held that it did not apply to the peculiar facts of this case; that the transaction was, in effect, a loan. A statute may give to preferred stock, issued to obtain money, a lien on the franchises and property of the corporation prior to any subsequent mortgage or incumbrance. Heller v. National Marine Bank, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 73 Am. St. Rep. 212.

[4] See Gordon's Ex'rs v. Richmond, F. & P. R. Co., 78 Va. 501.

[5] Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496.

WATERED AND BONUS STOCK

146. By the weight of authority, in the absence of constitutional or statutory prohibition, where a corporation issues stock gratuitously, or under an agreement by which the holder is to pay less than its par value, either in money or in property or services—

(a) The transaction is binding upon the corporation.

(b) It is binding as against stockholders who participate or acquiesce therein.

(c) But it is a fraud upon dissenting stockholders, and they may sue in equity to enjoin or cancel the issue.

(d) If the stock is original stock, issued on subscription, the transaction is a fraud upon creditors of the corporation, who deal with it on the faith of the stock being full paid; and, if the corporation becomes insolvent, the original holders of such stock, and purchasers of the stock with notice, may be held liable for its par value to pay such creditors.

(e) When a corporation is an active and going concern, it may issue stock at its market, instead of its par, value, in payment of a debt, or to raise money or purchase property necessary for carrying on its business, and, if the stock is issued as full paid, and the transaction is in good faith, the holders of the stock will not be liable to creditors.

(f) If stock is issued as a bonus, and without consideration, the holders will be liable for the par value of the stock to creditors who deal with the corporation on the faith of the stock being full paid. This rule is not recognized at common law in New York.

(g) In any case, only those creditors who have dealt with the corporation on the faith of the stock being full paid can complain. Therefore, the holders of stock issued as full paid, without being paid in fact, are not liable

(1) To persons who became creditors before the stock was issued.

(2) Or who became creditors with knowledge of the facts.

147. In the absence of constitutional or statutory prohibition, stock may be paid for in property or services, if they are such as the corporation has the power to purchase or engage; and by the weight of authority the transaction will be valid as against creditors, if it was free from fraud, though the

property may in fact have been worth less than the stock. If the overvaluation is intentional, the transaction is fraudulent as a matter of law, and obvious and gross overvaluation, if unexplained, is conclusive evidence of intentional overvaluation.

148. These rules are to some extent inapplicable under peculiar constitutional or statutory provisions in force in some states.

148a. Remedial legislation on this subject is being enacted in several jurisdictions, with the object of protecting the public from the flotation of overcapitalized securities that do not represent actual values.

Effect as to the Corporation

In the absence of constitutional or statutory prohibition, or express prohibition in its charter, a corporation may bind itself by an issue of stock as full paid on receipt of partial payment only, either in money or in property or services. It cannot repudiate the agreement, and recover from the holder of the stock the difference between what he has paid and the par value. This is because the liability of a shareholder to pay for his stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some constitutional provision or statute. And it can make no difference whether the agreement is made with original subscribers or whether the stock is issued by the corporation in order to raise money, pay debts, or obtain property after it has become an active and going concern.[6]

In Scovill v. Thayer [7] it was agreed between a corporation and

[6] Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Harrison v. Union Pac. R. Co. (C. C.) 13 Fed. 522; Kenton Furnace R. & Mfg. Co. v. McAlpin (C. C.) 5 Fed. 737; Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429; SOUTHWORTH v. MORGAN, 205 N. Y. 293, 98 N. E. 490, 51 L. R. A. (N. S.) 56, Wormser Cas. Corporations, 304; Milliken v. Caruso, 205 N. Y. 559, 98 N. E. 493; Union Mut. Life Ins. Co. v. Frear Stone Mfg. Co., 97 Ill. 537, 37 Am. Rep. 129; First Nat. Bank of Deadwood v. Gustin, Minerva Con. Min. Co., 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510; Gold Ridge Mining & Development Co. v. Rice, 77 Wash. 384, 137 Pac. 1001; Merchants' Mut. Adjusting Agency v. Davidson, 23 Cal. App. 274, 137 Pac. 1091. Compare, however, Morrow v. Nashville Iron & Steel Co., 87 Tenn. 262, 10 S. W. 495, 3 L. R. A. 37, 10 Am. St. Rep. 658; Ooregum Gold-Min. Co. v. Roper, [1892] App. Cas. 125; In re Almada & Tirito Co., L. R. 38 Ch. Div. 415; Welton v. Saffery, [1897] App. Cas. 299; Barcus v. Gates, 89 Fed. 783, 32 C. C. A. 337; Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423; Parmelee v. Price, 208 Ill. 544, 70 N. E. 725.

[7] 105 U. S. 143, 26 L. Ed. 968.

all of its stockholders that only 20 per cent. should be paid on their shares. Mr. Justice Woods said: "As between them and the company, this was a perfectly valid agreement. It was not forbidden by the charter of the company, or by any law or public policy, and as between the company and its stockholders was just as binding as if it had been expressly authorized by the charter. If the company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock which had been satisfied by 'discount,' according to their contract, the stockholders could have successfully resisted such a demand. No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the company."

In Arapahoe Cattle & Land Co. v. Stevens,[8] a corporation, in order to procure money for carrying on its business, entered into a contract with plaintiff, a person not connected with it, by which it agreed to pay him in stock 33⅓ per cent. of any sum he should procure to be loaned to it. Plaintiff procured a bank to lend the corporation $5,000, and the court held that the transaction was not ultra vires, but, in the absence of fraud, was binding upon the corporation, though the price agreed to be paid was extravagant.

A corporation free from indebtedness, if acting in good faith, has the power, as between itself and its stockholders (all the stockholders uniting therein), to agree, in consideration of the surrender by the stockholders to it of accumulated profits and of the increased value of its property, to treat stock upon which only 50 per cent. has been paid as full-paid stock; and the corporation cannot afterwards, in its own behalf, or on behalf of subsequent creditors with notice, disturb the arrangement.[9] So, if a corporation with the assent of all the stockholders, issues stock as a gratuity to stockholders who have been called upon to pay calls on their original subscriptions in excess of what was expected, the transaction is binding upon the corporation according to the intention, and it cannot hold the stockholders liable on the stock.[10]

If the issue of stock without consideration, or without receiving its par value in money or property, is not only prohibited by the Constitution or by statute, but the issue is declared void, stock so issued can have no effect at all. It is absolutely void, and the holders do not become stockholders.[11] The effect of particular consti-

[8] 13 Colo. 534, 22 Pac. 823.

[9] Kenton Furnace, R. & Mfg. Co. v. McAlpin (C. C.) 5 Fed. 737.

[10] Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429.

[11] Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co., 13 Colo. 587, 22 Pac. 954. Cf. Stein v. Howard, 65 Cal. 616, 4 Pac. 662.

tutional and statutory provisions is considered in a subsequent paragraph.

Effect as to Stockholders

A stockholder may maintain a bill in equity to enjoin a threatened and unauthorized issue of stock gratuitously, or for less than its par value; and, where stock has already been so issued, a stockholder who has not participated or acquiesced in the transaction may maintain a bill to cancel the same.[13] In Donald v. American Smelting & Refining Co.,[13] it was proposed to issue $33,000,000 of stock for certain plants, leases, contracts and good will. The physical value of the plants was $10,000,000, while the value of the leases, contracts and good will was indefinite. Suit was brought by minority stockholders to enjoin the issue. The court held that the issue of stock for property whose probable value was less than the par value of the stock was improper, and granted an injunction. But a stockholder who has participated or acquiesced in the transaction cannot complain.[14] And clearly a stockholder who has not only acquiesced in the transaction, but has also received part of the stock so issued, will not be heard to complain. A dissenting stockholder must raise objection without delay, or relief may be barred by laches. If he knows of the issue or contemplated issue, and neglects for an unreasonable time to take any steps to cancel or prevent it, he will be deemed to have acquiesced, and he cannot afterwards complain.[15]

Effect as to Creditors

The fact that a corporation or stockholders cannot complain of a transaction in which stock is issued as full paid on payment of a

[13] Parsons v. Joseph, 92 Ala. 403, 8 South. 788; Perry v. Tuskaloosa Cotton Seed Oil Mill Co., 93 Ala. 364, 9 South. 217; Fisk v. Chicago, R. I. & P. R. Co., 53 Barb. (N. Y.) 513; Kraft v. Griffon Co., 82 App. Div. 29, 81 N. Y. Supp. 438; Carver v. Southern Iron & Steel Co., 78 N. J. Eq. 81, 78 Atl. 240; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618.

[13] 62 N. J. Eq. 729, 48 Atl. 771.

[14] Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Callanan v. Windsor, 78 Iowa, 193, 42 N. W. 652; Ten Eyck v. Pontiac, O. & P. A. R. Co., 114 Mich. 494, 72 N. W. 362; Washburn v. National Wall-Paper Co., 81 Fed. 17, 26 C. C. A. 312. Nor can his transferee complain. Ambrose Lake Tin & C. Min. Co. v. Hayes, L. R. 14 Ch. Div. 390; Parsons v. Hayes, 14 Abb. N. C. (N. Y.) 419; Pollitz v. Gould, 202 N. Y. 11, 94 N. E. 1088, 38 L. R. A. (N. S.) 988, Ann. Cas. 1912D, 1098, semble; Babcock v. Farwell, 245 Ill. 14, 91 N. E. 683, 137 Am. St. Rep. 284, 19 Ann. Cas. 74. See post p. 501.

[15] Taylor v. South & North Alabama R. Co. (C. C.) 13 Fed. 152. And see Burrows v. Interborough-Metropolitan Co. (C. C.) 156 Fed. 389, where the delay was not unreasonable under all the circumstances, and it was held there was no laches.

part only of its par value does not necessarily preclude creditors from objecting. In some cases they may recover from the holder of such stock the difference between its par value and the amount paid. In other cases they cannot do so. In dealing with this branch of the subject, we shall first consider original subscriptions. We shall then consider the issue of stock by a corporation when it is an active corporation, or, as is sometimes expressed, "a going concern." We shall then consider questions relating to the valuation of property or services received in payment for stock, and finally, the effect of peculiar constitutional or statutory provisions on the subject.

Same—Payment of Original Subscriptions

All the courts, with few exceptions, agree that an original subscriber to the capital stock of a corporation must pay its par value, in order to be protected against claims of creditors of the corporation on its becoming insolvent. Nothing less than this will make the stock full paid as against creditors. The earlier English cases held that, where a corporation issues stock under an agreement with the subscriber by which only a part of the par value is to be paid in, the contract, if void at all, is void in toto, or, if valid at all, is valid in toto; and that in either view the assignee in insolvency of the corporation cannot compel the holders of such stock to pay the difference between what they have paid or agreed to pay and the par value of the stock.[16] Under a statute however, and, it seems, independently of any statutory provision, the later English cases hold otherwise.[17] And in this country it has for a long time been well settled that one who subscribes for stock in a corporation under an agreement by which he is to pay less than the par value cannot stand on his agreement where the corporation becomes insolvent, and when it becomes necessary to hold him for the full amount of his subscription in order to satisfy the claims of creditors of the corporation who have dealt with it on the faith of the stock having been fully paid up. The agreement may be binding upon the corporation and upon participating or assenting stockholders, but it is void as against such creditors. The rule does not depend upon any constitutional or statutory prohibition, and the question of actual fraud is altogether immaterial.[18]

[16] Currie's Case, 3 De Gex, J. & S. 367; De Ruvigne's Case, 5 Ch. Div. 306; Anderson's Case, 7 Ch. Div. 94.

[17] In re Addlestone Linoleum Co., 58 Law T. (N. S.) 428; In re London Celluloid Co., 59 Law T. (N. S.) 109. And see Ooregum Gold Min. Co. of India v. Roper, [1892] App. Cas. 125. See Cook, Corp. § 42; 10 Cyc. 470.

[18] Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Ogilvie v. Knox Ins. Co., 22 How. (U. S.) 380, 16 L. Ed. 349; Sawyer v. Hoag, 17 Wall. (U. S.) 610, 21

Some of the cases base this rule on the doctrine laid down by Mr. Justice Story in Wood v. Dummer,[19] that the capital stock of a corporation is a trust fund for the payment of its debts. "The reason," said Mr. Justice Woods in Scovill v. Thayer,[20] "is that the stock subscribed is considered in equity as a trust fund for the payment of creditors. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and, if it is not, a court of equity will at his instance, require it to be paid." And it was said by Mr. Justice Brown in a later case: "It is the settled doctrine of this court that the trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such, nor by any device short of actual payment in good faith; and, while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the claims of creditors."[21] The Supreme Court of Minnesota in a leading case holds, in an opinion by Judge Mitchell, that the rule is not based on any trust fund doctrine at all, but upon the ground of

L. Ed. 731; Hawley v. Upton, 102 U. S. 314, 26 L. Ed. 179; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; In re Glen Iron Works (D. C.) 17 Fed. 324; Marsh v. Burroughs, 1 Woods, 463, Fed. Cas. No. 9,112; Union Mut. Life Ins. Co. v. Frear Stone Mfg. Co., 97 Ill. 537, 37 Am. Rep. 129; Hickling v. Wilson, 104 Ill. 54; Alling v. Wenzel, 133 Ill. 264, 24 N. E. 551; First Nat. Bank of Deadwood v. Gustin Minerva Con. Min. Co., 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510; Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74; White Mountains R. Co. v. Eastman, 34 N. H. 124; Northrop v. Bushnell, 38 Conn. 498; Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; Goodnow v. American Writing Paper Co., 72 N. J. Eq. 645, 66 Atl. 607, affirmed 73 N. J. Eq. 692, 69 Atl. 1014. See, also, Gogebic Inv. Co. v. Iron Chief Min. Co., 78 Wis. 427, 47 N. W. 726, 23 Am. St. Rep. 417; Easton Nat. Bank v. American Brick & Tile Co., 70 N. J. Eq. 732, 64 Atl. 917, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84; s. c., 70 N. J. Eq. 722, 64 Atl. 1095; Vaughn v. Alabama Nat. Bank, 143 Ala. 572, 42 South. 64, 5 Ann. Cas. 665; Shaw v. Staight, 107 Minn. 152, 119 N. W. 951, 20 L. R. A. (N. S.) 1077; First Nat. Bank v. Northup, 82 Kan. 638, 109 Pac. 672, 136 Am. St. Rep. 119. In the last cited case, it was held that when a corporation is organized, and stock is issued at a discount, less than par being received for shares nominally paid up, the corporation agreeing that no further payment shall be demanded, the rule is that the stockholder assumes a liability so far as is necessary for the protection of creditors becoming such without notice of said arrangement, up to the point where his total contribution to the funds equals the face value of his stock.

[19] 3 Mason, 308, Fed. Cas. No. 17,944.

[20] 105 U. S. 143, 26 L. Ed. 968.

[21] Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363.

fraud—the fraud consisting in impliedly representing to the public that the stock has been paid in full, when it has been paid in part only, or when nothing at all has been paid. "By putting it upon the ground of fraud," it was said "and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, 'Make that representation good by paying for your stock.' It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases." [22]

On the other hand, it was recently held by the New York Court of Appeals that, under the common law, a stockholder's liability upon a stock subscription depends solely upon his contract; and that, therefore, one who had purchased two shares of stock in a New Jersey corporation of the par value of $100 each for $25 each, and paid the corporation for the same, was not liable under the trust fund doctrine or any other doctrine, to creditors of the corporation for $75 per share, since he had paid the amount in full which he had contracted to pay.[23] Collin, J., said: "In the case at bar there were not statutory conditions upon which the shares might be owned. The agreement between the defendant and the corporation expressed with completeness the obligation and liability of the defendant for his shares. He has fulfilled the obligation and thereby destroy-

[22] Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637. And see DOWNER v. UNION LAND CO. OF ST. PAUL, 113 Minn. 410, 129 N. W. 777, Wormser Cas. Corporations, 381. See post, p. 677, where the trust-fund doctrine is discussed.

[23] SOUTHWORTH v. MORGAN, 205 N. Y. 293, 98 N. E. 490, 51 L. R. A. (N. S.) 56, Wormser Cas. Corporations, 304, professing to follow Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429. And see Milliken v. Caruso, 205 N. Y. 559, 98 N. E. 493. As to the statute binding New York corporations, see Stock Corporation Law N. Y. (Consol. Laws, c. 59), § 56. There are similar statutes to-day in practically every state.

ed the liability. The trust fund doctrine is inapplicable, and the findings of fact do not constitute a cause of action." It should be noted that there was no allegation in the pleading and no evidence introduced, as to the statutes of New Jersey covering liability in such a case; and the common-law rule, as understood in New York, was accordingly applied. On principle, the decision is unsound, and from a standpoint of public policy it is unfortunate in tendency. The court, however, felt bound by the authority of its previous decisions. Cullen, C. J., in a concurring memorandum, went so far as to say frankly, regarding the question involved, that "were it an original one, I should reach a contrary conclusion." Stock should be paid for in full, it is submitted, and "water" is a poor and sorry substitute to creditors for money or money's value.

Same—Increase of Capital Stock

Where the capital stock of a corporation is increased, if the increase is for the purpose of adding to the original capital stock, and enabling the corporation to do a larger and more profitable business, subscribers to or purchasers of such stock stand practically upon the same basis as subscribers to the original stock; and they are liable for the par value of the stock.[24] In Flinn v. Bagley[25] the defendants had subscribed and agreed to pay certain sums of money towards the increased capital stock of a corporation, with the understanding that they were to receive stock therefor at 66⅔ cents on the dollar, which was all the existing stock was worth, and all that the new stock could be sold for. The arrangement having been carried out, and certificates of stock issued, it was held that, though the case was a hard one upon the defendants, and no fraud was intended, the assignee in bankruptcy of the corporation could hold them for the remaining one-third of the par value of the stock. If a corporation increases its capital stock, and distributes part of the new stock among the stockholders as full paid, without any consideration, they will be liable to creditors of the corporation for its par value.[26]

Same—Issue of Stock at Market Value by Active Corporation to Pay Debts, etc.

As has just been shown, in the case of original subscriptions to the capital stock of a corporation, and subscriptions to an increase of stock, the par value must be paid to protect the subscriber

[24] Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Flinn v. Bagley (D. C.) 7 Fed. 785; Rickerson Roller Mill Co. v. Farrell Foundry & Machine Co., 75 Fed. 554, 23 C. C. A. 302.

[25] (D. C.) 7 Fed. 785.

[26] Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227.

against the claims of creditors. A distinction has been made between these cases which we have been considering, and cases in which an active corporation issues stock for the purpose of paying its debts, or for the purpose of procuring money for the prosecution of its business where its original capital has become impaired by loss or misfortune; and it has been held that in the latter cases, in the absence of constitutional or statutory prohibition, it may issue stock as full paid on payment of its actual value, instead of its par value; and, if the transaction is honest and fair, the holders of the stock will not be liable to creditors on the theory that the stock is not paid up. There are some decisions against this view,[27] but it is supported by the weight of authority.[28]

In Clark v. Bever,[29] decided in 1891, a railroad company, of which the defendant's intestate was president and a stockholder, had a settlement with a construction company, of which he was also a member, for work done in building the road. The railroad company, being unable to pay the claim of the construction company, delivered to it 3,500 shares of its stock at 20 cents on the dollar, and they were accepted by the creditor company in full satisfaction of the debt. The stock was not worth anything on the market, and was issued directly to the defendant's intestate, and no other payment than the 20 per cent. was ever made on the stock. A judgment creditor of the railroad company filed a bill to compel the payment by the defendant of his claim upon the theory that he was liable for the par value of the stock, whatever may have been its market value at the time it was issued. It was held that he could not recover. Harlan, J., said: "It is not the case of an ordinary subscription of stock in a given amount. Nor is it, strictly, one of an ordinary purchase of stock for purposes of investment. It is the case of a creditor of an insolvent railroad corporation

[27] Jackson v. Traer, 64 Iowa, 469, 20 N. W. 764, 52 Am. Rep. 449, Rothrock, C. J., and Seevers, J., dissenting (disapproved in CLARK v. BEVER, infra). And see Kraft v. Griffon Co., 82 App. Div. 29, 81 N. Y. Supp. 438; Zelaya Min. Co. v. Meyer (City Ct. N. Y.) 8 N. Y. Supp. 487; Garrett v. Kansas City Coal Min. Co., 113 Mo. 330, 20 S. W. 965, 35 Am. St. Rep. 713.

[28] CLARK v. BEVER, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88, Wormser Cas. Corporations, 300; Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Van Cott v. Van Brunt, 82 N. Y. 535; Stein v. Howard, 65 Cal. 616, 4 Pac. 662; Ingraham v. Commercial Lead Co., 177 Fed. 341, 101 C. C. A. 317. Cf. Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143.

[29] 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88, Wormser Cas. Corporations, 300. See, also, Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; Union Loan & Trust Co. v. Southern California Motor-Road Co. (C. C.) 51 Fed. 840.

which, in consequence of its inability to pay creditors in money, was threatened with bankruptcy, and which refused or was unable to pay except in stock that was without market value. To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value—there being no statute forbidding such a transaction—without subjecting the creditor, surrendering his debt, to the liability attaching to stockholders who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts, or to borrow money secured by mortgage upon their corporate property."

So also, by the weight of authority, in the absence of constitutional or statutory prohibition, where an active corporation finds its original capital impaired by loss or misfortune, it may, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, when authorized to increase its capital stock, and may put it upon the market and sell it for the best price that can be obtained; and if the sale is fairly made, the purchasers cannot be held liable to creditors of the corporation, on its becoming insolvent, for the difference between the amount paid by them and the par value of the stock.[80] In Handley v. Stutz,[81] an active corporation, a "going concern," whose original capital had been impaired by loss and misfortune, for the purpose of paying its debts, and obtaining money to prosecute its business, issued bonds; but, finding it impossible to negotiate them, it issued shares of capital stock in an amount equaling the par value of the bonds to "sweeten" the bonds and thus to serve as an additional inducement to their purchase. The bonds and stock were sold at a price fairly representing their market value, without any unfair dealing on the part of any one connected with the transaction. Under these circumstances it was held that the purchasers could not be called upon to respond for the par value of the stock at the suit of the creditors of the corporation. "To say," said the court, Mr. Justice Brown writing, "that a corporation may not, under the circumstances above indicated, put its stock upon the market, and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The

[80] As we have seen, this does not apply where the stock is increased for the purpose of providing a larger capital and doing an extended business, and not to restore capital impaired by losses. Ante, p. 463.

[81] 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227. See article by Hon. G. W. Wickersham, 22 Harv. Law Rev. 319, 330, et seq.

wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and, so long as the transaction is bona fide, and not a mere cover for 'watering' the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. Of course, no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value." [82]

The decision holds that a going corporation, finding its initial capital eaten into and impaired, may, for the purpose of recuperating itself for the successful continuation of its business, issue new stock where the charter authorizes this, put the new stock upon the market and sell it for the best price that can be obtained. It seemingly was not called to the attention of the court that a corporation situated like the one described by Mr. Justice Brown, can market its stock and thus raise money in a different method than by selling it below par. The proper procedure is legally to reduce the capital stock to the actual value of the company's assets. This will in no wise hurt the stockholders, for each will have the same proportionate interest in the company that he had before. The company can then authorize an additional issue of stock which it can market at par, after the "water" has been squeezed out of its nominal capital stock by reducing the capital stock, in the manner provided by statute. To illustrate: Suppose a corporation whose nominal cap-

[82] See, also, Stein v. Howard, 65 Cal. 616, 4 Pac. 662; Dummer v. Smedley, 110 Mich. 466, 68 N. W. 260, 38 L. R. A. 490. But see Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; Peter v. Union Mfg. Co., 56 Ohio St. 181, 46 N. E. 894; Kraft v. Griffon Co., 82 App. Div. 29, 81 N. Y. Supp. 438.

ital is $100,000, has its actual assets reduced to $30,000, through various losses. Of course if it proceeds to increase its nominal capital no one would want to purchase the additional issue at more than one-third of its par value. But if the company should first reduce its nominal capital to $30,000 and then vote an issue of additional stock, there is no reason why the new shares should not sell at par, for there is then no inflation. It is not unlikely that if this consideration had been advanced, the result reached by the Supreme Court in Handley v. Stutz would have been different. As it was, even, there was a strong dissent by Fuller, C. J., with whom Lamar, J., concurred.[83]

If an active corporation can issue stock at its market value in payment of its debts, or to raise money necessary to carry on its business, as held in the cases referred to above, there seems to be no good reason why they cannot issue stock at its market value in payment for property or services which are necessary for the prosecution of its business, and which it can procure in no other way, and which it has the power to purchase or engage. And there are cases which hold that it can do so if the transaction is honest and fair. In Van Cott v. Van Brunt [84] a railroad company in good faith made a contract for the construction of its road, and agreed to pay therefor in its stock on the basis of its actual, instead of its par, value. The Court of Appeals of New York held that the contract was valid, and that the holders of the stock could not be held liable to creditors for the difference between what was thus paid and its par value. This decision has been criticized by text-writers and by some of the courts, but it has often been approved, and has lately been reaffirmed by the New York court.[85]

Same—Gratuitous Issue of Stock

In New York it is held that the liability of a shareholder in a corporation to pay for stock does not arise out of the relation, but depends upon his contract with the corporation, express or implied, or upon some statute fixing his liability, and that, in the absence of either contract or statute, one to whom shares have been issued as a gratuity does not, by accepting them, commit any wrong upon creditors, or make himself liable to pay the par value of the shares for

[83] See brief for plaintiff-appellant in Pollitz v. Wabash R. Co., 167 App. Div. 669, 152 N. Y. Supp. 803.

[84] 82 N. Y. 535. See dictum in Barr v. New York, L. E. & W. R. Co., 125 N. Y. 263, 26 N. E. 145. And see Coe v. East & W. R. Co. of Alabama (C. C.) 52 Fed. 531.

[85] Bostwick v. Young, 118 App. Div. 490, 103 N. Y. Supp. 607, affirmed short 194 N. Y. 516, 87 N. E. 1115.

the payment of corporate debts.[36] According to the better opinion, however, the rule is otherwise; and if a person accepts stock in a corporation, which is issued to him as a gratuity, and the corporation becomes insolvent, the law will create a promise to pay therefor in favor of creditors.[37]

Same—Payment for Stock in Property or Services

It is clear on principle, and well established by authority, that the directors of a corporation, in the absence of constitutional or statutory prohibition, may receive property or services in payment for stock, either from original subscribers or from persons to whom they sell stock, in any case in which they would have the power to purchase the property or contract for the services.[38] Such power is often expressly conferred by statute, but this is not necessary, for it exists at common law. Where the directors have the power to contract a debt for property or services, it would be absurd to say that they cannot pay for the same in stock, or receive the same in payment of subscriptions, and to require them to first contract the debt, and then pay it with money received for stock or on subscriptions. Whether the stock must be paid for at its par value instead

[36] Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429. And see, SOUTHWORTH v. MORGAN, 205 N. Y. 293, 98 N. E. 490, 51 L. R. A. (N. S.) 56, Wormser Cas. Corporations, 304; Milliken v. Caruso, 205 N. Y. 559, 98 N. E. 493. The New York rule, in practice, is modified by Stock Corporation Law N. Y. (Consol. Laws, c. 59), § 56.

[37] Stutz v. Handley (C. C.) 41 Fed. 531; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227. And see Skrainka v. Allen, 7 Mo. App. 434; Id., 76 Mo. 384; Washburn v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516; Morrow v. Nashville Iron & Steel Co., 87 Tenn. 262, 10 S. W. 495, 3 L. R. A. 37, 10 Am. St. Rep. 658.

[38] Carr v. Le Fevre, 27 Pa. 413; Brant v. Ehlen, 59 Md. 1; Liebke v. Knapp, 79 Mo. 22, 49 Am. Rep. 212; Coffin v. Ransdell, 110 Ind. 417, 11 N. E. 20; Spargo's Case, 8 Ch. App. 407, 412; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618; Fitzpatrick v. O'Neill, 43 Mont. 552, 118 Pac. 273, Ann. Cas. 1912C, 296. Stock of a corporation may be issued in payment for work and labor performed. Vineland Grape Juice Co. v. Chandler, 80 N. J. Eq. 437, 85 Atl. 213, Ann. Cas. 1914A, 679. Stock issued for the good will of a business is issued for property actually received, within the meaning of the New York corporation law. Washburn v. National Wall-Paper Co., 81 Fed. 17, 26 C. C. A. 312. Cf. See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843. Under a statute providing that the directors of a corporation may purchase "property necessary for their business" and issue stock "to the amount of the value thereof in payment therefor," the directors of a corporation organized for the consolidation of various industrial plants were not entitled, as against creditors, to issue stock in payment of property transferred to the corporation at a valuation based on a capitalization of contemplated profits. See v. Heppenheimer, supra; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618. And see article by Hon. G. W. Wickersham, 22 Harv. L. Rev. 319.

of its market value has been considered in the preceding paragraphs, and it has been seen that, according to the majority of the cases, subscribers must pay the par value; but that, by the weight of authority, an active corporation may sometimes issue stock in payment of debts, or to raise money for the prosecution of its business, at its market value.

Same—Value of the Property or Services

It is expressly provided by statute in some jurisdictions that property or services received in payment for stock must be taken at their money value. This is nothing more than a declaration of the common law in so far as dissenting stockholders and subsequent creditors of the corporation are concerned. Even in the absence of such a statute, for a corporation to issue stock for property intentionally overvalued would be a fraud upon dissenting stockholders; and, even if all the stockholders should consent, it would be a fraud upon persons dealing with the corporation. Dissenting stockholders could sue to enjoin the issue of stock for property intentionally overvalued, or to cancel it if issued; and persons afterwards dealing with the corporation could hold the persons to whom the stock is thus issued liable for the difference between the amount of their stock and the real value of the property.[39]

Where a corporation receives property or services in payment for stock, and issues the stock as full paid, it is very generally held that fraud, or intentional or reckless overvaluation of the property or

[39] Coleman v. Howe, 154 Ill. 458, 39 N. E. 725, 45 Am. St. Rep. 133; Sprague v. National Bank of America, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17; Gillett v. Chicago Title & Trust Co., 230 Ill. 373, 82 N. E. 891; Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65; State v. Citizens' Light & Power Co., 172 Ala. 232, 55 South. 193; Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652; Wallace v. Carpenter Electric Heating Mfg. Co., 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530; Wishard v. Hansen, 99 Iowa, 307, 68 N. W. 691, 61 Am. St. Rep. 238; Gates v. Tippecanoe Stone Co., 57 Ohio St. 60, 48 N. E. 285, 63 Am. St. Rep. 705; Dunlap v. Rauch, 24 Wash. 620, 64 Pac. 807. Some cases hold, however, that the transaction is valid and binding on all parties, unless there is a fraudulent overvaluation, and that in such case, as in other cases of fraud, the only remedy is a rescission, which must be in toto; the corporation returning the property and receiving back the stock. See Van Cott v. Van Brunt, 82 N. Y. 535; Du Pont v. Tilden (C. C.) 42 Fed. 87; Cook, Corp. §§ 42, 46. In a recent Kentucky case, it was held that, at common law, corporate creditors cannot hold stockholders liable on stock issued for property, even though the property was turned over to the corporation for the stock at an agreed valuation largely in excess of the real value of the property. The remedy, the court said, is by rescission; and cases decided under statutes or charter provisions are distinguished. Horton v. Sherrill-Russell Lumber Co., 147 Ky. 226, 143 S. W. 1053.

services must be shown before the holders of the stock can be held liable to creditors of the corporation on the ground that the stock is not full paid. It is not enough to show an overvaluation due to mere error of judgment.[40] "The transaction may be impeached for fraud, but not for error of judgment, or mistaken views of the value of the property, inasmuch as good faith and the exercise of an honest judgment is all that is required." [41] Accordingly, this is sometimes termed the "good faith rule," as opposed to the so-called "true value rule," which declares that the property received by the corporation must be the reasonable and just equivalent in value of

[40] Colt v. North Carolina Gold Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420 (as construed in Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Bank of Ft. Madison v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; Schenck v. Andrews, 57 N. Y. 133; Douglass v. Ireland, 73 N. Y. 100; Lake Superior Iron Co. v. Drexel, 90 N. Y. 87; Gamble v. Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; Rathbone v. Ayer, 196 N. Y. 503, 89 N. E. 1111, reversing 121 App. Div. 355, 105 N. Y. Supp. 1041; Richardson v. Treasure Hill Min. Co., 23 Utah, 366, 65 Pac. 74; Taylor v. Cummings, 127 Fed. 108, 62 C. C. A. 108. Many courts, however, assert a stricter rule, and declare that good faith is not enough, but that the property must be the fair equivalent in value of the stock issued for it. This is generally termed the "true value" or "fair value" rule. See Van Cleve v. Berkey, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; Berry v. Rood, 168 Mo. 316, 67 S. W. 644; State Trust Co. v. Turner, 111 Iowa, 664, 82 N. W. 1029, 53 L. R. A. 136; Kelly v. Clark, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668; Gates v. Tippecanoe Stone Co., 57 Ohio St. 60, 48 N. E. 285, 63 Am. St. Rep. 705; Gillin v. Sawyer, 93 Me. 151, 44 Atl. 677. In the leading case of State Trust Co. v. Turner, supra, the Iowa court says: "Involved primarily is the so-called 'trust fund doctrine,' as applied to stockholders' obligations to creditors. This is founded on the proposition that as the state undertakes to relieve the stockholder in a corporation of a general liability for the debts of the concern, to the amount that he has invested in the enterprise, he ought, in good faith, to pay in money or its equivalent the face value of the stock received; and, if he fails to do this, he should be treated as holding the remainder in trust for the benefit of the creditors of the corporation. From this proposition two apparently conflicting and inconsistent rules have grown up, one of which may be called the 'true value rule,' and the other the 'good faith rule.' Courts adopting the good faith rule are also divided on the proposition as to what is necessary to be shown to constitute good faith. Some of them hold that, in the absence of an affirmative showing of fraud aliunde, mere overvaluation of the property given in exchange for stock will not render the stockholder liable for the difference, while others hold that overvaluation itself, especially if gross, constitutes, or at least raises a strong presumption of fraud." As said by Gifford, L. J., in Drummond's Case, 4 Ch. App. 772: "If a man contracts to take shares he must pay for them, to use a homely phrase, 'in meal or in malt.'" Nothing but money or money's worth is to be regarded as payment for shares of capital stock. De Shelter v. American Spring Water Supply Co., 182 Ill. App. 403.

[41] Douglass v. Ireland, 73 N. Y. 100.

the stock issued in payment for it. In Gamble v. Queens County Water Co.[42] a shareholder in a water company, at his own expense, and for his own benefit, built a system of pipes, etc., suitable for an extension of the company's plant, and the corporation purchased the same from him, issuing in payment stocks and bonds of the value of $110,000. The cost of the work was from $80,000 to $85,000. It was held that the difference was not so large as to necessarily indicate fraud, and the transaction was upheld.

Some of the cases hold that an actual fraudulent intent must be shown in order that a person who pays for his stock in property may be held liable to creditors on the ground that the property was overvalued, and some opinions contain dicta to this effect.[43] But by the better opinion this is not necessary. The directors of a corporation have no right to take in payment for stock property that is intentionally overvalued. Laying aside all question as to whether there is an actual intention to defraud, such a transaction would be a fraud in law, both upon dissenting stockholders and upon persons dealing with the corporation on the faith of its stock being fully paid up, and it would be just as invalid as against creditors as a payment for stock in money at a discount. If the nature of the property and the extent of the overvaluation are such that the overvaluation may possibly have been due to error of judgment, then, to render the transaction invalid as against creditors, actual fraud must be shown, and the question is one of fact.[44] If, on the other hand, the overvaluation is so gross and obvious that it could not have been due to mere error of judgment, the transaction will be

[42] 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527 (decided under statute).

[43] See Phelan v. Hazard, 5 Dill. 45, Fed. Cas. No. 11,068; Colt v. North Carolina Gold Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; Young v. Erie Iron Co., 65 Mich. 111, 31 N. W. 814; Whitehill v. Jacobs, 75 Wis. 474, 44 N. W. 630; Coffin v. Ransdell, 110 Ind. 417, 11 N. E. 20; Clow v. Brown (Ind. Sup.) 31 N. E. 361; Carr v. Le Fevre, 27 Pa. 413; Brant v. Ehlen, 59 Md. 1; Bickley v. Schlag, 46 N. J. Eq. 533, 20 Atl. 250; Clayton v. Ore Knob Co., 109 N. C. 385, 14 S. E. 36; Walburn v. Chenault, 43 Kan. 352, 23 Pac. 657; Grant v. East & West R. Co., 54 Fed. 569, 4 C. C. A. 511; Donald v. American Smelting & Refining Co., 62 N. J. Eq. 729, 48 Atl. 771, 1116; McCarter v. Pitman, Glassboro & Clayton Gas Co., 74 N. J. Eq. 255, 69 Atl. 211.

[44] See Douglass v. Ireland, 73 N. Y. 100 (statutory); Lake Superior Iron Co. v. Drexel, 90 N. Y. 87 (ibid); Kunz v. National Valve Co., 29 Ohio Cir. Ct. R. 519; Hobgood v. Ehlen, 141 N. C. 344, 53 S. E. 857; Graves v. Brooks, 117 Mich. 424, 75 N. W. 932. In the last cited case, the court said: "In order to render stock issued as full-paid and nonassessable, assessable, it is necessary to establish either an actual fraud in fact, or such reckless conduct in fixing the value of the property conveyed, without regard to its value, that an intent to defraud may be inferred."

held fraudulent as a matter of law.[45] In most jurisdictions, the subject is regulated by statute. Thus, in New York, in the absence of fraud in the transaction, the judgment of the directors as to the value of the property purchased is conclusive.[46]

In Wetherbee v. Baker [47] five persons agreed for the purchase of a tract of land, and organized themselves into a corporation under a land improvement act. In the certificate of incorporation the capital stock was fixed at $100,000, and these persons subscribed for all of it, and became the directors of the company. The consideration of the purchase was $50,000. The deed was made directly to the corporation, and it gave its obligations for the whole purchase money. The directors then appraised the lands at $100,000, and credited $50,000 of the valuation as a credit of 50 per cent. on the subscriptions. The land was not worth more than the original purchase money, and the corporation acquired no other property. It was held that, as against creditors of the corporation, the allowance of a credit of 50 per cent. on the subscriptions was invalid, and that the stockholders were liable for the whole amount of their subscriptions as they appeared in the certificate of incorporation.

In Douglass v. Ireland [48] the entire capital stock of a corporation, $300,000, was issued to one of its trustees in consideration of the

[45] See Boynton v. Andrews, 63 N. Y. 93; Boynton v. Hatch, 47 N. Y. 225; National Tube-Works Co. v. Gilfillan, 124 N. Y. 302, 26 N. E. 538 (proof of fraudulent intent unnecessary); Wetherbee v. Baker, 35 N. J. Eq. 501; Northwestern Mut. Life Ins. Co. v. Cotton Exchange Real Estate Co. (C. C.) 46 Fed. 22; Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65; Flour City Nat. Bank v. Shire, 88 App. Div. 401, 84 N. Y. Supp. 810, affirmed 179 N. Y. 587, 72 N. E. 1141; Tooker v. National Sugar Refining Co. of New Jersey, 80 N. J. Eq. 305, 84 Atl. 10; Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538; Boulton Carbon Co. v. Mills, 78 Iowa, 460, 43 N. W. 290, 5 L. R. A. 649; First Nat. Bank of Deadwood v. Gustin Minerva Con. Min. Co., 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510; Garrett v. Kansas City Coal Min. Co., 113 Mo. 330, 20 S. W. 965, 35 Am. St. Rep. 713. Compare Libby v. Tobey, 82 Me. 397, 19 Atl. 904; Wallace v. Carpenter Electric Heating Mfg. Co., 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530; National Bank of Merrill v. Illinois & W. Lumber Co., 101 Wis. 247, 77 N. W. 185; Lea v. Iron Belt Mercantile Co., 119 Ala. 271, 24 South. 28; See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843.

[46] Stock Corporation Law N. Y. (Consol. Laws, c. 59), § 55. To similar effect, see Corporation Law N. J. (P. L. 1896, p. 293) § 49; but see amendment of February 19, 1913 (P. L. p. 28) (one of the now famous "Seven Sisters" Laws). As to construction, see Tooker v. National Sugar Refining Co. of New Jersey, 80 N. J. Eq. 305, 84 Atl. 10.

[47] 35 N. J. Eq. 501. See, also, Clevenger v. Moore, 71 N. J. Law, 148, 58 Atl. 88.

[48] 73 N. Y. 100 (statutory).

assignment to the company of two contracts for the purchase of mining property, upon which nothing had been paid, the contract price being $40,000. One-third of the stock was immediately transferred to the company, to be sold to raise a working capital, and was sold at from 40 to 60 cents on the dollar. Defendant, knowing the circumstances, and having participated as trustee of the corporation in the transaction, purchased $25,000 of the stock at 40 cents. The jury found the value of the property to be $68,000. It was held that the evidence justified a finding of fraud, and that the defendant was liable to creditors of the corporation. The court said that under the New York statute "all that is necessary to establish the legal fraud * * * is to prove two facts: (1) That the stock issued exceeded in amount the value of the property in exchange for which it was issued. (2) That the trustees deliberately and with knowledge of the real value of the property overvalued it, and paid in stock for it an amount which they knew was in excess of its value."

When property taken by a corporation in payment for stock is not only grossly overvalued, but there are other circumstances from which actual fraudulent intent may be inferred, there can be no question but that the stockholder is liable to subsequent creditors of the corporation, who became such in ignorance of the circumstances under which the stock was issued for the difference between the value of the property and the par value of the stock.[49]

In determining the value of property thus received in payment for stock, the true valuation is the value to the company; and where the property has been produced by the labor and at the expense of the person from whom it is received, a fair profit to him is to be included.[50] If the property is taken by the corporation at an honest

[49] Lloyd v. Preston, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. Ed. 1111, affirming Preston v. Cincinnati, C. & H. V. R. Co. (C. C.) 36 Fed. 54, 1 L. R. A. 140. There must be affirmative evidence of fraudulent overvaluation. Rathbone v. Ayer, 196 N. Y. 503, 89 N. E. 1111, reversing 121 App. Div. 355, 105 N. Y. Supp. 1041.

[50] Gamble v. Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527. In this case a shareholder in a water company, having built a system of pipes, etc., suitable for an extension of the company's plant, and having sold the same to the corporation for stock and bonds, it was held that, in determining the value of the property, the question was the value to the company, and that there should be included in the estimate, in addition to the money actually expended for labor and materials, an adequate charge by the owner and his assistant for personal services in superintending the work, interest upon the money invested, amounts saved by fortunate purchases of material, and a reasonable profit upon the undertaking, having regard to the nature and risks of the work. As to the elements to be considered in estimating value, see Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed.

valuation, fairly made and agreed upon, the transaction will not be rendered invalid by the fact that its value, estimated in the light of subsequent events, does not equal the amount at which it was received.[51] But the valuation must be such as a sensible business man would approve. "Values based on visionary or speculative hopes, unwarranted by existing conditions or facts, and without reasonable evidence from present appearances, are not such as the law will tolerate, as against creditors." [52] It will be presumed, in the absence of any proof as to the value of property received in payment for stock, that it was adequate.[53]

Same—Creditors Who Cannot Complain

The true reason why creditors of an insolvent corporation can hold the persons to whom the corporation has issued stock as full paid, when nothing at all, or only a part of it, has been paid, being that holding such stock out to the public as full paid is a fraud upon persons dealing with the corporation on the faith of the stock being actually fully paid for, only those creditors who come within the reason of the rule can complain.[54] It follows that creditors cannot attack a transaction by which a corporation has issued stock gratuitously or for a cash discount, or for property worth less than the amount of the stock, if they knew the facts, and did not give credit to the corporation in the belief that the stock was fully paid. In Coit v. North Carolina Gold Amalgamating Co.[55] it was held that where, upon the purchase of additional property by a corporation, its capital stock was increased by the issue to the stockholders, upon the surrender of their old certificates, of new stock to a much greater extent than the value of the additional property, the stockholders could not be held liable on the stock at the suit of a creditor who was cognizant of the whole transaction, and acquiesced in it.[56] The reason is because no credit is given upon a representation

363. As to valuation of good will, see Washburn v. National Wall-Paper Co., 81 Fed. 17, 26 C. C. A. 312.

[51] Coit v. North Carolina Gold Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; Carr v. Le Fevre, 27 Pa. 413; Richardson v. Treasure Hill Min. Co., 23 Utah, 366, 65 Pac. 74.

[52] State Trust Co. v. Turner, 111 Iowa, 664, 82 N. W. 1029, 53 L. R., A. 136.

[53] Davis v. Montgomery Furnace & Chemical Co., 101 Ala. 127, 8 South. 496.

[54] Ante, p. 460.

[55] 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420.

[56] And see Whitehill v. Jacobs, 75 Wis. 474, 44 N. W. 630; First Nat. Bank of Deadwood v. Gustin Minerva Con. Min. Co., 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510; Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; DOWNER v. UNION LAND CO., OF ST. PAUL, 113 Minn. 410, 129 N. W. 777, Wormser Cas. Corporations, 381; Rickerson Roller-Mill Co. v. Farrell Foundry &

of a different set of facts than those which actually existed. So, when the stock of a corporation is increased, and the increased stock issued for less than its value, persons who became creditors of the corporation prior to the increase cannot hold the purchasers or holders of such stock liable for its value; for they could not, by any legal presumption, have trusted the corporation upon the faith of such stock.[57] But persons who become creditors after the increase is voted are entitled to look to those who subsequently receive the stock, though their debts are contracted before the stock is received.[58]

"The whole doctrine that the capital stock of corporations is a trust fund for the payment of creditors rests upon the equitable consideration that the distribution of the capital among stockholders without making adequate provision for the payment of debts, or the issue of fictitiously paid-up stock, is a fraud upon creditors who contract with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full. But, when the reason for the rule does not exist, the rule itself ceases to apply. This trust does not arise absolutely in every case in favor of any and every creditor. It is not true, and no case can be found which holds, that it is in the power of a creditor in every and all cases as a matter of right to institute an inquiry as to the value or amount of the consideration given for stock issued as fully paid up, any more than it would be his right, in any and every case, to inquire into the distribution of the capital among the shareholders. It is only those creditors who can fairly allege that they have relied, or whom the law presumes to have relied, upon the amount of capital stock of the company, who have a right to make such inquiry, or in whose favor equity will impress a trust

Machine Co., 75 Fed. 554, 23 C. C. A. 302; State Trust Co. v. Turner, 111 Iowa, 664, 82 N. W. 1029, 53 L. R. A. 136; Colonial Trust Co. v. McMillan, 188 Mo. 547, 87 S. W. 933, 107 Am. St. Rep. 335; Lea v. Iron Belt Mercantile Co., 147 Ala. 421, 42 South. 415, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93; Reel v. Brammer, 56 Ind. App. 180, 101 N. E. 1043. Where the articles of a corporation were recorded as required by law, and provided that only 15 per cent. of the par value of the stock subscribed should be collected, and that such limitation should not be changed except by unanimous consent of the stockholders, and showed the amount subscribed by each stockholder and the cash paid therefor, the unpaid portion of such stock was not an asset for the benefit of the creditors, since the recorded articles gave notice of the liability of the stockholders. Bent v. Underdown, 156 Ind. 516, 60 N. E. 307.

[57] Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, affirming Stutz v. Handley (C. C.) 41 Fed. 531. And see Graham v. La Crosse & M. R. Co., 102 U. S. 148, 26 L. Ed. 106; Wallace v. Carpenter Electric Heating Mfg. Co., 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530.

[58] Handley v. Stutz, supra.

upon the subscription to the stock, and set aside a fictitious arrangement for its payment." [59]

In some states, however, by statute, the right of the creditor to enforce liability against the stockholder who has not paid in full is not dependent upon the knowledge possessed by the creditor that the subscription for the stock was not paid in full.[60]

Effect of Constitutional and Statutory Provisions

In a number of states constitutional or statutory provisions have been adopted or enacted with a view to preventing the issue of watered stock. These provisions vary somewhat in the different states. Even where they are similar, the courts have not always agreed in construing them.

In quite a number of states it is provided, in substance, that no corporation shall issue stock except for labor done, services performed, or money or property actually received; and all fictitious increase of stock shall be void. If effect is given to the language of this statute, it seems clear that stock issued by a corporation without any consideration at all is absolutely void, and the holders do not become stockholders at all for any purpose. It was so held by the Supreme Court of Colorado, where a holder of such stock sought to maintain an action, the right to maintain which depended upon his being a stockholder.[61] It would seem to follow necessarily from this construction that the corporation could refuse to recognize him as a stockholder, and that he could not be held liable to creditors.[62] A contract which contemplates the violation of this provision is illegal and void.[63] While a contract by a corporation to issue stock in violation of the statute for labor and property is executory, the corporation may maintain a suit to rescind the contract.[64] In such a case it has been held the contractor may recover from the corporation the value of the labor and materials actually

[59] First Nat. Bank of Deadwood v. Gustin Minerva Con. Min. Co., 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510.

[60] Sprague v. National Bank of America, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17.

[61] Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co., 13 Colo. 587, 22 Pac. 954. See, also, Kellerman v. Maier, 116 Cal. 416, 48 Pac. 377; Kimball v. New England Roller Grate Co., 69 N. H. 485, 45 Atl. 253; First Ave. Land Co. v. Parker, 111 Wis. 1, 86 N. W. 604, 87 Am. St. Rep. 841; Pietsch v. Krause, 116 Wis. 344, 93 N. W. 9.

[62] But see Nenny v. Waddill, 6 Tex. Civ. App. 244, 25 S. W. 308.

[63] Williams v. Evans, 87 Ala. 725, 6 South. 702, 6 L. R. A. 218; Garrett v. Kansas City Coal Mining Co., 113 Mo. 330, 20 S. W. 985, 35 Am. St. Rep. 713. And see, Pollitz v. Wabash R. Co., 167 App. Div. 669, 152 N. Y. Supp. 803.

[64] New Castle Northern R. Co. v. Simpson (C. C.) 21 Fed. 533.

furnished by him, if his conduct has been free from actual bad faith.[65] By the better opinion, a person who has entered into a contract to take stock to be issued in violation of the statute may withdraw before it is issued, and recover money paid by him under the contract, for, if an illegal agreement is not malum in se, but merely malum prohibitum, a locus pœnitentiæ remains; and, while the illegal object has not been carried out by performance of the agreement, it may be repudiated, and money paid under it may be recovered.[66] But, if the stock has been issued, and the illegal object thereby carried out, such an action cannot be maintained.[67]

The Constitution of Arkansas provides that "no private corporation shall issue stocks or bonds except for money or property actually received or labor done, and all fictitious increase of stock or indebtedness shall be void." Const. 1874, art. 12, § 8. In Memphis & L. R. R. Co. v. Dow [68] the Supreme Court of the United States, construing this provision, held that it was not intended to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued; or to restrict corporations, acting with the approval of their stockholders, in the exchange of their stock or bonds for money, property, or labor, upon such terms as they may deem proper, provided the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law. And the court held that the provision did not prevent mortgage bondholders, who bought in the property and franchises of a corporation upon foreclosure, from fixing the terms upon which they would surrender those interests, and that they might reorganize upon substantially the same basis, as to capital stock and bonded indebtedness, as that of the old corporation, although under that arrangement they received both stock and bonds to a large amount, of which the amount of the stock alone was sufficient to cover the full value of the property, rights, and privileges of the reorganized company.

[65] New Castle Northern R. Co. v. Simpson, supra. See, also, Potter v. Necedah Lumber Co., 105 Wis. 25, 80 N. W. 88, 81 N. W. 118.

[66] Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347, affirming 14 Blatchf. 364, Fed. Cas. No. 7,903; Clark, Cont. (2d Ed.) 338. Contra, Knowlton v. Congress & E. Spring Co., 57 N. Y. 518.

[67] Clarke v. Lincoln Lumber Co., 59 Wis. 655, 18 N. W. 492.

[68] 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595. Compare New Castle Northern R. Co. v. Simpson (C. C.) 21 Fed. 533. And see Pollitz v. Wabash R. Co., 150 App. Div. 715, 135 N. Y. Supp. 789, modified 207 N. Y. 113, 100 N. E. 721.

In California, under such a provision, it was held that an increase of stock in a water company, and an issue of the same at the actual market value, which was less than the par value, for the purpose of enlarging the works, was not a fictitious issue, and was authorized.[69] The court said: "Of the stock proposed to be issued there is no one share upon which a person can place his finger and say that share is or will be feigned, imaginary, not real, counterfeit, false, not genuine. Each share is offered at a price equal to the price of any one of the old shares."

In Peoria & S. R. Co. v. Thompson[70] it was held that a similar provision in Illinois applying to railroad companies was intended to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not, and are not intended to, represent money or property of any kind, either in possession or in expectancy, the stock or bonds in such case being entirely fictitious; that it was not intended to interfere with the usual and customary methods of raising funds by railroad companies by the issue of its stock or bonds, for the purpose of building their roads, or of accomplishing other legitimate corporate purposes.

Such a provision prohibits the issue of stock to subscribers on payment in cash of a less sum than its par value.[71] And it has been held that it prohibits a corporation from doubling its capital stock, and distributing the new stock among the stockholders as a stock dividend on the ground that its original capital stock has been invested in property which has more than doubled in value.[72]

As we have seen, the New York court has held, in the absence of constitutional or statutory prohibition, that a corporation, in issuing stock in payment of property, may issue it at its actual, instead of its par, value.[73] The former New York statute relating to manufacturing corporations provided that, on the purchase of property by such a corporation, stock might be issued "to the amount of the value of the property" (Laws 1848, c. 40, § 2, as amended by Laws 1853, c. 333, § 2) in payment, and that the stock so issued

[69] Stein v. Howard, 65 Cal. 616, 4 Pac. 662. And see Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015; Nelson v. Hubbard, 96 Ala. 238, 11 South. 428, 432, 17 L. R. A. 375; Ersfeld v. Exner, 128 App. Div. 135, 112 N. Y. Supp. 561.

[70] 103 Ill. 187. See, also, Sprague v. National Bank of America, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17.

[71] Williams v. Evans, 87 Ala. 725, 6 South. 702, 6 L. R. A. 218.

[72] Fitzpatrick v. Dispatch Pub. Co., 83 Ala. 604, 2 South. 727.

[73] Van Cott v. Van Brunt, 82 N. Y. 535; Boynton v. Hatch, 47 N. Y. 225.

should be taken to be full-paid stock. It was held that the statute meant that the stock must be issued at its par value, though that may be greater than its market value.[74]

In Alabama there are constitutional and statutory provisions prohibiting the issue of stock except for money or property actually received, and requiring all stock subscriptions to be paid in money, or in labor or property at its money value. Under these provisions it was said in Elyton Land Co. v. Birmingham Warehouse & Elevator Co.[75] that subscribers who pay their subscriptions in labor or property of a less money value than the amount of their subscriptions, though this is done by all the subscribers, and though there is no fraud, are liable to creditors of the corporation for the difference between the value of the property and the amount of their subscriptions. The dictum in this case goes much further than was necessary. The defendants had organized a corporation with a capital stock of $250,000, and subscribed for the whole amount. In payment of their subscription they transferred to the company a bond for title for land for which they had paid only $5,000. For the balance of the purchase money (about $50,000) the company executed its notes. The land was worth no more than was paid for it. Here, therefore, was a case in which there was so great a difference between the amount of stock and the value of the property that the court could have held it to be a case of fraud in law, and the decision on the facts, is nothing more than an application of the doctrine explained in a preceding paragraph. The New York cases under a similar provision are to the same effect.[76] It is not to be supposed that the Alabama court would hold a transaction by which a corporation receives property in payment for stock invalid as against creditors, where there was no actual fraud, and the overvaluation was not reckless or intentional, but was due merely to error of judgment.[77]

Under a constitutional provision prohibiting corporations from issuing any stock except to bona fide subscribers or any bond for

[74] Gamble v. Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527.

[75] 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65. See, also, Van Cleve v. Berkey, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; Berry v. Rood, 168 Mo. 316, 67 S. W. 644; Rumsey Mfg. Co. v. Kaime, 173 Mo. 551, 73 S. W. 470; Babbitt v. Read (D. C.) 215 Fed. 395.

[76] Ante, p. 471. And see Webre v. Christ, 130 La. 450, 58 South. 145; Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559; In re Monarch Corp., 203 Fed. 664, 122 C. C. A. 175, reversing order (D. C.) 196 Fed. 252.

[77] But see State Trust Co. v. Turner, 111 Iowa, 664, 82 N. W. 1029, 53 L. R. A. 136; Van Cleve v. Berkey, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; Pollitz v. Wabash R. Co., 167 App. Div. 669, 152 N. Y. Supp. 803.

the payment of money except for money or property received or labor done, it was held that a bond given by a corporation to a purchaser of stock for the payment of a certain sum, if dividends within a certain time did not amount to the price paid for the stock, was illegal, where compliance with the bond would leave the issuance of the stock without any consideration.[78]

The Stock Corporation Law of New York[79] prohibits the issuance of stock except for money, labor done, or property actually received. Where an individual, who conceived the idea of publishing a history of the Protestant Episcopal Church in this country, obtained from bishops their promises to act as supervising editors of the history of their respective dioceses, and then organized a corporation to publish the history, and thereupon transferred to the corporation the agreements with the bishops, and received in consideration thereof stock of the corporation, the agreements, though admittedly valuable, were held not to be property within the purview of the law.[80] Under the same statute, it has been decided that stock cannot be given in payment of promotion services.[81] The court said: "It will thus be seen that the statute is so worded as to preclude the payment for promotion services, because it, in express terms, provides that stock shall not be issued, except for money paid to or work done for, or property actually received by the corporation and the courts have so construed it." [82]

A note given for corporate stock, being neither money paid nor property, is void and uncollectible, where the local constitution prohibits the issue of stock or bonds except for money paid, labor done, or property actually received.[83] Under a similar provision, however, a note for shares of capital stock was held to be property.[84] The question is one of interpretation of the legislative intention. And under the same clause it has been decided that an un-

[78] Jorguson v. Apex Gold Mines Co., 74 Wash. 243, 133 Pac. 465, 46 L. R. A. (N. S.) 637.

[79] Consol. Laws N. Y. c. 59, § 55.

[80] Stevens v. Episcopal Church History Co., 140 App. Div. 570, 125 N. Y. Supp. 573.

[81] Lamphere v. Lang, 157 App. Div. 306, 141 N. Y. Supp. 967, reversed on other grounds, 213 N. Y. 585, 108 N. E. 82.

[82] And see, Herbert v. Duryea, 34 App. Div. 478, 54 N. Y. Supp. 311, affirmed 164 N. Y. 596, 58 N. E. 1088; Lewis v. Matthews, 161 App. Div. 107, 146 N. Y. Supp. 424; Hayward v. Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; McAllister v. American Hospital Ass'n, 62 Or. 530, 125 Pac. 286. But see, Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618.

[83] Mason v. First Nat. Bank (Tex. Civ. App.) 156 S. W. 366.

[84] German Mercantile Co. v. Wanner, 25 N. D. 479, 142 N. W. 463, 52 L. R. A. (N. S.) 453.

patented formula is not property, and that parties receiving stock in return for such formula are, therefore, liable to creditors of the corporation for the full face value of their stock.[85]

Liability of Transferees

Where stock is issued by a corporation as full paid on payment of a part only, and the person to whom it is issued transfers the same to a purchaser with notice, the transferee stands in the transferror's shoes, and will be liable on the stock to the same extent as the transferror. But, if the transfer is to a purchaser without notice, no such liability attaches. The stock, in his hands, must be regarded as full paid.[86] It was said by the Court of Appeals of Maryland in Brant v. Ehlen:[87] "The liability for subscription to the stock of a corporation is founded on contract. Where one agrees to take a certain number of shares, the law implies a promise to pay for them according to the terms of his subscription. If they are sold before all installments are paid, and are bought with such knowledge, the law implies a promise on the part of the purchaser to pay whatever may be due thereon, according to the terms of the original subscription. In such cases the purchaser stands in the shoes of the original subscriber. These are elementary principles, about which there can be no contention. But where shares are issued by the company to the subscriber as full-paid shares, and are sold by the subscriber as such, there is no ground on which a promise can be implied, on the part of the purchaser without notice, to be answerable, either to the company or to its creditors, should the representations on the faith of which he purchased prove to be false. He could not be held liable on the ground of contract, because he never agreed to purchase any other shares than full-paid shares; and, if it be said that the shares were fraudulently issued, he could not be held liable on the ground of fraud, because he was in no sense a party to the fraud."

[85] O'Bear-Nester Glass Co. v. Antiexplo Co., 101 Tex. 431, 108 S. W. 967, 109 S. W. 931, 16 L. R. A. (N. S.) 520, 130 Am. St. Rep. 865.

[86] Brant v. Ehlen, 59 Md. 1; Du Pont v. Tilden (C. C.) 42 Fed. 87; Steacy v. Little Rock & Ft. S. R. Co., 5 Dill. 348, Fed. Cas. No. 13,329; Cleveland Rolling-Mill Co. v. Texas & St. L. R. Co. (C. C.) 27 Fed. 250; Young v. Erie Iron Co., 65 Mich. 111, 31 N. W. 814; Wallace v. Carpenter Electric Heating Mfg. Co., 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530; Sprague v. National Bank of America, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17; Berry v. Rood, 168 Mo. 316, 67 S. W. 644; Allen v. Grant, 122 Ga. 552, 50 S. E. 494. And see Libby v. Tobey, 82 Me. 397, 19 Atl. 904; Utica Fire Alarm Tel. Co. v. Waggoner Watchman Clock Co., 166 Mich. 618, 132 N. W. 502.

[87] 59 Md. 1.

Remedial Legislation to Prevent Overcapitalization and the Flotation of Watered Stock

The constitutional and statutory provisions, some of which we have already considered, although well-intentioned, have proven almost worthless in practice. It has been aptly said that all such devices, designed to prevent overcapitalization, "must prove abortive unless some administrative body exercises a power of control in execution of the statute." [88] The beginnings of such administrative control are now discernible. Thus, in Massachusetts, it is provided that the value of property taken in payment for stock shall appear in a statement made, signed and sworn to by the president, treasurer, and majority of the directors giving a description "in such detail as the commissioner of corporations shall require or approve, and indorsed with his certificate that he is satisfied that said valuation is fair and reasonable." [89] In Iowa, the executive council of the state is made an official appraiser, where a transfer of property is made in payment of shares.[90]

The new German Commercial Code protects the public efficiently against the flotation of watered stock. Where property other than money is transferred in payment of shares, not only are the organizers required to sign a full and detailed statement, to which wide publicity is given, but, further, an examination must be made by the official board of trade of the district, or in the absence of such, by the court.[91] The responsibility is placed also upon the bankers who offer the shares for sale, making them practically guarantors of the accuracy of the representations of the corporate organizers.[92] This is calculated "to prevent the irresponsible dissemination of worthless shares by puffing and extravagant promises." [93] And, with characteristic thoroughness, the German law provides for severe criminal penalties for any violations of the statutes connected with corporate organization and stock flotation.[94] The keystone of the German system is disinterested supervision of organization plus

[88] Kuhn, Comparative Study of Law of Corporations, Columbia Univ. Studies in Hist., Econ. & Pub. Law, vol. 49, No. 2, p. 112. And see book review of this useful work by I. Maurice Wormser, 12 Columbia Law Rev. 758, 759.

[89] Rev. Laws Mass. c. 110, § 44. And see Fall River Gas Works Co. v. Board of Gas & Electric Light Com'rs, 214 Mass. 529, 102 N. E. 475. See, also, Consol. Laws N. Y. c. 48, §§ 55, 69; Act (P. L. p. 382) April 21, 1911, § 19.

[90] Acts 32d Gen. Assem. c. 71, §§ 1–3; Acts 34th Gen. Assem. c. 76, § 1. The Rhode Island provision as to manufacturing corporations is similar. Gen. Laws 1909, c. 214, § 8. See also, Kuhn, op. cit. pp. 112, 113.

[91] Comm. Code, §§ 190–192; Kuhn, op. cit. pp. 73, 74.

[92] Comm. Code, §§ 203, 204; Kuhn, op. cit. pp. 76, 77.

[93] Kuhn, op. cit. p. 77.

[94] Comm. Code, §§ 313, 314; Kuhn, op. cit. pp. 79, 80.

full publicity. It has followed actual economic conditions and has provided a just, rather than a needlessly harsh, remedy. It furnishes a splendid model for our state Legislatures.

In England, the same degree of protection to stockholders and creditors is not given. Though full publicity of the prospectus is adequately provided for,[95] no independent body is given supervision over valuation and capitalization, and in this respect there is a serious shortcoming.[96]

It has been suggested that a maximum limitation should be placed upon capitalization, and that this would operate as a preventive of overcapitalization. This suggestion overlooks the circumstance that a corporation with a very small amount of capital stock, possibly only $5,000, may nevertheless be grossly overcapitalized. Its tangible property may not be worth anything.

Another suggestion, supported by a distinguished sponsor,[97] is the issuance of shares of stock without nominal or par value. A statute, in terms authorizing this, was recently enacted in New York.[98] This suggestion seems of little value, since by doing away with the nominal value of the aliquot parts, it is clear that the evil of the overcapitalization of the whole is not thereby remedied. The stockholder and creditor would be no better off than they are today. "The incidents of an evil are often mistaken for its cause. What is required is an effective control over organization and administration; not a mere change in the association type." [99] This control preferably should be vested in an administrative tribunal, rather than in the already overburdened courts.

ACTIONS BY STOCKHOLDERS FOR INJURIES TO CORPORATION—INTERFERENCE IN MANAGEMENT

149. AT LAW—A stockholder cannot maintain an action at law for an injury to the corporation. Such an action can only be brought by the corporation.

150. IN EQUITY—The corporation is the proper party to sue in equity to redress or prevent wrongs against it, committed or threatened, either by strangers, or by its own officers or agents; but a court of equity will entertain such a suit by a stockholder, on behalf of himself and the other stock-

[95] Companies Act 1908, §§ 62, 80, 81. [96] Kuhn, op. cit. pp. 110, 111.
[97] Morawetz, 26 Harvard Law Rev. 729.
[98] Laws N. Y. 1912, c. 351, amending Stock Corp. Law (Consol. Laws, c. 59), adding sections 19–23. And see Laws N. Y. 1913, c. 779.
[99] Kuhn, op. cit. p. 115. But see Morawetz, supra.

holders, where, for any reason, redress or protection cannot be obtained through the corporation or its officers.

151. RIGHT OF STOCKHOLDER TO SUE ON HIS OWN BEHALF—A stockholder may apply to a court of equity for a preventive remedy by injunction to restrain those who are administering the affairs of the corporation from doing acts which are ultra vires, or to prevent a misapplication of the corporate funds which might result injuriously to the stockholders, where the acts intended to be performed would amount to a breach of trust.

151a. RIGHT OF STOCKHOLDER TO SUE ON BEHALF OF THE CORPORATION IN A REPRESENTATIVE OR DERIVATIVE ACTION—To enable a stockholder to maintain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself would be ordinarily the proper party to sue, there must exist as the foundation of the suit:

(a) Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred upon them by the charter or other source of organization.

(b) Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other stockholders.

(c) Or the board of directors or trustees, or a majority of them, must be acting for their own interests, in a manner destructive of the corporation itself, or of the rights of the other shareholders.

(d) Or the majority of the stockholders themselves must be oppressively and illegally pursuing a course which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

(e) In addition to the existence of grievances calling for equitable relief, it must appear that the complainant has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances. He must apply to the managing officers to take action in the corporate name, unless for some reason such attempt would be useless and vain. If he fails with them, and the acts done or contemplated to be done are of such a nature as

to admit of ratification by the body of stockholders, he must also seek to obtain relief from the stockholders as a body, unless for potent reasons the matter will not admit of such delay, or unless it clearly appears that such application would be futile.

(f) Plaintiff, in such a suit, must be free from any personal exception against his capacity to sue in equity.

As was explained in treating of the nature of a corporation, the corporate body exists in law as a legal entity, separate and distinct from the members who compose it. The corporation and its members are not the same thing for the purpose of suits to redress injuries to the corporation. A corporation is a collection of individuals, it is true; but the individuals in their collective capacity are represented by the corporation, the artificial person. An infringement of their collective rights is an injury to the corporation, for which an action, if brought at all, must be brought by the corporation. For such injuries, as a general rule, the individual members cannot sue. This applies not only to injuries inflicted by strangers, but it also applies to injuries resulting from the wrongs of the officers or agents of the corporation.

Actions at Law

It is well settled that a stockholder cannot maintain an action at law for injury to the corporation, either by its officers or by a stranger. The property of a corporation belongs to the corporation as a distinct legal entity separate from the members who compose it, and for any injury thereto the corporation must sue. Neither a single stockholder, for instance, nor even all of the stockholders, could maintain trover or trespass for conversion of or injury to the corporate property, or replevin to recover the same; but all such suits must be brought by the corporation.[1] Nor can a stockholder maintain an action at law against the directors or other officers of a corporation for their negligence or misfeasance in conducting its affairs, whereby the capital is wasted and lost, though the shares are thereby rendered worthless. Such an action, when it can be maintained at all, must be brought by the corporation, for the injury is to the corporation.[2] All injuries to corporate prop-

[1] Ante, pp. 5, 6; Tomlinson v. Bricklayers' Union No. 1, 87 Ind. 308; BUTTON v. HOFFMAN, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131, Wormser Cas. Corporations, 1; Palmer v. Ring, 113 App. Div. 643, 99 N. Y. Supp. 290. The mere fact that one has become sole owner of the stock does not entitle him to sue in his own name on an account stated. Randall v. Dudley, 111 Mich. 437, 69 N. W. 729.

[2] SMITH v. HURD, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, Wormser Cas.

erty are indirectly injurious to the stockholders, but at law their rights must invariably be asserted through the corporation, since there is no direct legal privity between the stockholders individually and the wrongdoing directors or other corporate officers. If, for any reason, the corporation will not sue for injuries suffered by it, the remedy of a stockholder, if he has any, is in equity.

The rule which restrains the stockholder from suing to redress wrongs against the corporation does not operate to restrain him from suing to redress wrongs which are not only wrongs against the corporation, but also violations of duties arising from contracts or otherwise and owing directly to the stockholders. Thus, if a stockholder pledge his stock as collateral with directors of the corporation, and they enter into a conspiracy to depreciate the price of the stock by using their power as directors, for the purpose of buying it in for less than its value, this is a wrong, not only against the corporation, but against the pledgor, for which there is a direct liability to him.[3]

In a recent New York case, plaintiff corporation was the principal stockholder in a subsidiary corporation, the general manager of which was a defaulter. Plaintiff alleged that defendant, who was one of its directors, knew of this misuse of moneys and acquiesced in it and approved of it, and for his own profit intentionally withheld and concealed the truth. It was also alleged that, had defendant given this information, plaintiff corporation could have prevented the misapplication and the loss. Defendant was declared to be liable.[4] The claim of defendant that he was not liable to plaintiff by reason of the fact that he was liable to the sub-

Corporations, 375; Talbot v. Scripps, 31 Mich. 268; Allen v. Curtis, 26 Conn. 456; Collier v. Deering Camp Ground Ass'n, 66 S. W. 183, 23 Ky. Law Rep. 1799; Kavanaugh v. Commonwealth Trust Co., 181 N. Y. 121, 73 N. E. 562. An action at law cannot be maintained by a stockholder for conspiracy to injure and ruin the corporation. Converse v. United Shoe Machinery Co., 185 Mass. 422, 70 N. E. 444; Niles v. New York Cent. & H. R. R. Co., 176 N. Y. 119, 68 N. E. 142. Cf. GENERAL RUBBER CO. v. BENEDICT, 215 N. Y. 18, 109 N. E. 96, Wormser Cas. Corporations, 318. A stockholder simply as such cannot, either at law or in equity, maintain an action against stockholders who have illegally issued stock, so as to decrease the value of his stock; such right of action being in the corporation, and not in the individual stockholder. Perry v. Hayes, 215 Mass. 296, 102 N. E. 318.

[3] Ritchie v. McMullen, 79 Fed. 522, 25 C. C. A. 50; Krohn v. Williamson (C. C.) 62 Fed. 869. And see GENERAL RUBBER CO. v. BENEDICT, 215 N. Y. 18, 109 N. E. 96, Wormser Cas. Corporations, 318, per Cardozo, J. Cf. De Neufville v. New York & N. R. Co., 81 Fed. 10, 26 C. C. A. 306; Fletcher v. Newmark Telephone Co., 55 N. J. Eq. 47, 35 Atl. 903.

[4] GENERAL RUBBER CO. v. BENEDICT, 215 N. Y. 18, 109 N. E. 96, Wormser Cas. Corporations, 318.

sidiary company was held untenable. The majority of the court adopted the view that the wrong to plaintiff did not cease to be remediable because it was also a wrong to somebody else.

Suits in Equity

It was at one time contended that a court of equity had no jurisdiction over a corporation, as such, at the suit of a stockholder for violations of its charter. But that it has such jurisdiction is now well settled. It was said by the Supreme Court of the United States in 1855: "It is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capital or profits which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law." [5]

If a case arises of injury to a corporation by some of its members, or by its officers, or by strangers, for which no adequate remedy remains except that of a suit by individual members in their private characters, asking in such character the protection of those rights to which in their corporate character they are entitled, a court of equity will regard the claims of justice as superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue, and will entertain a suit by stockholders individually.[6] Therefore it is well settled that if the majority of the stockholders do or threaten to do acts which are ultra vires of the corporation, or which constitute a violation of the

[5] Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401. And see Pratt v. Pratt, Read & Co., 33 Conn. 446, 455; Hartford & N. H. R. Co. v. Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354; Stevens v. Rutland & B. R. Co., 29 Vt. 545; Hardon v. Newton, 14 Blatchf. 376, Fed. Cas. No. 6,054; Bacon v. Robertson, 18 How. (U. S.) 480, 15 L. Ed. 499; Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Land, Log & Lumber Co. v. McIntyre, 100 Wis. 245, 75 N. W. 964, 69 Am. St. Rep. 915, and cases cited in note 7, infra.

[6] Dictum of Vice Chancellor Wigram in Foss v. Harbottle, 2 Hare, 461. And see the cases hereafter cited.

rights of the other stockholders, and the directors cannot or will not take steps to redress or prevent the wrong; or if the directors or other officers do or threaten such acts, and the majority of the stockholders participate or acquiesce; or if a stranger inflicts an injury, and the corporate officers and majority of the stockholders fraudulently refuse to sue for redress—a suit in equity may be maintained to redress or enjoin the wrong, and the suit cannot be defeated on the ground that the injury is to the corporation, and that it ought to sue.[7] Any other rule would allow the majority to "freeze out" the minority. They could violate the rights of the minority at their pleasure, and could put all the assets of the company into their pockets; and, as they could prevent a suit by the corporation, the minority would be without any means of redress.

A stockholder is permitted to sue on his own behalf to restrain the commission of ultra vires or fraudulent acts by the directors or officers of the corporation.[8] In other words, a preventive remedy may be applied at the instance of a stockholder. Thus, where

[7] Atwood v. Merryweather, L. R. 5 Eq. 464; Simpson v. Hotel Co., 8 H. L. Cas. 712; Menier v. Telegraph Works, 9 Ch. App. 350; Booth v. Robinson, 55 Md. 419; Mason v. Harris, 11 Ch. Div. 97; Russell v. Waterworks Co., L. R. 20 Eq. 474; Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. Ed. 401; Chicago City R. Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. Ed. 902; Zabriskie v. Cleveland, C. & C. R. Co., 23 How. (U. S.) 381, 16 L. Ed. 488; City of Davenport v. Dows, 18 Wall. (U. S.) 626, 21 L. Ed. 938; Hawes v. City of Oakland, 104 U. S. 450, 26 L. Ed. 827; WATHEN v. JACKSON OIL & REFINING CO., 235 U. S. 635, 35 Sup. Ct. 225, 59 L. Ed. 395, Wormser Cas. Corporations, 309; Nathan v. Tompkins, 82 Ala. 437, 2 South. 747; Peabody v. Flint, 6 Allen (Mass.) 52; Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; City of Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899; Bailey v. Citizens' Gas Light Co., 27 N. J. Eq. 196; Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487; Allen v. Curtis, 26 Conn. 456; Slattery v. St. Louis & N. O. Transp. Co., 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245; Greaves v. Gouge, 69 N. Y. 154; Brinckerhoff v. Bostwick, 88 N. Y. 52; Cogswell v. Bull, 39 Cal. 320; Hazard v. Durant, 11 R. I. 195; Exter v. Sawyer, 146 Mo. 302, 47 S. W. 951; Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189; Schoening v. Schwenk, 112 Iowa, 733, 84 N. W. 916; Morris v. Elyton Land Co., 125 Ala. 263, 28 South. 513; Watkins v. North American Land & T. Co., 107 La. 107, 31 South. 683; Metcalf v. American School Furniture Co. (C. C.) 108 Fed. 909; Pittsburg, C., C. & St. L. R. Co. v. Dodd, 115 Ky. 176, 72 S. W. 822, 24 Ky. Law Rep. 2057; Glover v. Manila Gold Min. & Mill. Co., 19 S. D. 559, 104 N. W. 261; BARTLETT v. NEW YORK, N. H. & H. R. R. CO., 221 Mass. 530, 109 N. E. 452, Wormser Cas. Corporations, 311; Pollitz v. Wabash R. Co., 207 N. Y. 113, 100 N. E. 721; s. c., 167 App. Div. 669, 152 N. Y. Supp. 803.

[8] Hearst v. Putnam Min. Co., 28 Utah, 184, 77 Pac. 753, 66 L. R. A. 784, 107 Am. St. Rep. 698; Tomkinson v. Southeastern R. Co., L. R. 35 Ch. Div. 675; Hoole v. Great Western R. Co., L. R. 3 Ch. App. Cas. 262; Bigelow v. Calumet & Hecla Min. Co. (C. C.) 155 Fed. 869.

the directors of a railroad corporation were about to contribute, by way of donation to an educational enterprise, and the contribution was ultra vires of the corporation, it was held by the chancellor "that any one shareholder may come to this court and say, 'This company is going to do an act which is beyond its powers: stop it,' and the court thereupon has no discretion in the matter." [9]

Where the grievance, however, which is complained of, has been consummated, the cause of action belongs solely to the corporation, and a stockholder's suit on his own behalf, seeking to enforce his individual rights, is not maintainable.[10] In such instances the bill must be brought by the stockholders for themselves and other stockholders similarly situated who may join in the action, and "on behalf of the corporation." [11] Wherever the acts complained of have been consummated, a stockholder has no remedy to recover, in his own right, any specific or proportionate part of the property for his own benefit. The accounting must be to the corporation and not to any stockholders. Of necessity, therefore, if a right of action exists, it exists in favor of the corporation, and of necessity the action must be brought in the right of the corporation, on its behalf, and for its benefit. A stockholder's action, in such cases, is brought for and on behalf of the corporation, and a stockholder is permitted to sue in the right of the corporation merely to set the judicial machinery of the court of equity in motion when the corporation refuses to enforce its own rights to the detriment of its stockholders. In these cases, the stockholder is not enforcing any personal right of his own. The real plaintiff is the corporation. The position of the stockholder who institutes such a suit is, after all, the same as that of the directors when they institute an action in the name of the corporation. The stockholder is permitted to sue merely because the directors disregard their duty by refusing to sue. The relief asked is on behalf of the corporation, not the individual shareholder, and, if it be granted, the complaining shareholder derives only an incidental benefit from it. The mere fact

[9] Tomkinson v. Southeastern R. Co., supra.

[10] Converse v. United Shoe Machinery Co., 209 Mass. 539, 95 N. E. 929. As to the distinction between a suit brought by the stockholder in his individual right and on his own behalf, and a suit brought in the corporate right and on the corporate behalf, see also, Alexander v. Atlanta & W. P. R. Co., 113 Ga. 193, 38 S. E. 772, 54 L. R. A. 305; Witherbee v. Bowles, 201 N. Y. 427, 95 N. E. 27.

[11] Converse v. United Shoe Machinery Co., supra; Continental Securities Co. v. Belmont, 206 N. Y. 7, 99 N. E. 138, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914A, 777; Pollitz v. Wabash R. Co., 167 App. Div. 669, 152 N. Y. Supp. 803; Hearst v. Putnam Min. Co., 28 Utah, 184, 77 Pac. 753, 66 L. R. A. 784, 107 Am. St. Rep. 698.

that, in such a suit, the stockholder cannot use the name of the corporation as the plaintiff, but appears himself as the nominal plaintiff, makes no difference.[12] The Court of Appeals of New York has said of such representative or derivative suits: "The plaintiffs do not bring this action because their rights have been directly violated or because the cause of action is theirs, or because they are entitled to the relief sought; they are permitted to sue in this manner simply to set in motion the judicial machinery of the court. * * * The cause of action belongs to the corporate body and not to the plaintiffs and other stockholders individually, nor to the body of stockholders collectively." [13]

In stockholder's suits, brought on the corporate behalf, in which plaintiff succeeds, the judgment recovered invariably is for the total amount of loss suffered by the corporation and the recovery goes into the treasury of the company.[14] In a recently decided suit of this nature, Justice Cardozo stated: "I cannot accede to the plaintiff's request that the judgment should award directly to the plaintiff such proportion of the damages as his stock bears to the total issued stock. The action is a derivative one, and the judgment must be in favor of the corporation, which in legal theory is the real plaintiff." [15]

That some of the parties who have participated in the transaction, as well as some of the stockholders who voted in favor of it, may benefit by the recovery, constitutes no objection to rendering a judgment in favor of the company. Otherwise a corporation could never sue one of its stockholders, for the defendant would al-

[12] Continental Securities Co. v. Belmont, 206 N. Y. 7, 99 N. E. 138, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914A, 777; Kavanaugh v. Commonwealth Trust Co., 181 N. Y. 121, 73 N. E. 562; Hunnewell v. New York Cent. & H. R. R. Co. (C. C.) 196 Fed. 543, 546.

[13] Continental Securities Co. v. Belmont, supra.

[14] Godley v. Crandall & Godley Co., 212 N. Y. 121, 105 N. E. 818, L. R. A. 1915D, 632; Ebling v. Nekarda, 148 App. Div. 193, 196, 132 N. Y. Supp. 309; Carr v. Kimball, 153 App. Div. 825, 139 N. Y. Supp. 253; Lewis v. Matthews, 161 App. Div. 107, 146 N. Y. Supp. 424; Miller v. Crown Perfumery Co., 125 App. Div. 881, 110 N. Y. Supp. 806; Davids v. Davids, 135 App. Div. 206, 120 N. Y. Supp. 350; Drucklieb v. Harris, 84 Misc. Rep. 291, 298, 147 N. Y. Supp. 298 (Cardozo, J.); McCourt v. Singers-Bigger, 145 Fed. 103, 76 C. C. A. 73, 7 Ann. Cas. 287; McConnell v. Combination Min. & Mill. Co., 31 Mont. 563, 79 Pac. 248; Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312, 320, 67 N. E. 17; Barry v. Moeller, 68 N. J. Eq. 483, 489, 59 Atl. 97; Landis v. Sea Isle City Hotel Co., 53 N. J. Eq. 654, 33 Atl. 964; Arnold v. Searing, 78 N. J. Eq. 146, 165, 78 Atl. 762; Tooker v. National Sugar Refining Co., 80 N. J. Eq. 305, 84 Atl. 10; Davis v. Gemmell, 73 Md. 530, 21 Atl. 712; Exter v. Sawyer, 146 Mo. 302, 324, 47 S. W. 951; Hichens v. Congreve, 1 Russ & M. 150; Pollitz v. Wabash R. Co., 167 App. Div. 669, 152 N. Y. Supp. 803.

[15] Drucklieb v. Harris, supra.

ways indirectly benefit from a recovery by the company. The mere fact that some of the guilty may benefit is no reason for not giving redress to the innocent. The law cannot always apportion the punishment among the guilty and cases are frequent where one person has been made to bear the brunt of a loss caused by him not alone but in conjunction with others.[16] As said by Jessel, M. R., in a leading English case: "If the argument were once allowed to prevail, it would only be necessary to corrupt one single shareholder to prevent a company from ever setting the contract aside." [17]

To entitle a stockholder to maintain a suit in equity to redress a corporate injury from an act done or to prevent a corporate injury from an act threatened, either on his own behalf, or on behalf of himself and other stockholders, it must be shown that every reasonable effort to obtain redress or protection through the regularly constituted agents and controlling power of the corporation has proved unavailing. In other words, the dissenting stockholders must first seek to correct the abuses complained of, within the corporation itself, before resorting to suit. Equity will only aid them where they have exhausted all means of relief "within the corporation." [18] It must be made to appear from the bill, not only that the directors are disabled, by their disqualification or misconduct, to sue, or that they have wrongfully refused to do so upon a proper demand; but, where the transaction is one which the majority of the stockholders could ratify, and the matter will admit of the necessary delay, and it is practicable to call upon the stockholders to act, it must also be shown that this has been done.[19] No doctrine

[16] New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 73, affirmed, L. R. 3 App. Cas. 1218; Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 193, 89 N. E. 193, 40 L. R. A. (N. S.) 314; Exter v. Sawyer, 146 Mo. 302, 324, 47 S. W. 951; Pollitz v. Wabash R. Co., 167 App. Div. 669, 152 N. Y. Supp. 803.

[17] New Sombrero Phosphate Co. v. Erlanger, supra.

[18] Godley v. Crandall & Godley Co., 212 N. Y. 121, 105 N. E. 818, L. R. A. 1915D, 632.

[19] Foss v. Harbottle, 2 Hare, 461; Mozley v. Alston, 1 Phil. Ch. 790; Russell v. Waterworks Co., L. R. 20 Eq. 474; Hawes v. City of Oakland, 104 U. S. 450, 26 L. Ed. 827; Allen v. Wilson (C. C.) 28 Fed. 677; Booth v. Robinson, 55 Md. 419; Brewer v. Boston Theater, 104 Mass. 378; Dunphy v. Traveller Newspaper Ass'n, 146 Mass. 495, 16 N. E. 426; Mount v. Radford Trust Co., 93 Va. 427, 25 S. E. 244; Rathbone v. Parkersburg Gas Co., 31 W. Va. 798, 8 S. E. 570; Doud v. Wisconsin, P. & S. Ry. Co., 65 Wis. 108, 25 N. W. 533, 56 Am. Rep. 620; Hazard v. Durant, 11 R. I. 195; Black v. Huggins, 2 Tenn. Ch. 780; Blair v. Telegram Newspaper Co., 172 Mass. 201, 51 N. E. 1080; Flynn v. Brooklyn City R. Co., 158 N. Y. 493, 53 N. E. 520; Dillon v. Lee, 110 Iowa, 156, 81 N. W. 245; Louisville & N. R. Co. v. Neal, 128 Ala. 149, 29

in the law of corporations is better settled than this. The only difficulty is in its application to particular cases. It is not enough to show inability or refusal to sue on the part of the directors, but it must be shown that for some reason redress cannot be obtained by calling a meeting of the stockholders.[20]

It is necessary for the stockholder, therefore, to set forth fully the facts which entitle him to maintain the action in place of the corporation.[21] The complaining stockholder must first go to the gov-

South. 865; Ulmer v. Maine Real Estate Co., 93 Me. 324, 45 Atl. 40; Wolf v. Pennsylvania R. Co., 195 Pa. 91, 45 Atl. 936; Fry v. Rush, 63 Kan. 429, 65 Pac. 701; Kavanaugh v. Commonwealth Trust Co. of New York, 103 App. Div. 95, 92 N. Y. Supp. 543. Continental Securities Co. v. Belmont, 206 N. Y. 7, 99 N. E. 138, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914A, 777; WATHEN v. JACKSON OIL & REFINING CO., 235 U. S. 635, 35 Sup. Ct. 225, 59 L. Ed. 395, Wormser Cas. Corporations, 309. It is not enough to make a request that suit be brought, but the facts on which a suit could be maintained must be submitted. Doherty v. Mercantile Trust Co., 184 Mass. 590, 69 N. E. 335.

[20] Foss v. Harbottle, 2 Hare, 461; Mozley v. Alston, 1 Phil. Ch. 790; Rathbone v. Parkersburg Gas Co., 31 W. Va. 798, 8 S. E. 570. "In addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit." Hawes v. City of Oakland, supra. And see "Additional Rules of Practice in Equity," No. 94, 104 U. S. ix, now Rule No. 27 (33 Sup. Ct. xxv), as promulgated by the Supreme Court of the United States November 4, 1912, post, p. 501; Dickinson v. Consolidated Traction Co. (C. C.) 114 Fed. 232; Corbus v. Alaska Treadwell Gold Min. Co., 187 U. S. 458, 23 Sup. Ct. 157, 47 L. Ed. 256; WATHEN v. JACKSON OIL & REFINING CO., 235 U. S. 635, 35 Sup. Ct. 225, 59 L. Ed. 395, Wormser Cas. Corporations, 309; 10 Cyc. 982.

[21] Kavanaugh v. Commonwealth Trust Co., 181 N. Y. 121, 73 N. E. 562; O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 76 N. E. 1082; Continental Securities Co. v. Belmont, supra. In the last cited case, the court said: "It is necessary, therefore, in an action by the plaintiffs to set

erning body of the corporation, namely, its board of directors, with the demand for relief, before he can bring an action. Such demand on the directors may only be dispensed with where it clearly appears from the complaint that such application would be vain or useless, and why. "If the facts are such as to show that such a demand would be an idle ceremony, or the action required be such that the guilty agents of the corporation ought not to be intrusted with the conduct of the necessary suit, none need be made." [22] Where the emergency is extremely urgent, demand has been held unnecessary as a condition precedent to suit.[23] If the subject-matter of the stockholder's complaint is for any reason within the immediate control, direction, or power of confirmation of the body of stockholders, it should be brought to the attention of the stockholders for action, before an action is commenced, unless it clearly appears from the detailed facts set forth in the complaint that such application is useless.[24] Thus acts done by the directors or officers in the interest of the corporation, which are voidable by reason of irregularities in the makeup of the board of directors, or by reason of the directors or some of them being personally interested in the subject-matter of the contract or act, or for some similar reason, may nevertheless be ratified by a majority of the stockholders. Consequently those who object must first seek to correct the wrong within the corporation. "That rule results from the necessity that the majority must determine the policy of the corporation, with whose internal management the courts wisely refrain from interfering." [25] On the other hand, if the body of stockholders has no adequate power or authority to remedy the wrong asserted by the individual stockholders, it is unreasonable and consequently unnecessary to require an application to the stockholders to redress the wrong, before bringing the representative action. Thus acts which

forth two things: First, a cause of action in favor of the corporation with the same detail of facts as would be proper in case the corporation itself had brought the action; second, the facts which entitle the plaintiffs to maintain the action in place of the corporation."

[22] Rogers v. Nashville, C. & St. L. Ry. Co., 91 Fed. 299, 33 C. C. A. 517; Harrison v. Thomas, 112 Fed. 22, 50 C. C. A. 98; In re Swofford Bros. Dry Goods Co. (D. C.) 180 Fed. 549; Starr v. Shepard, 145 Mich. 302, 108 N. W. 709; McCoy v. Gas Engine & Power Co., 135 App. Div. 771, 119 N. Y. Supp. 864; Pellio v. Bulls Head Coal Co., 231 Pa. 157, 80 Atl. 71; Law v. Fuller, 217 Pa. 439, 66 Atl. 754; Duquesne Gold Min. Co. v. Glaser, 46 Colo. 186, 103 Pac. 299.

[23] Starr v. Shepard, supra.

[24] Continental Securities Co. v. Belmont, supra.

[25] Godley v. Crandall & Godley Co., 212 N. Y. 121, 105 N. E. 818, L. R. A. 1915D, 632.

are fraudulent, or in breach of trust, or ultra vires, cannot be ratified by a majority of the stockholders, and therefore application to them is not a requisite precedent condition to the maintenance by a stockholder of his suit.[26] Where the complaint, accordingly, alleged fraud by the directors and a substantial misappropriation of 15,000 shares of the stock of the corporation through a nominal purchase of property and the payment of a pretended claim for services, application to the body of stockholders was held not necessary.[27] A similar holding was made where the directors voted increases of salary to themselves.[28] Such actions cannot be confirmed and ratified by the body of shareholders. A sharp distinction has to be drawn, therefore, between acts legal, but voidable, on the one hand, and acts fraudulent, in breach of trust, or ultra vires, on the other. As to the latter the rule applies that "even majority stockholders may not for selfish purposes act in hostility to the interests of the corporation with the intention of defrauding the nonassenting stockholders." [29]

When the directors or officers of a corporation cause a loss of corporate property by negligence or culpable lack of prudence or failure to exercise their functions; or fraudulently misappropriate the corporate property in any manner, whether for their own benefit or for the benefit of a third person; or obtain any undue advantage, benefit, or profit for themselves by contract, purchase, sale, or other dealings under color of their official functions; or misuse the franchise; or violate the rules established by the charter or by-laws for their management of the corporate affairs; or in any other similar manner commit a breach of their fiduciary obligations towards the corporation, so that it sustains injury or loss, and a liability devolves upon themselves—then the corporation is the party to sue for equitable relief, and in such cases no equitable suit for relief can be maintained against the directors or officers by the stockholder or stockholders individually, nor by a stockholder in a representative capacity on behalf of all the others similarly situated, unless the corporation either actually or virtually refuses to prosecute.[30] It must clearly appear that the corporation would be damaged, since one asserting a derivative cause of action must first es-

[26] Godley v. Crandall & Godley Co., supra; Continental Securities Co. v. Belmont, supra; Delaware & H. Co. v. Albany & S. R. Co., 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862.

[27] Continental Securities Co. v. Belmont, supra.

[28] Godley v. Crandall & Godley Co., supra.

[29] Godley v. Crandall & Godley Co., supra.

[30] Doud v. Wisconsin, P. & S. Ry. Co., 65 Wis. 108, 25 N. W. 533, 56 Am. Rep. 620.

tablish the existence of a cause of action in the party whose rights are sought to be enforced.[31]

The effort by a stockholder to induce the managing body of the corporation to sue must have been earnest, and not simulated.[32] No request at all to sue need be made of the directors, nor of the stockholders as a body, if it is clear that the request would be useless,[33] or if irreparable injury would be caused by the delay.[34] A bare assertion of a demand on the directors, without stating any grounds for dispensing with efforts to procure action by the corporation is not sufficient. The reasons, if any, for not making such effort must be stated,[35] and, as recently remarked by Mr. Justice Hughes: "These reasons, of course, must be adequate." [36] It is

[31] Waters v. Horace Waters & Co., 201 N. Y. 184, 94 N. E. 602, affirming, 130 App. Div. 678, 115 N. Y. Supp. 432; Continental Securities Co. v. Belmont, supra; Collins v. Penn-Wyoming Copper Co. (D. C.) 203 Fed. 726.

[32] Bacon v. Irvine, 70 Cal. 221, 11 Pac. 646; Dannmeyer v. Coleman (C. C.) 11 Fed. 97; Hawes v. City of Oakland, 104 U. S. 450, 26 L. Ed. 827; City of Detroit v. Dean, 106 U. S. 537, 1 Sup. Ct. 560, 27 L. Ed. 300; WATHEN v. JACKSON OIL & REFINING CO., 235 U. S. 635, 35 Sup. Ct. 225, 59 L. Ed. 395, Wormser Cas. Corporations, 309; BARTLETT v. NEW YORK, N. H. & H. R. R. CO., 221 Mass. 530, 109 N. E. 452, Wormser Cas. Corporations, 311.

[33] City of Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899; Mack v. De Bardeleben Coal & Iron Co., 90 Ala. 396, 8 South. 150, 9 L. R. A. 650; Tillis v. Brown, 154 Ala. 403, 45 South. 589; Starbuck v. Mercantile Trust Co. (Shepaug Voting Trust Cases) 60 Conn. 553, 24 Atl. 32; Pencille v. State Farmers' Mut. Hail Ins. Co., 74 Minn. 67, 76 N. W. 1026, 73 Am. St. Rep. 326; Stahn v. Catawba Mills, 53 S. C. 519, 31 S. E. 498; Schoening v. Schwenk, 112 Iowa, 733, 84 N. W. 916; Rogers v. Nashville, C. & St. L. Ry. Co., 91 Fed. 299, 33 C. C. A. 517; Eldred v. American Palace Car Co. (C. C.) 99 Fed. 168; Appleton v. American Malting Co., 65 N. J. Eq. 375, 54 Atl. 454; McConnell v. Combination Min. & Mill. Co., 30 Mont. 239, 76 Pac. 194, 104 Am. St. Rep. 703. A request to sue need not be made to the directors, if they are the wrongdoers. Montgomery Traction Co. v. Harmon, 140 Ala. 505, 37 South. 371; Kern v. Arbeiter Unterstuetzungs Verein, 139 Mich. 233, 102 N. W. 746; Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co. (C. C.) 136 Fed. 710; Delaware & H. Co. v. Albany & S. R. Co., 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862; Ellis v. Vandergrift, 173 Ala. 142, 55 South. 781; National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818, Ann. Cas. 1914D, 830; Id., 122 Minn. 532, 142 N. W. 822.

[34] Brewer v. Boston Theater Co., 104 Mass. 378; Tevis v. Hammersmith, 31 Ind. App. 281, 66 N. E. 79, 912, affirmed 161 Ind. 74, 67 N. E. 672.

[35] U. S. Rule of Practice in Equity, No. 27 (33 Sup. Ct. xxv). The stockholder must, by his pleadings, make a sufficient showing of unsuccessful effort to induce the officers of the corporation to bring suit in the name of the corporation. Strang v. Edson, 198 Fed. 813, 117 C. C. A. 455. And see, Vogeler v. Punch, 205 Mo. 558, 103 S. W. 1001; Elliott v. Puget Sound Wood Products Co., 52 Wash. 637, 101 Pac. 228.

[36] WATHEN v. JACKSON OIL & REFINING CO., 235 U. S. 635, 640, 35 Sup. Ct. 225, 59 L. Ed. 395, Wormser Cas. Corporations, 309.

not enough, to excuse application to the directors or stockholders as a body, merely, to show that they would probably refuse to take steps to obtain relief.[37]

Where, however, the adoption of a plan which will create an unjust discrimination between different classes of stock is reasonably certain, minority stockholders, it has been held, need not await the result of a stockholder's meeting before seeking injunctive relief.[38] The point is that facts must be set forth showing a genuine and substantial effort to induce corporate action "with a real purpose to bring about that result before filing the bill." [39]

Acts within the Power of the Majority—Discretionary Powers

"Nothing connected with internal disputes between shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent; unless there is something ultra vires on the part of the company qua company, or on the part of the majority of the company, so that they are not fit persons to determine it; but every litigation must be in the name of the company, if the company really desire it." [40] Obviously a stockholder, or a minority of the stockholders, cannot maintain a suit to prevent or to set aside a transaction by the majority, if the transaction is within the powers of the majority. In such a case the will of the majority must govern, and the courts will not interfere merely because a minority of the stockholders object to the transaction, and deem it injurious to the interests of the corporation. As was said by the Kentucky court, in a suit for an injunction, relief will not be granted unless the corporation, represented by the majority, is about to do some act outside of the scope of its authority, or in disobedience

[37] Foote v. Cunard Min. Co. (C. C.) 17 Fed. 46. See, also, Decatur Mineral Land Co. v. Palm, 113 Ala. 531, 21 South. 315, 59 Am. St. Rep. 140; Siegman v. Maloney, 65 N. J. Eq. 372, 54 Atl. 405.

[38] Page v. Whittenton Mfg. Co., 211 Mass. 424, 97 N. E. 1006.

[39] BARTLETT v. NEW YORK, N. H. & H. R. R. CO., 221 Mass. 530, 109 N. E. 452, Wormser Cas. Corporations, 311, per Rugg, C. J. In this case it was held that insufficient time had been given to the board of directors to redress the wrongs complained of, where a letter was sent a week before the filing of the bill, to twenty-three directors, most of them living in different states, and the transactions complained of were intricate and covered a long period; and it was further held that insufficient facts were set forth showing that such an application, properly made, would have been useless.

[40] Macdougall v. Gardiner, 1 Ch. Div. 13. And see Flynn v. Brooklyn City R. Co., 158 N. Y. 493, 507, 508, 53 N. E. 520, 524, where Vann, J. said: "While courts cannot compel directors or stockholders, proceeding by the vote of a majority, to act wisely, they can compel them to act honestly, or undo their work if they act otherwise."

to the provisions of its constitution; for so long as it exercises the powers granted by the charter the acts of the company must be treated by the courts as the acts of all the stockholders. Each and every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation; and in cases involving no breach of trust, but only error or mistake of judgment upon the part of the directors who represent the company, individual stockholders have no right to appeal to the courts to dictate the line of policy to be pursued by the corporation.[41]

If the majority of the stockholders are abusing their powers, and are depriving the minority of their rights, the minority may, in a proper case, come into a court of equity, and sue to maintain their rights. But they cannot sue to set aside something which the majority were entitled to do, though it may have been done irregularly. "If the thing complained of is a thing which, in substance, the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally," the court will not interfere at the suit of individual stockholders.[42]

It has been held, under this doctrine, that a stockholder in a corporation, the charter of which is subject to amendment or repeal at the pleasure of the Legislature, cannot maintain a suit to restrain the corporation from engaging in a new enterprise, in addition to that contemplated by the charter, but of the same kind, if it is sanctioned by an express legislative grant, and by a vote of the majority of the stockholders.[43] As to this proposition, however, there is much doubt. Perhaps the weight of authority is against it.[44]

A stockholder, or a minority of the stockholders, cannot maintain a suit to set aside a transaction entered into by the directors,

[41] Dudley v. Kentucky High School, 9 Bush (Ky.) 576. And see Foss v. Harbottle, 2 Hare, 461; Durfee v. Old Colony & F. R. R. Co., 5 Allen (Mass.) 230; Bill v. Western Union Tel. Co. (C. C.) 16 Fed. 14; Meredith v. New Jersey Zinc & Iron Co., 59 N. J. Eq. 257, 44 Atl. 55, affirmed 60 N. J. Eq. 445, 50 Atl. 1119; Trimble v. American Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912; Metcalf v. American School Furniture Co. (C. C.) 122 Fed. 115; Godley v. Crandall & Godley Co., 212 N. Y. 121, 105 N. E. 818, L. R. A. 1915D, 632. See ante, p. 432, for the application of this principle to suits by stockholders to compel the corporation to declare and pay a dividend.

[42] Macdougall v. Gardiner, 1 Ch. Div. 13. Per Mellish, L. J.

[43] Durfee v. Old Colony & F. R. R. Co., 5 Allen (Mass.) 230.

[44] Compare Zabriskie v. Hackensack & N. Y. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617. See ante, p. 406, and post, p. 562, where the cases are referred to.

if it is one which a majority of the stockholders may lawfully ratify, and thus render binding as against the minority. In Foss v. Harbottle [45] the complaint in a suit by stockholders was that the directors had purchased land from themselves for the corporation at an excessive price. Vice Chancellor Wigram held that the suit could not be maintained, since the transaction, though subject to rescission by the corporation, was not void, but might be ratified by a majority of the members.[46] However, as we have seen, acts of the directors which are fraudulent, or in breach of trust, or ultra vires, cannot be ratified by a majority.[47]

Even when it is clear that a corporation has a right to sue to redress or enjoin wrongs committed or threatened, the fact that it refuses to do so does not necessarily entitle a stockholder to sue on behalf of himself and the other stockholders. As a rule, the courts will not interfere at the suit of a stockholder to obtain redress for an injury to the corporation, because of failure or refusal of the directors, or of the majority of the stockholders, to sue. It is only when the action of the corporation in refusing to proceed at the request of a stockholder is fraudulent, or ultra vires, or in disregard of his vested rights, that he can maintain a suit in his own name in the corporate right. The court cannot interfere with the management of corporations in matters which are properly within their discretion, so long as their discretion is fairly exercised; and it is always assumed, until the contrary appears, that they and their officers obey the law, and act in good faith towards all their members.[48] It is generally discretionary with a corporation whether it will sue for injuries suffered by it; and, so long as it acts fairly, honestly, and within its powers, in refusing to sue, the courts will not entertain a suit by an individual stockholder. "It is not always best to insist upon all one's rights; and a corporation, acting by its directors, or by vote of its members, may properly refuse to bring a suit which one of its stockholders believes should be prosecuted. In such a case the will of the majority must control." [49]

[45] 2 Hare, 461.

[46] And see Bill v. Western Union Tel. Co. (C. C.) 16 Fed. 14; Kessler & Co. v. Ensley Co. (C. C.) 129 Fed. 397.

[47] See, ante, the cases in notes 26, 27, 28, 29; Godley v. Crandall & Godley Co., 212 N. Y. 121, 105 N. E. 818, L. R. A. 1915D, 632; Hampton v. Buchanan, 51 Wash. 155, 98 Pac. 374. And see Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 N. E. 670; Dunbar v. American Telephone & Telegraph Co., 224 Ill. 9, 79 N. E. 423, 115 Am. St. Rep. 132, 8 Ann. Cas. 57.

[48] Per Knowlton, J., in Dunphy v. Traveller Newspaper Ass'n, 146 Mass. 495, 16 N. E. 426. And see Sullivan v. Central Land Co., 173 Ala. 426, 55 South. 612.

[49] Dunphy v. Traveller Newspaper Ass'n, supra; Hendrickson v. Bradley,

So when a suit is brought against a corporation, it is ordinarily within the discretion of the directors whether or not to defend.[50] A stockholder will be permitted, however, to intervene and defend an action brought against the corporation, where it is made to appear that its directors or managing agents are wilfully or fraudulently neglectful of its interests.[51]

There are numerous recent instances where courts of equity have intervened to prevent the tyranny of majorities which need restraint. While ordinarily in corporations, as in republics, the majority must govern, a court of equity will not tolerate the discretion of a majority that does not properly consult the interests of the minority. The majority cannot put something into their pockets at the expense of the minority.[52] Some cases go to the extent of constituting the majority stockholders a trustee for the minority.[53] In

85 Fed. 508, 29 C. C. A. 303; Kessler v. Ensley Co. (C. C.) 123 Fed. 546. "There may be a great many wrongs committed in a company—there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps to prevent the wrong from being done." Per Sir W. M. James, L. J., in Macdougall v. Gardiner, 1 Ch. Div. 13.

[50] Davis v. Gemmell, 73 Md. 530, 21 Atl. 712; Stradley v. Pailthorp, 96 Mich. 287, 55 N. W. 807; Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. R. Co. (C. C.) 67 Fed. 49; General Electric Co. v. West Asheville Imp. Co. (C. C.) 73 Fed. 386; Meyer v. Bristol Hotel Co., 163 Mo. 59, 63 S. W. 96.

[51] Morrill v. Little Falls Mfg. Co., 46 Minn. 260, 48 N. W. 1124; National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818, Ann. Cas. 1914D, 830; Home Min. Co. v. McKibben, 60 Kan. 387, 56 Pac. 756; Fitzwater v. National Bank of Seneca, 62 Kan. 163, 61 Pac. 684, 84 Am. St. Rep. 377; Shively v. Eureka Tellurium Gold-Min. Co., 129 Cal. 293, 61 Pac. 939. Cf. Gunderson v. Illinois Trust & Savings Bank, 199 Ill. 422, 65 N. E. 326. Where one railroad corporation purchased a majority of the stock in another for the purpose of controlling it, and purposely so mismanaged its affairs as to cause a default in the payment of a mortgage upon its property, and in pursuance of its plan to secure control caused suit to be brought to foreclose the mortgage, minority stock-holders were permitted to become parties defendant and to show that the foreclosure was in fraud of their rights. Farmer's Loan & Trust Co. v. New York & N. R. Co., 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689.

[52] Menier v. Hooper's Telegraph Works, L. R. 9 Ch. App. Cas. 350; Burland v. Earle, L. R. [1902] App. Cas. 83, especially the opinion of Lord Davey; Chicago Hansom Cab Co. v. Yerkes, 141 Ill. 320, 30 N. E. 667, 33 Am. St. Rep. 315.

[53] Glengary Consol. Min. Co. v. Boehmer, 28 Colo. 1, 62 Pac. 839. And see Bias v. Atkinson, 64 W. Va. 486, 63 S. E. 395, where a "fiduciary" relation was held to exist between the majority stockholder and the minority; Russell v. Rock Run Fuel Gas Co., 184 Pa. 102, 39 Atl. 21.

any event, their duty is to exercise good faith and diligence to protect the holders of the minority of the stock.[54] On the other hand, virtual attempts at blackmail by small minorities should be prevented with equal solicitude, and the fact that only a small minority of the stockholders of a corporation are complainants in a bill against the officers for fraud and mismanagement has been held a proper circumstance to consider in balancing the equities.[55]

The Rule as Stated by the United States Supreme Court

In Hawes v. City of Oakland [56] the supreme court of the United States thus states the doctrine governing suits by stockholders:

"We understand that doctrine to be that, to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist, as the foundation of the suit:

"Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

"Or such a fraudulent transaction, completed or contemplated, by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders;

"Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers; but the foregoing may be regarded as an outline of the principles which govern this class of cases.

[54] Wheeler v. Abilene Nat. Bank Bldg. Co., 159 Fed. 391, 89 C. C. A. 477, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917; Geddes v. Anaconda Copper Min. Co. (D. C.) 197 Fed. 860. See note, 9 Col. Law Rev. 357. But compare Windmuller v. Standard Distilling & Distributing Co. (C. C.) 114 Fed. 491.

[55] Aldrich v. Union Bag & Paper Co., 81 N. J. Eq. 244, 87 Atl. 65. Cf. Hoole v. Great Western R. Co., L. R. 3 Ch. App. Cas. 262.

[56] 104 U. S. 450, 26 L. Ed. 827. And see Dimpfel v. Ohio & M. R. Co., 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121; Corbus v. Alaska Treadwell Gold Min. Co., 187 U. S. 455, 23 Sup. Ct. 157, 47 L. Ed. 256; WATHEN v. JACKSON OIL & REFINING CO., 235 U. S. 635, 35 Sup. Ct. 225, 59 L. Ed. 395, Wormser Cas. Corporations, 309.

"But, in addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it."

The reasons for not making such efforts, where none were made, must be fully stated and must, of course, be adequate.[57]

Who May Sue as Stockholders

A stockholder may sue on behalf of himself and other stockholders, notwithstanding that he was not the owner of the stock at the time of the transaction of which he complains,[58] and even if he purchased his stock for the purpose of bringing suit.[59] It is otherwise, however, in the federal courts, where, in order to guard

[57] WATHEN v. JACKSON OIL & REFINING CO., supra.

[58] Winsor v. Bailey, 55 N. H. 218; Parsons v. Joseph, 92 Ala. 403, 8 South. 788; Montgomery Light Co. v. Lahey, 121 Ala. 131, 25 South. 1006; Forrester v. Butte & M. Consol. Copper & Silver Min. Co., 21 Mont. 544, 55 Pac. 229, 353; Pollitz v. Gould, 202 N. Y. 11, 94 N. E. 1088, 38 L. R. A. (N. S.) 988, Ann. Cas. 1912D, 1098; Appleton v. American Malting Co., 65 N. J. Eq. 375, 54 Atl. 454; Just v. Idaho Canal & Improvement Co., 16 Idaho, 639, 102 Pac. 381, 133 Am. St. Rep. 140. Contra: Alexander v. Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337; Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716; Boldenweck v. Bullis, 40 Colo. 253, 90 Pac. 634.

[59] Seaton v. Grant, L. R. 2 Ch. App. 459; Bloxam v. Metropolitan Ry., L. R. 3 Ch. 337; Ramsey v. Gould, 57 Barb. (N. Y.) 398. "The plaintiff had in a collateral way lost some money, and he then finds a blot in the management of the company of which he thinks the shareholders might complain. He buys five shares in the company, and then files this bill, in order to induce the company to buy off the litigation. That, no doubt, is a course of conduct which would meet with little approval in this court, or, indeed, in any other court, and such conduct might be material at the hearing with reference to the amount of relief which the plaintiff could obtain, or whether he was entitled to any relief at all. But the question is whether these facts are necessarily fatal to the plaintiff's claim to relief. Suppose an answer were put in admitting all the allegations contained in the bill, it would be difficult to say at this stage of the suit that the plaintiff's conduct would altogether

against collusion in bringing cases within the jurisdiction resting on diversity of citizenship, the following rule has been adopted: "Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law;[60] and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action or the reasons for not making such effort."[61]

Laches and Estoppel—Personal Exception to Stockholder

A stockholder may be precluded by acquiescence, laches, or estoppel from bringing suit to redress injuries to the corporation by the directors, or other officers, or by the majority of the stockholders, or by third persons; for such suits are subject to the familiar principle of equity jurisprudence that acquiescence in a course of conduct by one interested in it, especially when the rights of others are affected thereby, will induce the court to refuse him relief.[62]

disentitle him to relief." Per Lord Cairns, L. J., in Seaton v. Grant, supra. Cf. Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423.

[60] Hitchings v. Cobalt Cent. Mines Co. (C. C.) 189 Fed. 241.

[61] Equity Rule No. 94, 104 U. S. ix, now Equity Rule No. 27 (33 Sup. Ct. xxv), promulgated November 4, 1912. The last clause, "or the reasons for not making such effort," was added in 1912 and is new. See WATHEN v. JACKSON OIL & REFINING CO., 235 U. S. 635, 35 Sup. Ct. 225, 59 L. Ed. 395, Wormser Cas. Corporations, 309.

[62] Dunphy v. Traveller Newspaper Ass'n, 146 Mass. 495, 16 N. E. 426; Dimpfel v. Ohio & M. R. Co., 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121; Allen v. Wilson (C. C.) 28 Fed. 677; Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. 501; Alexander v. Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337; Peabody v. Flint, 6 Allen (Mass.) 54; Gregory v. Patchett, 33 Beav. 595; Ashhurst's Appeal, 60 Pa. 290; Watt's Appeal, 78 Pa. 370; Stewart v. Erie & Western Transp. Co., 17 Minn. 372 (Gil. 348); Burt v. British, etc., Ass'n, 4 De G. & J. 158; Post v. Beacon Vacuum Pump & E. Co., 84 Fed. 371, 28 C. C. A. 431; Clark v. Pittsburg Natural Gas Co., 184 Pa. 188, 39 Atl. 86; Wills v. Porter (Cal.) 61 Pac. 1109; McCampbell v. Fountain Head R. Co., 111 Tenn. 55, 77 S. W. 1070, 102 Am. St. Rep. 731; Burrows v. Interborough Metropolitan Co. (C. C.) 156 Fed. 389; Rabe v. Dunlap, 51 N. J. Eq. 40, 25 Atl. 959. In a suit by minority stockholders to compel restoration to the corporation of moneys received by an officer in excess of his salary, where one of the complainants is debarred from relief by ac-

Thus it was held in a late Massachusetts case that a stockholder could not bring suit for improper investments of corporate funds, made three years before, if he knew of them at the time, and did not object.[63] And it has often been held that a stockholder is estopped to object to corporate acts done with his consent.[64] In cases like these, the personal conduct of the complaining stockholder is such as to preclude him from insisting on the relief which he claims.[65]

One who purchases with notice of acquiescence on the part of his transferror is also precluded from bringing suit.[66] And it has been held that an innocent transferee stands in no better position in this respect than his transferror;[67] but there are some decisions to the contrary,[68] which insist that a line of cleavage should be drawn between cases in which the plaintiff acquires the stock with knowledge of the acquiescence on the part of the prior holder and cases where he obtains it without such knowledge. In these days of colossal

quiescence in such misappropriation, equity will treat the excessive salary as a fund, giving to the innocent stockholders their proportion, and leaving the balance in the hands of him to whom it was appropriated by his co-wrongdoers. Brown v. De Young, 167 Ill. 549, 47 N. E. 863.

[63] Dunphy v. Traveller Newspaper Ass'n, supra. Cf. Von Arnim v. American Tube Works, 188 Mass. 515, 74 N. E. 680. As to when laches constitutes a bar, see, also, Kessler & Co. v. Ensley Co. (C. C.) 141 Fed. 130, affirmed, 148 Fed. 1019, 79 C. C. A. 534; Marks v. Merrill Paper Co., 203 Fed. 16, 123 C. C. A. 380; Modifying (C. C.) 188 Fed. 850; Venner v. New York Cent. & H. R. R. Co., 160 App. Div. 127, 145 N. Y. Supp. 725.

[64] See the cases cited above.

[65] Towers v. African Tug Co., L. R. [1904] 1 Ch. Div. 558; Wormser v. Metropolitan St. R. Co., 184 N. Y. 83, 76 N. E. 1036, 112 Am. St. Rep. 596, 6 Ann. Cas. 123.

[66] Clark v. American Coal Co., 86 Iowa, 436, 53 N. W. 291, 17 L. R. A. 557.

[67] Parsons v. Hayes, 14 Abb. N. C. (N. Y.) 419; Clark v. American Coal Co., supra; Erny v. G. W. Schmidt Co., 197 Pa. 475, 47 Atl. 877; Trimble v. American Sugar R. Co., 61 N. J. Eq. 340, 48 Atl. 912; Hodge v. United States Steel Corp., 64 N. J. Eq. 90, 53 Atl. 601; Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716; McCampbell v. Fountain Head R. Co., 111 Tenn. 55, 77 S. W. 1070, 102 Am. St. Rep. 731; Babcock v. Farwell, 245 Ill. 14, 91 N. E. 683, 137 Am. St. Rep. 284, 19 Ann. Cas. 74. In the last cited case, the court said: "Shares of stock are merely choses in action, and the successive owners acquire only the rights held by their predecessors in title."

[68] Parsons v. Joseph, 92 Ala. 403, 8 South. 788; Warren v. Robison, 25 Utah, 205, 70 Pac. 989; Just v. Idaho Canal & Improvement Co., 16 Idaho, 639, 102 Pac. 381, 383, 133 Am. St. Rep. 140. And see London Trust Co. v. Mackenzie, 68 L. T. (N. S.) 380, 62 L. J. Ch. 870, 877. Cf. Pollitz v. Gould, 202 N. Y. 11, 94 N. E. 1088, 38 L. R. A. (N. S.) 988, Ann. Cas. 1912D, 1098, where Hiscock, J., said: "If the prior holder should give binding consent to the transaction, this under certain circumstances undoubtedly would prevent the subsequent purchaser from questioning it."

corporations, when shares of stock are daily bought and sold in large numbers on many stock exchanges, there would seem to be considerable practical advantage in holding that the estoppel or disqualification is a personal one and does not follow the stock, unless the subsequent purchaser has notice of the facts. In any event, the burden of proving any acquiescence or ratification is upon the defense.[69] It is necessary, in order to sustain such a defense, to show that all of the shares owned by the plaintiffs were formerly held by persons who are estopped.[70]

Motive of Stockholder

Ordinarily, the motive of a stockholder in suing to restrain ultra vires acts by the corporation is immaterial.[71] But he must come in a bona fide character as a stockholder. In Forrest v. Manchester S. & L. Ry. Co.,[72] the plaintiff, who held a small amount of stock in the defendant company, sued to enjoin acts alleged to be ultra vires. It appeared that the other stockholders were opposed to the suit, and that another corporation, in which the plaintiff was a larger stockholder, directed him to institute it, and had indemnified him against costs, and that the suit was really in the interests of this company. It was held, without deciding whether the acts complained of were ultra vires, that the suit, not being instituted by the plaintiff in a bona fide character as a stockholder, but merely as the puppet of a rival company, was an imposition on the court, and could not be maintained.[73]

Parties to Suits

A representative suit in equity by a stockholder can only be maintained on the ground that the rights of the corporation are involved; and the suit should be so conducted that any decree on

[69] Continental Securities Co. v. Belmont, 206 N. Y. 7, 99 N. E. 138, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914A, 777; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513. The defense must be pleaded and proved. Continental Securities Co. v. Belmont, supra; Pollitz v. Gould, supra.

[70] Hyams v. Old Dominion Copper Mining & Smelting Co., 82 N. J. Eq. 507, 89 Atl. 37.

[71] Seaton v. Grant, L. R. 2 Ch. App. Cas. 459; Hodge v. United States Steel Corp., 64 N. J. Eq. 111, 53 Atl. 553, reversed United States Steel Corp. v. Hodge, 64 N. J. Eq. 807, 54 Atl. 1, 60 L. R. A. 742. Contra: Pitcher v. Lone Pine Surprise Consol. Min. Co., 39 Wash. 608, 81 Pac. 1047. Cf. Rice v. Rockefeller, 134 N. Y. 174, 31 N. E. 907, 17 L. R. A. 237, 30 Am. St. Rep. 658.

[72] 4 De Gex, F. & J. 125.

[73] And see Waterbury v. Merchants' Union Exp. Co., 50 Barb. (N. Y.) 157; Jenkins v. Auburn City Ry. Co., 27 App. Div. 553, 50 N. Y. Supp. 852; Watson v. Le Grand Roller-Skating Rink Co., 177 Ill. 203, 52 N. E. 317; Beshoar v. Chappell, 6 Colo. App. 323, 40 Pac. 244; Breeze v. Lone Pine Surprise Consol. Min. Co., 39 Wash. 602, 81 Pac. 1050.

the merits will be binding upon the corporation. It is therefore necessary to make the corporation a party defendant. It would be wrong, in case the stockholder were unsuccessful in his suit, to allow the corporation to renew the litigation in another suit; and to avoid this result a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it be made a party to the suit.[74] It is a necessary party defendant, accordingly, although, in truth, the plaintiff.[75] It is only because the corporation refuses or is unable to sue, that the representative action may be brought at all. The corporation, although the real plaintiff, is not treated as such, however, for the purposes of the jurisdiction of the federal courts.[76]

Where the subject-matter of the complaint is fraud or misconduct on the part of the directors or other officers of the corporation, they should be made defendants.[77]

If the subject-matter of the suit is an agreement between the corporation, acting by its directors or managers, and some other corporation, or some other person, strangers to the corporation, it

[74] Davenport v. Dows, 18 Wall. (U. S.) 626, 21 L. Ed. 938. And see Hersey v. Veazie, 24 Me. 9, 41 Am. Dec. 364; Greaves v. Gouge, 69 N. Y. 154; Black v. Huggins, 2 Tenn. Ch. 780; Brinckerhoff v. Bostwick, 88 N. Y. 52; Allen v. Curtis, 26 Conn. 456; Mount v. Radford Trust Co., 93 Va. 427, 25 S. E. 244. The decision of questions litigated in a suit brought by a stockholder in behalf of the corporation, in which the corporation is made defendant and appears, is conclusive in another suit brought by another stockholder for the purpose of relitigating the questions which have been determined. Willoughby v. Chicago Junction Rys. & Union Stockyards Co., 50 N. J. Eq. 656, 25 Atl. 277; Hearst v. Putnam Min. Co., 28 Utah, 184, 77 Pac. 753, 66 L. R. A. 784, 107 Am. St. Rep. 698; Dana v. Morgan (D. C.) 219 Fed. 313. Where the suit, however, is brought by the stockholder solely on his own behalf, the decision is not res adjudicata as to similar suits by other stockholders on their individual behalf. Morris v. Elyton Land Co., 125 Ala. 263, 28 South. 513. See 28 Harv. Law Rev. 811. Stockholders in a foreign corporation may maintain a suit for property of the corporation in the state, though it is not served with process in the state and does not appear. Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574. If the corporation has been declared insolvent, and the statutory receiver, appointed by the court where the suit is pending, be made a party, the corporation need not be joined. Barry v. Moeller, 68 N. J. Eq. 483, 59 Atl. 97.

[75] Gilman v. German Lithographic Stone Co., 152 Ky. 606, 153 S. W. 996; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Lawrence v. Southern Pac. Co. (C. C.) 180 Fed. 822; Starr v. Heald, 28 Okl. 792, 116 Pac. 188.

[76] Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606.

[77] Slattery v. St. Louis & N. O. Transp. Co., 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245; McCrea v. Robertson, 192 N. Y. 150, 84 N. E. 960, affirming, 114 App. Div. 77, 99 N. Y. Supp. 694; Edwards v. Bay State Gas Co. (C. C.) 91 Fed. 942. Cf. Eldred v. American Palace Car Co. (C. C.) 99 Fed. 168.

is proper to make that other corporation or person a defendant to the suit; and the court may grant relief against such corporation or person, as by compelling it to return money or property received under the agreement, if it was ultra vires or fraudulent.[78]

Costs and Expenses

In all stockholder's actions in which plaintiff is successful he is entitled to be reimbursed for all his expenses, since the corporation is the beneficiary of the recovery and plaintiff sues merely in a representative capacity.[79]

Accordingly, where an action was prosecuted by a stockholder for the benefit of the corporation, and, as a result, the corporation was enriched to the amount recovered, it was held the court below properly entered judgment in favor of the stockholder against the corporation for all costs, attorney's fees, and necessary disbursements.[80]

EXPULSION OF MEMBERS

152. Corporations not having a joint stock have, as an incident, power to remove or expel members for sufficient cause. This right does not exist in joint-stock corporations. When the charter is silent on the subject, or grants the power in general terms, it can be exercised only for the following causes:

(a) Offenses of an infamous character, and indictable at common law, and of which the party has been convicted.

(b) Offenses against the party's duty to the corporation as a member of it.

(c) Offenses compounded of these two.

Courts are reluctant to interfere with the decision of the corporate authorities in matters of disfranchisement. Where the pro-

[78] Russell v. Wakefield Waterworks Co., L. R. 20 Eq. 474; Salomons v. Laing, 12 Beav. 377; Peabody v. Flint, 6 Allen (Mass.) 52, 57. And see Pittsburg, C., C. & St. L. R. Co. v. Dodd, 115 Ky. 176, 72 S. W. 822, 24 Ky. Law Rep. 2057; Edwards v. Mercantile Trust Co. (C. C.) 124 Fed. 381; Montgomery Traction Co. v. Harmon, 140 Ala. 505, 37 South. 371; Purdy v. Bankers' Life Ass'n, 101 Mo. App. 91, 74 S. W. 486.

[79] Meeker v. Winthrop Iron Co. (C. C.) 17 Fed. 48, 52; McCourt v. Singers-Bigger, 145 Fed. 103, 76 C. C. A. 73, 7 Ann. Cas. 287; Decatur Mineral Land Co. v. Palm, 118 Ala. 531, 21 South. 315, 59 Am. St. Rep. 140; Davis v. Gemmell, 73 Md. 530, 21 Atl. 712; Underwood v. Smith, 93 Tenn. 687, 27 S. W. 1008, 42 Am. St. Rep. 946; Sant v. Perronville Shingle Co., 179 Mich. 42, 146 N. W. 212.

[80] Steinfeld v. Zeckendorf, 15 Ariz. 335, 138 Pac. 1044.

ceedings, however, are irregular, or in bad faith, or where the charges are frivolous, mandamus will lie to compel the ousted member's reinstatement.

Joint-stock corporations and corporations organized for gain have no power to remove or expel their stockholders, unless the power to do so is expressly conferred upon them by charter or by agreement with their members.[81] In the case of other corporations, however, they have the power to remove members for good cause, provided they do not thereby violate charter or statutory provisions. This power need not be expressly conferred by the charter. It is an incident to every corporation other than a joint-stock corporation.[82] It is, in its nature, really consequential upon the powers expressly granted.[83] Questions as to the nature and extent of this power have frequently arisen in connection with incorporated clubs, literary and medical societies, benevolent societies, boards of trade, etc.

The power can only be exercised for good cause, and it must be for some offense that has an immediate relation to the duties of the party as a member, or for an offense of an infamous character, indictable at law, and of which the party has been convicted. And a by-law or rule authorizing expulsion for a less cause is void.[84] "It appears to be well settled that when the charter of a corporation is silent upon the subject of expulsion, or grants the power in general terms, there are but three legal causes of disfranchisement: (1) Offenses of an infamous character indictable at common law. (2) Offenses against the corporator's duty to the corporation as a member of it. (3) Offenses compounded of the two." [85] In order, there-

[81] See Edgerton Tobacco Mfg. Co. v. Croft, 69 Wis. 256, 34 N. W. 143; People ex rel. Pulford v. Fire Department of City of Detroit, 31 Mich. 465. The stockholders of a private corporation agreed that the majority of the common stockholders might declare that a stockholder had ceased to be a desirable associate, and thereupon take his stock at its cash value. This was held valid. Boggs v. Boggs & Buhl, 217 Pa. 10, 66 Atl. 105.

[82] 2 Kent, Comm. 297; 1 Thomp. Corp. 847; Lord Bruce's Case, 2 Strange, 819; Rex v. Richardson, 1 Burrows, 517; Dickenson v. Chamber of Commerce of City of Milwaukee, 29 Wis. 45, 9 Am. Rep. 544; Fawcett v. Charles, 13 Wend. (N. Y.) 473. A corporation not for pecuniary profit may adopt rules or by-laws providing for the expulsion of members. Allen v. Chicago Undertakers' Ass'n, 232 Ill. 458, 83 N. E. 952.

[83] United States ex rel. De Yturbide v. Metropolitan Club of City of Washington, 11 App. D. C. 180.

[84] 2 Kent, Comm. 297; Commonwealth v. St. Patrick Benev. Soc., 2 Bin. (Pa.) 441, 4 Am. Dec. 453; New York Protective Ass'n v. McGrath (Super. N. Y.) 5 N. Y. Supp. 8; Otto v. Journeymen Tailors' Protective & Benevolent Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156.

[85] State v. Chamber of Commerce of City of Milwaukee, 20 Wis. 63, 71;

fore, to justify expulsion, a member must be proven guilty of a course of behavior which can, in a fair sense, be said to be "improper and prejudicial." [86] Otherwise, a member might be expelled arbitrarily, and upon wholly insufficient or clearly frivolous grounds, and this may not be done.[87] A member cannot be arbitrarily or capriciously expelled,[88] though broad discretion should be allowed to the associates, and their judgment should not be lightly set aside.[89]

A member may be expelled from a Board of Trade for violating a by-law [90] prohibiting members, under penalty of expulsion, from making any contract for the future delivery of produce before the time fixed for opening the exchange room, or after the time fixed for closing the same; [91] or from making or reporting any false or fictitious purchase or sale, or from acting in bad faith or dishonestly.[92] So a by-law of a board of trade or similar corporation may authorize expulsion of a member for nonfulfillment of any contract.[93] Where a member of a fraternal insurance organization is expelled upon charges, and the expulsion proceedings are conducted strictly in accordance with the laws of the order, the courts cannot review the proceedings or re-examine the merits of the expulsion,

Dickenson v. Chamber of Commerce of City of Milwaukee, 29 Wis. 45, 9 Am. Rep. 544; Evans v. Philadelphia Club, 50 Pa. 107; People v. Medical Society of Erie County, 24 Barb. (N. Y.) 570.

[86] Loubat v. Le Roy, 15 Abb. N. C. 1, 20; BARRY v. THE PLAYERS, 147 App. Div. 704, 132 N. Y. Supp. 59, Wormser Cas. Corporations, 326, affirmed, no opinion, 204 N. Y. 669, 97 N. E. 1102.

[87] Haebler v. New York Produce Exchange, 149 N. Y. 414, 44 N. E. 87; People ex rel. Ward v. Uptown Ass'n, 9 App. Div. 191, 41 N. Y. Supp. 154; BARRY v. THE PLAYERS, supra.

[88] BARRY v. THE PLAYERS, supra. See Dawkins v. Antrobus, L. R. 17 Ch. Div. 615.

[89] Brandenburger v. Jefferson Club Ass'n, 88 Mo. App. 148. See also, note, 12 Col. L. Rev. 275, 276. But compare BARRY v. THE PLAYERS, supra.

[90] Such by law must be within the limits of the charter and reasonable, and must not be inconsistent with law or public policy. People v. Chicago Live Stock Exchange, 170 Ill. 556, 48 N. E. 1062, 39 L. R. A. 373, 62 Am. St. Rep. 404; Green v. Board of Trade of City of Chicago, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365.

[91] State v. Chamber of Commerce, 47 Wis. 670, 3 N. W. 760.

[92] Pitcher v. Board of Trade, 121 Ill. 412, 13 N. E. 187; Board of Trade of City of Chicago v. Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312; Wood v. Chamber of Commerce of City of Milwaukee, 119 Wis. 367, 96 N. W. 835.

[93] Dickenson v. Chamber of Commerce of City of Milwaukee, 29 Wis. 45, 9 Am. Rep. 544: Haebler v. New York Produce Exchange, 149 N. Y. 414, 44 N. E. 87; People v. New York Produce Exchange, 149 N. Y. 401, 44 N. E. 84 ("fraudulent breach of contract, or any proceedings inconsistent with just or equitable principles of trade").

and the only issue is whether the expulsion was "according to the law of the land." [94] Where the association's judges are prejudiced and disqualified, the "law of the land" is not observed, and the proceeding is therefore reviewable.[95]

It has been held that a by-law of a benevolent society, authorizing expulsion of a member for vilifying any of the other members, is void, as such conduct does not affect the interest or good government of the corporation, and is not indictable by the law of the land.[96] This holding, however, would hardly be extended to organizations incorporated for social intercourse.[97]

If a member is guilty of an offense which renders him liable to indictment, but which has no immediate relation to the corporation or his duties as a member, he cannot be expelled therefor until his guilt is established by an indictment and trial at law.[98]

If there is no special provision on the subject in the charter, the power of removal of a member for cause is in the whole body, and not in the board of managers or other officers.[99] But a select body of the corporation, as the board of directors may possess the power, not only when it is given by the charter, but in consequence of a by-law made by the body at large, for the body at large may thus delegate the power to a committee of its agents, or its managing body.[1] The committee, however, may be objected to on the ground of bias, prejudice, or direct interest, and if its members are disqualified, the committee is thereby deprived of jurisdiction.[2]

Strictly speaking, the term "amotion" applies only to directors

[94] Wilcox v. Supreme Council Royal Arcanum, 210 N. Y. 370, 104 N. E. 624, 52 L. R. A. (N. S.) 806; Spilman v. Supreme Council of the Home Circle, 157 Mass. 128, 31 N. E. 776.

[95] Wilcox v. Supreme Council Royal Arcanum, supra.

[96] Commonwealth v. St. Patrick Benev. Soc., 2 Bin. (Pa.) 441, 4 Am. Dec. 453.

[97] United States ex rel. De Yturbide v. Metropolitan Club of City of Washington, 11 App. D. C. 180. Contra, Evans v. Philadelphia Club, 50 Pa. 107. Compare also, BARRY v. THE PLAYERS, supra.

[98] 2 Kent, Comm. 297; Commonwealth v. St. Patrick's Benev. Soc., 2 Bin. (Pa.) 441, 4 Am. Rep. 453.

[99] 2 Kent, Comm. 298; State v. Chamber of Commerce of City of Milwaukee, 20 Wis. 63.

[1] 2 Kent, Comm. 298; Pitcher v. Board of Trade, 121 Ill. 412, 13 N. E. 187; State v. Chamber of Commerce, 47 Wis. 670, 3 N. W. 760. Where one appears before the board of directors of an association charged with violating its rules, and submits his case to them without objection to the manner in which the body is constituted, or the mode of its proceeding, all irregularities therein are deemed to be waived. Pitcher v. Board of Trade, supra.

[2] Wilcox v. Supreme Council Royal Arcanum, 210 N. Y. 370, 104 N. E. 624, 52 L. R. A. (N. S.) 806.

and officers.[3] "Disfranchisement" is the term applied to the removal or expulsion of members.[4]

"It is absolutely essential to the validity of the suspension or expulsion of a member of an incorporated society that the accused should be notified of the charges against him, and of the time and place set for their hearing; that the accusing body should proceed upon inquiry, and consequently upon evidence; and that the accused should have a fair opportunity of being heard in his defense." [5] And, generally, there must be a regular sentence of expulsion.[6] These rules do not apply to mutual benefit corporations whose charter or by-laws provide that nonpayment of an assessment after notice shall, ipso facto, work a forfeiture of membership or of the member's benefit certificate.[7] Where the proceedings have been regular and in accord with the rules and by-laws, the courts, as a rule, will not review them.[8]

Courts are chary, and properly so, to interfere with the internal affairs of any association, at least until the complaining member has resorted to all the remedies provided for in the regulations of the society for a redress of his grievances. The decision of the corporate authorities ordinarily, therefore, is final.

In expelling members the corporation or its authorized board acts in a quasi judicial character, and, so long as it confines itself to the exercise of the powers vested in it, and in good faith pursues the method prescribed by its laws, such laws not being in violation of the laws of the land, or any inalienable right of the member, its sentence is conclusive, like that of a judicial tribunal.[9] The courts,

[3] Bayless v. Orne, Freem. Ch. (Miss.) 161; Robertson v. Bullions, 11 N. Y. 243.

[4] 2 Kent, Comm. 298.

[5] 1 Thomp. Corp. § 881. See Id. §§ 882–899. See Green v. Board of Trade of City of Chicago, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365; Weiss v. Musical Mut. Protective Union, 189 Pa. 446, 42 Atl. 118, 69 Am. St. Rep. 820; People v. East Buffalo Live Stock Ass'n, 88 App. Div. 619, 84 N. Y. Supp. 795. Cf. People v. Old Guard of City of New York, 87 App. Div. 478, 84 N. Y. Supp. 766.

[6] 1 Thomp. Corp. § 898.

[7] 1 Thomp. Corp. §§ 881, 898.

[8] Wilcox v. Supreme Council Royal Arcanum, 210 N. Y. 370, 104 N. E. 624, 52 L. R. A. (N. S.) 806; Spilman v. Supreme Council of the Home Circle, 157 Mass. 128, 31 N. E. 776.

[9] Otto v. Journeymen Tailors' Protective & Benevolent Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156; Commonwealth v. Pike Beneficial Soc., 8 Watts & S. (Pa.) 250; Burt v. Grand Lodge F. & A. Masons, 66 Mich. 85, 33 N. W. 13; Robinson v. Yates City Lodge No. 448, A. F. & A. Masons, 86 Ill. 598; Pitcher v. Board of Trade, 121 Ill. 412, 13 N. E. 187; Board of Trade of City of Chicago v. Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312; Brandenburger v. Jefferson Club Ass'n, 88 Mo. App. 148; Common-

however, will decide whether there were sufficient grounds for expulsion, and whether the power has been lawfully exercised, and they will interfere with the sentence if there was not sufficient cause for expulsion; or if the decision arrived at was contrary to natural justice; as where the member was not given an opportunity to be heard, or if the judges were disqualified because of bias or interest, or if the rules of the company were not observed, or if the action of the company was malicious, and not bona fide.[10] In the recent case of Barry v. The Players, the relator applied for a writ of mandamus to reinstate him in a social club. He had been expelled, by a vote of two-thirds of the board of directors as provided in the constitution of the club, because he had published an article in a popular magazine, tending in the judgment of the directors of the club to belittle and reflect upon members of the dramatic profession, of whom many belonged to the club. There was nothing in the article reflecting specifically upon the club or its members, however. The constitution of the club authorized suspension or expulsion "for cause." The court granted a writ of peremptory mandamus.[11] Scott, J., said: "On the whole, while the relator's article may have given just offense to some of the club's members, we cannot say that its publication was prejudicial to the club or constituted conduct incompatible with relator's duty to the club. The expulsion was, therefore, unjustified." It is difficult to reconcile this holding with the general rule that the courts are loath to review the exercise of the discretion of the corporate authorities.

If a member of a corporation is wrongfully expelled, and denied rights of membership, mandamus is a proper remedy to compel his reinstatement.[12] In some states the remedy by injunction is al-

wealth v. Union League of Philadelphia, 135 Pa. 301, 19 Atl. 1030, 8 L. R. A. 195, 20 Am. St. Rep. 870. See Loubat v. Le Roy, 15 Abb. N. C. 1.

[10] Otto v. Journeymen Tailors' Protective & Benevolent Union, supra; Savannah Cotton Exchange v. State, 54 Ga. 668; People v. New York Produce Exchange, 149 N. Y. 401, 44 N. E. 84; De Hart v. Good Will Hook & Ladder Co., 61 N. J. Law, 507, 40 Atl. 570; Wilcox v. Supreme Council Royal Arcanum, 210 N. Y. 370, 104 N. E. 624, 52 L. R. A. (N. S.) 806; and cases cited in notes 92, 93, 5, 9, supra.

[11] BARRY v. THE PLAYERS, 147 App. Div. 704, 132 N. Y. Supp. 59, Wormser Cas. Corporations, 326, Ingraham P. J., dissenting, affirmed without opinion, 204 N. Y. 669, 97 N. E. 1102. See note, 12 Col. L. Rev. 275–6.

[12] State v. Chamber of Commerce of City of Milwaukee, 20 Wis. 63; State v. Chamber of Commerce, 47 Wis. 670, 3 N. W. 760; Otto v. Journeymen Tailors' Protective & Benevolent Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156; Black & White Smiths' Society v. Vandyke, 2 Whart. (Pa.) 309, 30 Am. Dec. 263; De Hart v. Good Will Hook & Ladder Co., 61 N. J. Law. 507, 40 Atl. 570; Weiss v. Musical Mut. Protective Union, 189 Pa. 446, 42 Atl. 118, 69 Am. St. Rep. 820; BARRY v. THE PLAYERS, supra.

lowed, while in others it is denied, generally, on the ground that there is an adequate remedy at law by mandamus.[13] The regularity of the proceedings and the sufficiency of the evidence in case of expulsion of a member after notice, trial, and conviction cannot be inquired into collaterally.[14]

[13] 1 Thomp. Corp. §§ 909–913. Equity will not interfere on the ground that a member will not have a fair hearing by the officers of the corporation authorized to discipline him. Wood v. Chamber of Commerce of City of Milwaukee, 119 Wis. 367, 96 N. W. 835. Cf. Bartlett v. L. Bartlett & Son Co., 116 Wis. 450, 93 N. W. 473.

[14] Black & White Smiths' Society v. Vandyke, 2 Whart. (Pa.) 309, 30 Am. Dec. 263. Compare Wilcox v. Supreme Council Royal Arcanum, 210 N. Y. 370, 104 N. E. 624, 52 L. R. A. (N. S.) 806.

CHAPTER XII

MEMBERSHIP IN CORPORATIONS (Continued)

153–154. Transfer of Shares.
155. Effect of Transfer.
156–156a. Lien of Corporation on Shares.
157–158. Validity of Transfers.
159–160a. Mode of Transfer.
161–162a. Registration of Transfer.
163–166. Forged and Unauthorized Transfers.
167. Liability of Indorser of Forged Certificate.
168–169. Liability of Corporation Arising from Unauthorized or Invalid Transfer.
170–171. Liability of Corporation on Certificates Issued Fraudulently, without Authority, etc.
172. Remedy against Corporation for Refusal to Recognize Transfer.
173. Compelling Corporation to Issue New Certificates.

TRANSFER OF SHARES

153. Except in so far as they may be restricted by charter or statutory provisions, or by an authorized by-law, or by contract, stockholders have an absolute right to transfer their shares in good faith to any one who is capable in law of taking and holding the same, and of assuming liability in respect thereto; and this right is in no way dependent upon the consent of the corporation or of its officers or the other stockholders.

154. An agreement between the stockholders of a corporation not to sell, pledge, or transfer their shares is in unreasonable restraint of trade, and void, but the tendency of the recent cases is in the direction of according the right of choosing one's associates to some extent, although this may operate as a partial restraint on alienation.

By the charters of private corporations, the shares of stock are often expressly declared to be transferable by the holders, but express provision is not at all necessary to give the right of transfer. It exists at common law. In ordinary partnerships, as we have seen, the consent of all the partners to the admission or retirement of a member is necessary, and every such change in membership involves the dissolution of the old firm and the formation of a new one. In corporations, however, it is different. One of the very ob-

jects of incorporation is to avoid this doctrine of the law of partnership. In the absence of express statutory restrictions, it is always implied that shares of stock are transferable. Subject to the limitations hereafter shown, it is well settled that a stockholder has an absolute right incident to his ownership, to make an actual and bona fide sale and transfer of his shares to any person who is capable in law of taking and holding them, and of assuming liability as a stockholder. And, in the absence of express restrictions in the charter or in some statute, or by contract, the right is not in any way dependent upon the consent of the directors or of the other stockholders. Unless the power to do so is expressly conferred by the Legislature creating the corporation, or by an authorized amendment of its charter, neither the directors nor a majority of the stockholders can, directly or indirectly, prohibit or refuse to recognize bona fide transfers.[1] For instance, a by-law, not expressly authorized by the Legislature, to the effect that the validity of a transfer shall depend upon the approval and acceptance of the board of directors, while it may perhaps be lawfully enforced to protect the rights of the corporation, and prevent transfers to irresponsible persons, cannot be enforced so as to defeat the rights of a bona fide and responsible purchaser of shares. "Its enforcement," said the Iowa court, "would operate as an infringement upon the property rights of others, which the law will not permit. It would, besides, operate as a restraint upon the disposition of property in the stock of the corporation, in the nature of restraint of trade, which the courts will not tolerate." [2] So, it has been held that a by-law, providing that, if any stockholder shall desire to dispose of his stock, he shall give written notice of his intention to sell, and of the price he can obtain, and that the other stockholders shall thereupon have the option to purchase the stock at the price named, is an invalid restraint or alienation.[3] So it has been held that,

[1] Johnson v. Laflin, 5 Dill. (U. S.) 65, Fed. Cas. No. 7,393, affirmed Johnston v. Laflin, 103 U. S. 800, 26 L. Ed. 532; Farmers' & Merchants' Bank of Lineville v. Wasson, 48 Iowa, 336, 30 Am. Rep. 398; Moore v. Bank of Commerce, 52 Mo. 377; First Nat. Bank v. Lanier, 11 Wall. (U. S.) 369, 20 L. Ed. 172; Weston's Case, 4 Ch. App. 20; Gilbert's Case, 5 Ch. App. 559; Driscoll v. West Bradley & Cary Manufacturing Co., 59 N. Y. 96; Bank of Attica v. Manufacturers' & Traders' Bank, 20 N. Y. 501; Chouteau Spring Co. v. Harris, 20 Mo. 383; Kinnan v. Sullivan County Club, 26 App. Div. 213, 50 N. Y. Supp. 95.

[2] Farmers' & Merchants' Bank of Lineville v. Wasson, 48 Iowa, 336, 30 Am. Rep. 398. See, also, McNulta v. Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203. And see post, p. 576, and cases there cited.

[3] Victor G. Bloede Co. v. Bloede, 84 Md. 129, 34 Atl. 1127, 33 L. R. A. 107, 57 Am. St. Rep. 373; Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber

in the absence of express authority, a by-law providing that no stockholder shall transfer his stock to any person, unless he shall first offer it to the corporation and it shall have refused to purchase it, is invalid.[4] But it seems that, although such a by-law may be void, a stockholder may enter into a contract with the corporation whereby he will be bound by conditions requiring him to offer his shares to the corporation before he shall have the right to sell them to another, and the fact that the conditions are contained in an invalid by-law will not render his agreement void.[5] And it has been

Co., 118 Mo. 447, 24 S. W. 129; Herring v. Ruskin Co-op. Ass'n (Tenn. Ch. App.) 52 S. W. 327. But see, Barrett v. King, 181 Mass. 476, 63 N. E. 934; Feckheimer v. National Exch. Bank of Norfolk, 79 Va. 80, 83.

[4] Ireland v. Globe Milling & Reduction Co., 19 R. I. 180, 32 Atl. 921, 29 L. R. A. 429, 61 Am. St. Rep. 756.

[5] In New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271, where it was held that where a stockholder purchases certificates of stock which provide that they are transferable only to the company, and at an appraisal to be made by its directors, as provided in the by-laws printed on the back of the certificates, and signs a receipt therefor, "subject to the conditions and restrictions therein referred to, and to the by-laws of the company, to which I agree to conform," he is bound by the provisions of the certificates, though, when considered as by-laws, they may be void, and that the company may enforce specific performance. The court said: "The defendant contends that these by-laws are void. We have not found it necessary to consider that question, and we express no opinion upon it. We think that the case may well stand on the ground that the defendant's testator entered into an agreement with the plaintiff to do what the plaintiff now seeks to compel his executor to do. It is manifest that a stockholder may make a contract with a corporation to do or not to do certain things in regard to his stock, or to waive certain rights, or to submit to certain restrictions respecting which the stockholders might have no power of compulsion over him. * * * In the present case the certificates were issued to the defendant's testator in consideration of the payment by him to the corporation of the amount due for the stock, and of the agreements with it on his part which they contained. By accepting them without objection, and by signing the receipts, he must be held to have agreed to the conditions printed on the backs of the certificates. The fact that the conditions were contained in the by-laws, which may have been invalid as such, does not render his agreement void, if the contract was in substance one which the corporation had power to make. We think that it had such power. It is held in this state that a corporation, unless prohibited, may purchase its own stock; and we see nothing opposed to public policy in such an agreement as this, with corporations like this. If honestly carried out by the directors, it tends to secure a trustworthy body of stockholders, from which those having the care and management of the affairs of the corporation naturally would be selected. It certainly cannot be contrary to public policy that the managers of this and similar institutions should be persons of skill who possess the confidence of the public. The restraint upon alienation is no greater than is often agreed to." See, also, Blien v. Rand, 77 Minn. 110, 79 N. W. 606, 46 L. R. A. 618; Barrett v. King, 181 Mass. 476, 63 N. E. 934. In the last cited case, Holmes, C. J., said: "Not-

decided that provisions in articles of incorporation directing a stockholder who desires to sell his shares at any time during the life of the corporation, to sell them to certain designated persons at a fixed price, were enforcible and were not repugnant to the rule forbidding restraints on freedom of alienation.[6]

A provision in the charter of a corporation that the shares shall be transferable on the books of the corporation in such manner as the directors shall provide, as is provided in the national banking act, is merely for the purpose of enabling the corporation to know who are stockholders, and, as such, entitled to vote, receive dividends, etc., and for the protection of bona fide purchasers of shares, and of creditors and persons dealing with the corporation, and does not in any way restrict the right of the stockholders to sell and transfer their shares, or clothe the corporation or its officers with the power to refuse to register bona fide transfers.[7]

Power to refuse to assent to or register a transfer, or power to prescribe the manner of transfer, is often given to the directors by the act of incorporation. Even in such a case, however, the power must be exercised in a reasonable manner and bona fide, and there must be some good reason for refusing to recognize or register a transfer. "The power," said Mr. Justice Field, "can only go to the extent of prescribing conditions essential to the protection of the association against fraudulent transfers, or such as may be designed to evade the just responsibility of the stockholder. It is to be exercised reasonably. Under the pretense of prescribing the manner of the transfer, the association cannot clog the transfer with useless restrictions, or make it dependent upon the consent of the directors or other stockholders." [8] Power given by the charter to regulate transfers does not give the power to restrain transfers, or prescribe to whom they may be made, but merely gives the power to prescribe formalities to be observed in making them.[9] The mere fact that the purchaser of shares is a business rival of the corporation, and hostile to it, does not affect his rights as transferee, and is no ground for refusal of a court of equity to compel the cor-

withstanding decisions under statutes, like In re Klaus, 67 Wis. 401, there seems to be no greater objection to retaining the right of choosing one's associates in a corporation than in a firm."

[6] Borland's Trustee v. Steel Bros. & Co., Ltd., [1901] 1 Ch. D. 279.

[7] Johnson v. Laflin, 5 Dill. (U. S.) 65, Fed. Cas. No. 7,393, affirmed Johnston v. Laflin, 103 U. S. 800, 26 L. Ed. 532.

[8] Johnson v. Laflin, supra, and cases there referred to.

[9] Chouteau Spring Co. v. Harris, 20 Mo. 383. The requirement of a small fee for making the transfer is not unreasonable. Giesen v. London & Northwest American Mortg. Co., 102 Fed. 584, 42 C. C. A. 515.

poration to register the transfer.[10] While inquiry into the motive of the transferee is ordinarily regarded as immaterial in the eye of the law,[11] it has nevertheless been held that registration was properly refused by the corporation where the avowed purpose of the transferee was to wreck the corporation if possible.[12]

The directors of a corporation have the same right as any other stockholder to make a bona fide sale and transfer of their shares, and thus get rid of liability, if they comply with the regulations, and take no advantage of their position to commit fraud.[13] There is nothing to prevent a transfer to an officer of the corporation, as the president or a director; and, if the transfer is in good faith, it will prevail as against any claim of the corporation against the transferror, unless there is some charter or statutory provision to the contrary.[14]

It has been held that the stockholders in a corporation cannot make a valid agreement among themselves not to transfer their shares, and that such an agreement, being in unreasonable restraint of trade, would be contrary to public policy, and void. In Fisher v. Bush,[15] a number of stockholders entered into an agreement for

[10] Rice v. Rockefeller, 134 N. Y. 174, 31 N. E. 907, 17 L. R. A. 237, 30 Am. St. Rep. 658.

[11] State ex rel. Townsend v. McIver, 2 S. C. 25; State ex rel. Page v. Smith, 48 Vt. 266.

[12] Senn v. Union Premium Mercantile Co., 115 Mo. App. 685, 92 S. W. 507. And see, Gould v. Head (C. C.) 41 Fed. 240.

[13] Johnson v. Laflin, supra; Gilbert's Case, 5 Ch. App. 559; Ex parte Littledale, 9 Ch. App. 257.

[14] Farmers' & Merchants' Bank of Lineville v. Wasson, 48 Iowa, 336, 30 Am. Rep. 398.

[15] 35 Hun (N. Y.) 641. A contract whereby the promoters of a corporation apportioned their respective interests in the stock, and agreed that a certain amount was to be placed in the treasury for working capital, and that the certificates issued to themselves were to be deposited with a trust company, and not withdrawn for six months without consent of each party, or unless sufficient treasury stock should be sold to realize a certain sum, was not a restraint upon trade. "As an incident to the contract making partition of the shares," said the court, "it was competent for the parties to agree that the stock donated to the corporation, in which they had a common interest, should be first offered for sale. This was no restraint upon the business freedom of the parties, but a promotion of the general interest, by temporarily withholding from the market shares owned by individuals, in order to afford a reasonable opportunity to sell shares indirectly owned by all. The protection of the interests of all concerned, by preventing the market from suddenly becoming overcrowded, and ruinously depressed, was a reasonable, just, and honest purpose, which the law does not condemn. There was no evil tendency in the arrangement, as it simply prevented a course of action that would have brought loss both to the common and the personal interests." Williams v. Montgomery, 148 N. Y. 519, 43 N. E. 57.

the expressed purpose of mutual protection, and to prevent a sale of the company's franchise by a majority of the members of the board of directors, who represented a minority of the shares, by which they agreed not to "sell, assign, set over, pledge, or give power of attorney to vote" their stock, without the consent of all the parties to the agreement. The agreement was held void because, for one reason, it was in restraint of trade and against public policy. The decision is explained in later New York cases on the ground that "there was an express agreement not to sell for any purpose," and this was void as prohibiting the right to alienate the stock.[16] The New York courts have upheld, however, the validity of a joint agreement entered into between stockholders not to pledge or sell their shares of stock for a period of ten years.[17] The correct test would seem to be the fairness and reasonableness of the agreement.

EFFECT OF TRANSFER

155. By the weight of authority, when a valid and complete transfer of shares is made in good faith, and in accordance with the principles to be explained in subsequent sections, and there are no charter or statutory provisions to the contrary, the transferee takes the place of the transferror as a stockholder, and acquires all the rights and assumes all the liabilities which arise after the transfer by virtue of the shares. In detail:

(a) The transferror—

(1) In most jurisdictions, is not liable for calls made after the transfer; but he is liable for calls previously made.

(2) As a rule, he is no longer subject to liability as a stockholder to creditors of the corporation.

(3) In the absence of a special agreement with the transferee, which must be known to the corporation to be binding upon it, he is not entitled to dividends declared after the transfer, though earned before; but he is entitled to dividends declared before the transfer, though not paid nor payable until afterwards.

(4) He is not entitled, after the transfer, to vote at stockholders' meetings, or otherwise take any part in the management of the corporation.

[16] Scruggs v. Cotterill, 67 App. Div. 583, 588, 73 N. Y. Supp. 882.
[17] Hey v. Dolphin, 92 Hun, 230, 36 N. Y. Supp. 627.

(b) The transferee—

(1) Is liable for calls made after the transfer.

(2) He is, in most jurisdictions, liable to the same extent as the other stockholders to creditors of the corporation, though their claims may have arisen before the transfer.

(3) He is entitled to all dividends declared after the transfer, though earned before, in the absence of an agreement to the contrary with the transferror, known to the corporation.

(4) He is entitled to vote at stockholders' meetings, and to all other rights arising after the transfer by virtue of ownership of shares.

We shall consider in subsequent sections the manner of making a transfer of shares, and the validity of transfers. In this section will be considered generally the effect of transfers, assuming that they are valid and complete. Whenever a valid and effectual transfer is made, the effect is, in general, to substitute the transferee in the place of the transferror as a member of the corporation, and to give him all the rights, and subject him to all the liabilities, arising after the transfer, to which the transferror would have been entitled or subject if the transfer had not been made.

Liability for Calls

If the stock is not fully paid up at the time of the transfer, the transferror, by the weight of authority, is not liable for calls subsequently made, unless he is made so by express charter or statutory provisions, or by special agreement; but the liability for such calls is impliedly assumed by the transferee.[18] The liability is thus shifted from the outgoing to the incoming shareholder, the transfer of stock working a novation of the contract of membership, with the transferee substituted to the place of the transferror and with all the rights and liabilities incident to stockholding.[19] In Pennsyl-

[18] 1 Mor. Priv. Corp. §§ 159–161; Isham v. Buckingham, 49 N. Y. 216; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818; Glenn v. Porter, 73 Fed. 275, 19 C. C. A. 503; Huddersfield Canal Co. v. Buckley, 7 Term R. 36; Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530; Merrimac Min. Co. of Lake Superior v. Bagley, 14 Mich. 501; Bend v. Susquehanna Bridge & Bank Co., 6 Har. & J. (Md.) 128, 132, 14 Am. Dec. 261; Hall v. United States Ins. Co. of Baltimore, 5 Gill. (Md.) 484, 497; Allen v. Montgomery Railroad Co., 11 Ala. 437; Rochester & K. F. Land Co. v. Raymond, 158 N. Y. 576, 53 N. E. 507, 47 L. R. A. 246; Sigua Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194; Elford v. Piedmont Land Imp. & Inv. Co., 55 S. C. 78, 32 S. E. 758, 897.

[19] Brinkley v. Hambleton, 67 Md. 169, 8 Atl. 904. In New York, the Stock

vania the rule is different;[20] and by statute in some states, as in Virginia, the transferrors as well as the transferees of stock that is not fully paid are each made liable for any installment which may have accrued before the transfer or which may accrue afterwards.[21] The rule does not apply where the shares were issued as full paid, and the transferee is a bona fide purchaser, without any notice that the stock has not been fully paid. In such a case he is not liable for calls.[22] For all calls made prior to the transfer, though not payable until afterwards, the transferror, and not the transferee, is liable.[23] But, if such calls are not paid by the transferror, new

Corporation Law (Consol. Laws, c. 59) § 50, provides that "no share shall be transferable until all previous calls thereon shall have been fully paid in." And see Rochester & K. F. Land Co. v. Raymond, 158 N. Y. 576, 53 N. E. 507, 47 L. R. A. 246.

[20] In Pennsylvania it is held that an original subscriber to the stock of a corporation is not discharged from liability for the amount remaining unpaid on the subscription by transferring his shares in good faith to another, unless the corporation consents to release him. See Everhart v. West Chester & P. R. Co., 28 Pa. 339; Pittsburgh & C. R. Co. v. Clarke, 29 Pa. 146; Graff v. Pittsburgh & S. R. Co., 31 Pa. 489; Messersmith v. Sharon Sav. Bank, 96 Pa. 440. To release the transferror, in Pennsylvania, he must be released and the transferee accepted by the corporation. It is not enough for the corporation to consent to the transfer and register the same. Messersmith v. Bank, supra. The transferee is not liable in Pennsylvania for future calls, unless made so by express agreement or by statute. "No implication of a personal promise of the transferee to pay assessments arises. The company can indemnify themselves only by a sale of the stock, and pursuit of the original subscriber." Franks Oil Co. v. McCleary, 63 Pa. 317. And see Palmer v. Ridge Min. Co., 34 Pa. 288. The earlier cases were limited, however, in Bell's Appeal, 115 Pa. 88, 8 Atl. 177, 2 Am. St. Rep. 532, where it is said that the case of Messersmith v. Bank, supra, is not to be understood as a decision that the transferee of stock in a corporation which has become insolvent is not liable for the payment of the unpaid portion of the shares held by him, when the unpaid capital is required for the payment of the debts of the corporation. The rule in Ohio seems to be the same as in Pennsylvania. See Gaff v. Flesher, 33 Ohio St. 107, 111.

[21] See Hamilton v. Glenn, 85 Va. 901, 9 S. E. 129; Hambleton v. Glenn, 72 Md. 331, 20 Atl. 115; McKim v. Glenn, 66 Md. 479, 8 Atl. 130; Morris v. Glenn, 87 Ala. 628, 7 South. 90; White v. Green, 105 Iowa, 176, 74 N. W. 928.

[22] Foreman v. Bigelow, 4 Cliff. (U. S.) 508, Fed. Cas. No. 4,934; Steacy v. Little Rock & Ft. S. R. Co., 5 Dill. (U. S.) 348, Fed. Cas. No. 13,329; West Nashville Planing Mill Co. v. Nashville Sav. Bank, 86 Tenn. 252, 6 S. W. 340, 6 Am. St. Rep. 835; Ingles Land Co. v. Knoxville Fire Ins. Co. (Tenn. Ch. App.) 53 S. W. 1111; Easton Nat. Bank v. American Brick & Tile Co., 69 N. J. Eq. 826, 60 Atl. 54; American Alkali Co. v. Campbell (C. C.) 113 Fed. 398. Contra, Garden City Sand Co. v. American Refuse Crematory Co., 205 Ill. 42, 68 N. E. 724. Ante, p. 480.

[23] 1 Mor. Priv. Corp. § 161; Schenectady & S. Plank-Road Co. v. Thatcher, 11 N. Y. 102, 108; Campbell v. American Alkali Co., 125 Fed. 207, 61 C. C. A. 317; Brinkley v. Hambleton, 67 Md. 169, 8 Atl. 904.

calls may be made upon the transferee, leaving him to his remedy against the transferror.[24] After a transfer has been made in such a manner as to be effective as against the corporation, the transferror is not liable for assessments authorized to be made on "stockholders" beyond the amount of their shares.[25]

Right to Dividends

It is a general rule, as shown in a preceding chapter, that dividends on shares belong to the person who is the owner of them at the time they are declared, without regard to the time during which the dividends were earned, or the time when such person acquired the shares.[26] In the absence of a special agreement to the contrary, therefore, dividends declared before a transfer, though not payable until afterwards, belong to the transferror, and he may sue the corporation therefor after the transfer.[27] But dividends declared after the transfer, though earned before, belong to the transferee.[28] This rule may be changed by special agreement between the parties, and the agreement will be binding on the corporation if it has notice of it.[29] If it has not such notice, it may safely pay the dividends to the transferee.[30]

Statutory Liability of Stockholders

As a rule, where by statute stockholders are made liable for the debts of the corporation, no liability attaches until the corporate property fails, and it becomes necessary to resort to the stockholders' liability, and such persons only as are then stockholders are subject to the liability. A valid and complete transfer of stock, therefore, in the absence of express provision to the contrary, relieves the transferror of all liability to creditors of the corporation, and the transferee becomes liable in his place. Such is the general rule; but there are some decisions to the contrary, and the peculiar provisions of particular statutes may require a different rule. The subject will be explained at length in treating of the rights and remedies of creditors.[31]

[24] 1 Mor. Priv. Corp. § 161.

[25] Chouteau Spring Co. v. Harris, 20 Mo. 383.

[26] Ante, p. 427.

[27] Id.

[28] Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449; Jones v. Terre Haute & R. R. Co., 57 N. Y. 196; Jermain v. Lake Shore & M. S. R. Co., 91 N. Y. 483; March v. Eastern R. Co., 43 N. H. 515.

[29] Mor. Priv. Corp. § 162.

[30] Ante, p. 429.

[31] Post, p. 716. And see Higgins v. Illinois Trust & Savings Bank, 193 Ill. 394, 61 N. E. 1024; White, Corbin & Co. v. Jones, 167 N. Y. 158, 60 N. E. 422.

Pledgees, Trustees, etc., of Shares

Persons to whom shares have been transferred as security for debts due them from the transferror, and who appear on the registration books of the corporation as owners of the shares, have the same rights as against the corporation, and are subject to the same liability to the corporation and to creditors, as if they owned the shares absolutely. And the same is true of trustees, or others in whose names the shares stand on the books, though they have no beneficial interest therein; at least if it does not appear that they hold as pledgees, trustees, etc. They are liable, for instance, to the corporation and to corporate creditors for an unpaid balance due on the shares.[32] They are also subject to the statutory liability of stockholders for debts of the corporation, and their liability is not limited to the extent of their interest.[33] But one who is described in his stock certificate as a pledgee and who in good faith holds the shares as such, is not regarded as a shareholder, subject to the personal liability imposed by the National Bank Act.[34]

LIEN OF CORPORATION ON SHARES

156. At common law a corporation has no lien on the shares of its stockholders for debts due from them; but such a lien may be created by the charter, or by statute, or by a by-law, if there is express legislative authority therefor. The National Banking Act prohibits such a lien on national bank shares.

156a. The Uniform Stock Transfer Act provides that there shall be no lien or restriction upon the shares unless indicated on the stock certificate issued therefor.

It is well settled that at common law a corporation has no lien on the shares of its stockholders for debts due to it from them.[35]

[32] Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818; post, p. 722. Under Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 58, no person holding stock as collateral security, or as executor, administrator, guardian, or trustee, is personally subject to liability as a stockholder, unless it appears that the funds were voluntarily invested by him in such stock, in which event alone he is made personally liable.

[33] Post, p. 716.

[34] Pauly v. State Loan & Trust Co., 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844. And see Ohio Valley Nat. Bank v. Hulitt, 204 U. S. 162, 27 Sup. Ct. 179, 51 L. Ed. 423.

[35] Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Massachusetts Iron Co. v. Hooper, 7 Cush. (Mass.) 183; Steamship Dock Co. v. Heron's Adm'x, 52 Pa. 280; Farmers' & Merchants' Bank of Lineville v. Wasson,

The reason given is that a different rule would subvert the wholesome doctrine of the common law against secret liens.[86] It follows that the fact that a stockholder is indebted to the corporation does not of itself give the corporation any greater or different rights than any other creditors would have, and is no ground for a refusal of the corporation to recognize and register a bona fide transfer, unless a lien is given by the charter, or by statute, or by an authorized by-law.[87] Whether, in the absence of charter or statutory authority, a corporation may by a by-law create a lien on its shares for debts due from its stockholders, is a question upon which the courts do not entirely agree. By the weight of authority, such a by-law is binding upon the stockholders, and upon transferees who are not bona fide purchasers; but it is ineffectual as against bona fide purchasers.[88]

The Legislature may, in the charter or by statute, give a corporation a lien on shares for debts due to it by its stockholders, or may give the corporation the power to create such a lien by a by-law. In such a case a lien attaches, and a transferee of the stock will take subject to it, whether he had notice or not; and the corporation may refuse to register the transfer until the indebtedness is paid.[89] A provision in the charter of a corporation that shares of stock shall be transferable only on the books of the corporation, according to rules established by it and all debts due and payable to the corporation by a stockholder must be satisfied before the transfer shall be made, gives the corporation a lien on shares for debts due by stock-

48 Iowa, 336, 30 Am. Rep. 398; Driscoll v. West Bradley & Cary Mfg. Co., 59 N. Y. 96, 102; First Nat. Bank v. Lanier, 11 Wall. (U. S.) 369, 20 L. Ed. 172; Heart v. State Bank, 17 N. C. 111; Dana v. Brown, 1 J. J. Marsh. (Ky.) 304; Dearborn v. Washington Sav. Bank, 18 Wash. 8, 50 Pac. 575; Ingles Land Co. v. Knoxville Fire Ins. Co. (Tenn. Ch. App.) 53 S. W. 1111; Herrick v. Humphrey Hardware Co., 73 Neb. 809, 103 N. W. 685, 119 Am. St. Rep. 917, 11 Ann. Cas. 201. Compare, Mohawk Nat. Bank of Schenectady v. Schenectady Bank, 78 Hun, 90, 28 N. Y. Supp. 1100.

[86] Driscoll v. West Bradley & Cary Mfg. Co., 59 N. Y. 96, 102.

[87] See the cases cited above.

[88] Post, p. 576.

[89] Union Bank v. Laird, 2 Wheat. (U. S.) 390, 4 L. Ed. 269; Brent v. Bank of Washington, 10 Pet. (U. S.) 596, 9 L. Ed. 547; Bishop v. Globe Co., 135 Mass. 132; Dorr v. Life Ins. Clearing Co., 71 Minn. 38, 73 N. W. 635, 70 Am. St. Rep. 309; Mohawk Nat. Bank of Schenectady v. Schenectady Bank, 78 Hun, 90, 28 N. Y. Supp. 1100; H. W. Wright Lumber Co. v. Hixon, 105 Wis. 153, 80 N. W. 1110, 1135. Third persons are charged with notice of the provisions of articles of association required by statute to be recorded in the registry of deeds; and liens on stock created by them are binding as against third persons, though they have no actual notice thereof. Dempster Mfg. Co. v. Downs, 126 Iowa, 80, 101 N. W. 735, 106 Am. St. Rep. 340, 3 Ann. Cas. 187.

holders.[40] The lien given by statute to a corporation upon the shares of stockholders "indebted" to it, extends to all debts, whether payable presently or at a future time, except where the statute limits the lien to debts actually due and payable.[41]

Under the National Banking Act, a national bank cannot, by by-law or otherwise, acquire a lien upon the shares of its stockholders for debts due from them to the bank.[42]

A corporation, which by its charter or otherwise is given a lien on its shares for debts due from its stockholders, may waive its rights in this respect; and, if it induces a purchaser of its shares to alter his condition in reliance upon its assurances that it has no adverse claim on the shares, it will be held estopped from asserting any lien it may have had.[43]

Uniform Stock Transfer Act

In pursuance of the general policy of the act to make stock certificates, so far as possible the sole representatives of the shares of

[40] Union Bank v. Laird, supra. In New York Stock Corporation Law (Consol. Laws, c. 59) § 51, provides that "if a stockholder shall be indebted to the corporation, the directors may refuse to consent to a transfer of his stock until such indebtedness is paid, provided a copy of this section is written or printed upon the certificate of stock." And see Reynolds v. Bank of Mt. Vernon, 6 App. Div. 62, 39 N. Y. Supp. 623, affirmed short 158 N. Y. 740, 53 N. E. 1131.

[41] Pittsburgh & C. R. Co. v. Clarke, 29 Pa. 146, 151; National Bank of the Republic of New York v. Rochester Tumbler Co., 172 Pa. 614, 33 Atl. 748; St. Paul Nat. Bank v. Life Ins. Clearing Co., 71 Minn. 123, 73 N. W. 713. See, also, Battey v. Eureka Bank, 62 Kan. 384, 63 Pac. 437. The lien must be for a debt incurred in good faith, and will not prevail against a prior claim to the stock of which the corporation had notice when the debt was created. Prince Investment Co. v. St. Paul & S. C. Land Co., 68 Minn. 121, 70 N. W. 1079. See, also, Bank of Kentucky v. Bonnie, 102 Ky. 343, 43 S. W. 407; Curtice v. Crawford County Bank (C. C.) 110 Fed. 830; Just v. State Sav. Bank, 132 Mich. 600, 94 N. W. 200; White River Sav. Bank v. Capital Sav. Bank & Trust Co., 77 Vt. 123, 59 Atl. 197, 107 Am. St. Rep. 754. The lien extends only to indebtedness directly incurred to the corporation, not to indebtedness to third persons acquired by it. Boyd v. Redd, 120 N. C. 335, 27 S. E. 35, 58 Am. St. Rep. 792. A claim arising out of the embezzlement of the company's funds by a stockholder as its officer is a debt. Sproul v. Standard Plate Glass Co., 201 Pa. 103, 50 Atl. 1003.

[42] Bullard v. National Eagle Bank, 18 Wall. (U. S.) 589, 21 L. Ed. 923; Third Nat. Bank v. Buffalo German Ins. Co., 193 U. S. 581, 24 Sup. Ct. 524, 48 L. Ed. 801, affirming 171 N. Y. 670, 64 N. E. 1119.

[43] Cecil Nat. Bank v. Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1069; Oakland County Sav. Bank v. State Bank of Carson City, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463. The lien is not waived by taking other security. German Nat. Bank v. Kentucky Trust Co. (Ky.) 40 S. W. 458. And see Moore v. Bank of Commerce, 52 Mo. 377. The acts of an agent of the corporation relied upon as a waiver must have been within his authority or

stock which they represent, the uniform act provides as follows: "There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation, and there shall be no restriction upon the transfer of shares so represented by virtue of any by-law of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate." [44]

VALIDITY OF TRANSFERS

157. A stockholder, unless restricted by the charter or by statute, may transfer his shares, and thereby cease to be liable as a stockholder, to any one who is capable of holding them, and assuming the liability of a stockholder. But, as against the corporation and its creditors.

(a) He cannot transfer his shares colorably, or collusively.

(b) In this country, he cannot transfer to a man of straw, or to an insolvent person, for the purpose of escaping liability. The law looks through subterfuges and apparent ownerships. The rule is otherwise in England, however.

(c) He cannot transfer to a person who is incapable in law of assuming liability with respect to the shares, as

(1) To an infant.

(2) To an insane person.

(3) To a married woman, where by the law of the particular jurisdiction she cannot assume liability.

(4) To the corporation itself, or to another corporation, if it is incapable of purchasing and holding the shares.

158. Shares are not transferable after dissolution of the corporation, so as to pass the legal title.

apparent authority. In Bishop v. Globe Co., 135 Mass. 132, it was held that a corporation was not estopped to assert its lien by the fact that, on the transferee's presenting the certificate for transfer, the person in charge of the transfer book promised to make the transfer and issue a new certificate as soon as a certain officer returned, it not appearing that such person had any authority, except to receive requests for transfers, and communicate them to the proper officers.

[44] Section 15. This act, drafted under the auspices of the Conference of Commissioners on Uniform Laws, has been enacted in Alaska (Laws 1913, c. 67), Louisiana (Act No. 180 of 1910), Maryland (Laws 1910, c. 73), Massachusetts (St. 1910, c. 171), Michigan (Pub. Acts 1913, No. 106), New York (Laws 1913, c. 600), Ohio (102 Ohio Laws, p. 500), Pennsylvania (P. L. 1911, p. 126), Rhode Island (Laws 1912, c. 840), and Wisconsin (Laws 1913, c. 458). In certain states, e. g., New York, the act was passed with some slight variations of the text. See Personal Property Law (Consol. Laws, N. Y. c. 41), art. 6, §§ 162–185.

These questions are considered at length in a subsequent chapter in dealing with the liability of stockholders. It is the general rule that a stockholder, where there are no restrictions in the charter or in the statutes, has an absolute right to transfer his shares. This rule, however, is subject to exceptions. A transfer may be perfectly valid as between the parties themselves, and yet be invalid as against the corporation and creditors of the corporation. Thus, as we shall presently see, a stockholder cannot transfer his shares colorably to an insolvent or irresponsible person, or to a mere dummy, and thereby escape liability as a stockholder to creditors of the corporation.[45] And, though in England the rule is different, in this country a stockholder cannot transfer to an insolvent person, when he knows that the corporation is insolvent, for the purpose of escaping his statutory liability, though the transaction is an out and out sale and transfer.[46] There is also an implied prohibition against a transfer of shares to an infant or any other person who is not capable in law of assuming the liabilities, as well as enjoying the rights, of the transferror in respect thereto.[47] So it is with transfers to the corporation, or to some other corporation, where it has no power to hold the shares.[48]

Transfer after Dissolution

The right of a stockholder in a corporation to sell and transfer his stock, and to pass the legal title of such stock to the purchaser, ceases upon the dissolution of the corporation. The interests of the several stockholders are then reduced to mere equitable rights to their several distributive shares of the funds of the corporation, upon principles of justice and equity among all the stockholders; and in making distribution each stockholder is to be charged with the debts due from him to the corporation, so as to equalize the distributive shares of all the stockholders in the fund after payment of all debts due by them respectively to the corporation. When a stockholder assigns his interest after dissolution of the corporation, the assignee takes subject to this rule.[49]

[45] Post, p. 721. And see McDonald v. Dewey, 202 U. S. 510, 26 Sup. Ct. 731, 50 L. Ed. 1128, 6 Ann. Cas. 419; Ohio Valley Nat. Bank v. Hulitt, 204 U. S. 162, 27 Sup. Ct. 179, 51 L. Ed. 423.

[46] Post, p. 720.

[47] Post, p. 719.

[48] Post, p. 719.

[49] James v. Woodruff, 10 Paige (N. Y.) 541, affirmed 2 Denio (N. Y.) 574.

MODE OF TRANSFER

159. In the absence of express regulations by the Legislature, or under legislative authority, shares of stock may be transferred, and the legal title vested in the transferee, by delivery of the certificate with a written assignment thereof, or with an assignment in blank indorsed thereon.

160. The validity and completeness of a transfer depends upon the law of the state by which the corporation was created.

160a. Under the Uniform Stock Transfer Act, the transfer of the certificate is made to operate as a transfer of the shares, and the certificate, in accordance with mercantile usage, is regarded, to the fullest extent possible, as the representative of the shares.

In the absence of a statutory or charter provision, or of a by-law passed in pursuance of legislative authority, prescribing an exclusive manner in which the stock of a corporation shall be transferred, the owner may transfer the same to a purchaser, pledgee, or donee by the delivery of the stock certificate, with a written assignment thereof. Usually the certificate contains upon its back a form of assignment, with power of attorney authorizing the transfer upon the books of the corporation. Such a transfer is sufficient at common law to convey the legal as well as the equitable title as against all persons, including the corporation,[50] though it required registry on the books of the corporation to make the transfer complete as between the corporation and the transferee. The assignment may be in blank, in which case the shares will pass from person to person by delivery of the certificate, without further indorsement; the person who may be the holder of the certificate having the right at any time to fill in the blank in the assignment with his name, and to fill in his name or another's as attorney.

A valid gift of the stock may be effected by delivery of the certificate, accompanied by words of absolute and present gift, without written assignment.[51]

[50] Boston Music Hall Ass'n v. Cory, 129 Mass. 435; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Scott v. Pequonnock Nat. Bank (C. C.) 15 Fed. 494; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58. See, also, Bank of Culloden v. Bank of Forsyth, 120 Ga. 578, 48 S. E. 226, 102 Am. St. Rep. 115; Central Trust Co. of New York v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387.

[51] Com. v. Compton, 137 Pa. 138, 20 Atl. 417; Leyson v. Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; Larimer v. Beardsley, 130 Iowa, 706, 107 N. W. 935; Bond v. Bean, 72 N. H. 444, 57 Atl. 340, 101 Am. St. Rep. 686;

It is also held in several cases at common law that a transfer of the stock to the transferee on the books of the company is all that is legally necessary in order effectually to pass title to shares of stock, and that the delivery of the stock certificate is not at all essential.[52]

What Law Governs

The validity of a transfer of stock in a corporation, and its sufficiency to pass title to the transferee, depend upon the law of the state by which the corporation was created, and not upon the law of the state in which the transferror and transferee reside, and the transfer is made.[53]

Uniform Stock Transfer Act

The act provides as follows:

"Title to a certificate and to the shares represented thereby shall be transferred only,

"(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

"(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attor-

Gilkinson v. Third Ave. R. Co., 47 App. Div. 472, 63 N. Y. Supp. 792. Contra, Matthews v. Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054; Baltimore Retort & Fire Brick Co. v. Mali, 65 Md. 93, 3 Atl. 286, 57 Am. Rep. 304; Coffey v. Coffey, 179 Ill. 283, 53 N. E. 590. Cf. Calkins v. Equitable Building & Loan Ass'n, 126 Cal. 531, 59 Pac. 30.

[52] White v. Salisbury, 33 Mo. 150; Boatmen's Ins. & Trust Co. v. Able, 48 Mo. 136.

[53] Black v. Zacharie, 3 How. (U. S.) 483, 11 L. Ed. 690; Masury v. Arkansas Nat. Bank (C. C.) 87 Fed. 381. And see Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647; Giesen v. London & Northwest American Mortg. Co., 102 Fed. 584, 42 C. C. A. 515. A decision by a state Supreme Court that by a donatio causa mortis the equitable title in national bank shares passed to the donee, under general principles of law, involves no federal question, and is not reviewable by the Supreme Court, though Rev. St. § 5139 (U. S. Comp. St. 1913, § 9676), makes such shares transferable on the books of the bank in such manner as may be prescribed by the by-laws, and the by-laws of the particular bank made the shares transferable only on its books. Leyson v. Davis, 170 U. S. 36, 18 Sup. Ct. 500, 42 L. Ed. 939. Under the Constitution of California, providing that every business corporation organized and doing business in the state shall maintain an office therein, where transfers of stock shall be made, and providing that no corporation organized outside the state shall be allowed to transact business therein on more favorable conditions than are prescribed for domestic corporations, a British corporation, which transacted business in the state and maintained an office with managers empowered to transfer stock and issue shares, and which there sold and issued stock to a citizen of the state, was governed as to the transfer of such shares by the laws of California, and on the death of the stockholder his executrix, appointed in the state, was entitled to have

ney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

"The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent." [54]

This is substantially in accordance with the rule at common law, with the exception that the transfer of the stock certificate is made to operate as a transfer of the shares, whereas at common law it required registry of the transfer on the books of the corporation to make the transfer complete. The reason for the change is so that the certificate may, so far as possible, be the representative of the shares. This is the keynote of the entire act.

REGISTRATION OF TRANSFER

161. It is generally provided by charter or statutory provisions, or by authorized by-laws, that shares shall be transferable only on the books of the corporation. In the absence of such a requirement no record is necessary. As to the effect of such a requirement, the authorities do not agree. The result of the cases may be thus stated:

(a) In some states it is held that until a transfer is registered, or deposited for registration, the legal title to the shares remains in the transferror, and the transferee has only an equitable title. Under this view, until registration,

(1) The transferror remains the owner of the shares, as far as the acts and dealings of the corporation are concerned, unless it has notice of the transfer, in which case it must regard the equitable title of the transferee. In the absence of notice, it may hold the transferror liable as a stockholder, and may pay him dividends, and accord him other rights as the owner of the shares.

the stock transferred to her. London, Paris & American Bank v. Aronstein, 117 Fed. 601, 54 C. C. A. 663.

[54] Section 1. And see note of the commissioners thereto: "The transfer on the books of the corporation becomes thus like the record of a deed of real estate under a registry system." See also, sections 2 and 3.

(2) The corporation may, as far as it is concerned, waive registration.

(3) Registration is not necessary to entitle a bona fide purchaser of shares from the holder of the legal title to prevail against equities of third persons.

(4) Nor is it necessary to entitle an innocent purchaser from the apparent and registered owner, under an unauthorized assignment, to prevail against the true owner on the ground of estoppel.

(5) Registration is necessary to relieve the transferror from the statutory liability to creditors of the corporation.

(6) It is also necessary as against bona fide purchasers or pledgees from the transferror.

(7) In some states, but not in all, attaching or execution creditors of the transferror after the transfer, but before registration, will prevail as against the transferee's equitable title, if they have levied in ignorance of the transfer; but, by the weight of authority, not if they had notice of it.

(8) In some jurisdictions it is held that failure to register a transfer, or deposit it for registration, is prima facie evidence of a secret trust, and, if unexplained, evidence of an intent to hinder and defraud creditors, so that, as to them, the transfer is void. Perhaps in some states it would be held that failure to deposit a transfer for registration is conclusive evidence of a secret trust.

(b) In some states it is held that the requirement of registration is intended solely for the benefit and protection of the corporation, and may be waived by it, and that it does not prevent an unregistered transfer from conveying, as against the transferror and all third persons, the whole title, legal as well as equitable.

162. Where a transfer is duly registered, issuance of a new certificate is not necessary to transfer the legal title.

162a. Under the Uniform Stock Transfer Act, the transfer of the certificate operates to transfer title to the shares, and registry on the books of the corporation is not made requisite in order to complete the transfer. This does not forbid the corporation, however, from treating the registered holder as the owner of the shares for the purpose of receiving dividends, or of voting, or of liability for calls and assessments.

No record is necessary to perfect the transfer of stock, unless it is required by statute, or by the charter or by-laws of the corporation.[55] Almost all charters or acts of incorporation contain the provision that the stock shall be transferable on the books of the corporation in such manner as may be prescribed by the by-laws or articles of association. Often it is provided that they shall be transferable "only" on the books of the corporation. There is no difference in the meaning of these provisions.[56] The cases are far from being clear as to the effect of such a provision. On some points there is a direct conflict.

In some states the provision has been construed literally, and as excluding any other mode of transferring the legal title; and it is held in these states that until a transfer is registered, or at least deposited with the corporation for the purpose of registration, the legal title to the shares remains in the transferror, and the transferee obtains only an equitable title.[57]

In other states it is held that such a provision is intended solely for the protection of the corporation, and can be waived or asserted at its pleasure. No effect is given to it except for the protection of the corporation, and it does not prevent a stockholder from parting with his interest by a mere assignment of his certificate, subject only to such liens as the corporation may have upon it,[58] and excepting the right of voting at stockholders' meetings, receiving dividends, etc. And it is held that, as between the parties themselves to a sale or pledge of shares, a delivery of the stock certificate, with an assignment and power of attorney to transfer the shares on the books of the corporation, passes the entire title, legal

[55] Sayles v. Bates, 15 R. I. 342, 5 Atl. 497.

[56] See Williams v. Mechanics' Bank, 5 Blatchf. (U. S.) 59, Fed. Cas. No. 17,727.

[57] Fisher v. President, etc., of Essex Bank, 5 Gray (Mass.) 373; Colt v. Ives, 31 Conn. 25, 81 Am. Dec. 161 (explaining the earlier Connecticut cases); Reed v. Copeland, 50 Conn. 488, 47 Am. Rep. 663; Brown v. Adams, 5 Biss. (U. S.) 181, Fed. Cas. No. 1,986; Black v. Zacharie, 3 How. (U. S.) 483, 11 L. Ed. 690; Scott v. Pequonnock Nat. Bank (C. C.) 15 Fed. 494, 21 Blatchf. (U. S.) 203; Johnson v. Laflin, 5 Dill. (U. S.) 65, Fed. Cas. No. 7,393, affirmed Johnston v. Laflin, 103 U. S. 800, 26 L. Ed. 532; Union Bank v. Laird, 2 Wheat. (U. S.) 390, 4 L. Ed. 269; Sabin v. Bank of Woodstock, 21 Vt. 362; People's Bank of Bloomington v. Gridley, 91 Ill. 457; Becher v. West Flouring-Mill Co. (C. C.) 1 Fed. 276; Kerr v. Urie, 86 Md. 72, 37 Atl. 789, 38 L. R. A. 119, 63 Am. St. Rep. 493; Russell v. Easterbrook, 71 Conn. 50, 40 Atl. 905. And it has even been held that delivery of a certificate, properly indorsed, to the officers of the corporation, with a request to transfer the same, is not sufficient to pass the legal title. Brown v. Adams, supra.

[58] Ante, p. 521.

as well as equitable, in the shares, whether the transfer is registered or not.[59]

By the weight of authority, unless authorized to do so by its charter or by some statute, a corporation could not pass by-laws restricting the power to transfer the title to stock to transfers on the books of the corporation.[60]

Necessity as against the Corporation

Even in those jurisdictions where an unregistered transfer is regarded as passing the legal title as between the parties, and, a fortiori, in those jurisdictions where it is held that the equitable title only passes, a transfer, until registered or deposited for registration, confers on the transferee, as between himself and the company, no right beyond that of having the transfer properly entered. Until that is done, the person in whose name the stock is registered is, as between himself and the company, the owner to all intents and purposes.[61] A transferee, for instance, until he has had his transfer registered, or deposited it for registration, has no right to vote at stockholders' meetings.[62] He also takes the risk, as against the corporation, of payment of the dividends to the person who appears as owner on the books of the corporation.[63] But, of course, he would be entitled to recover them from the person so receiving them in an action for money had and received to his use. Assets of a corporation, on dissolution, may, like dividends, be safely distributed to those who appear on its books as owners of stock, and the distribution will be valid as against persons claiming under an unregistered transfer, of which the corporation had no notice.[64] The unregistered transferee also takes the risk of any lien which the corporation may acquire on the shares for indebtedness of the

[59] McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Isham v. Buckingham, 49 N. Y. 216; Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644; Duke v. Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472; Mandlebaum v. North American Min. Co., 4 Mich. 465; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261, 276. And see Blouin v. Liquidators of Hart, 30 La. Ann. 714; Lund v. Wheaton Roller Mill Co., 50 Minn. 36, 52 N. W. 268, 36 Am. St. Rep. 623; Meredith Village Sav. Bank v. Marshall, 68 N. H. 417, 44 Atl. 526; Bates-Farley Sav. Bank v. Dismukes, 107 Ga. 212, 33 S. E. 175; Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273; Leyson v. Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429.

[60] Sargent v. Essex Marine Ry. Corp., 9 Pick. (Mass.) 202; Driscoll v. West Bradley & Cary Mfg. Co., 59 N. Y. 96.

[61] People v. Robinson, 64 Cal. 373, 1 Pac. 156; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 78–86.

[62] People v. Robinson, supra.

[63] Ante, p. 429.

[64] Bank of Commerce's Appeal, 73 Pa. 59.

registered holder.[65] The transferror is not relieved from liability for calls, nor does the transferee become liable for calls, until the transfer is registered, when registration on the books is required.[66] It has been held that the transferror's liability as a stockholder continues even where the failure to register the transfer is due to the neglect of the corporation,[67] but this seems questionable. A request to the proper corporate officer that a transfer be made on the books of the company should suffice.[68]

In those jurisdictions where it is held that the provision is for the protection of the corporation, it may be waived by the corporation. Therefore, though a transferror may be held liable for calls made subsequently to the transfer, but before registration, he cannot be held liable where the corporation waives the requirement of registration expressly or by its mode of doing business, as by failing to keep a registry book.[69]

If a transfer is valid, the corporation is bound to register it. Any valid transfer in writing is valid as against the company, if, on being notified, it refuses to allow registration. A transferror, therefore, is not liable to the corporation for assessments authorized to be made on "stockholders" beyond their shares, after a valid assignment has been made, and the corporation has refused to register it.[70]

Necessity as against Estoppel of Owner in Case of Unauthorized Transfer

As we shall presently see, if the true owner of stock holds out another, or allows him to appear as having full power to dispose of the stock, and innocent third persons are thus led into dealing with the apparent owner, and taking a transfer from him, they will be protected, under the doctrine of equitable estoppel, against any claim by the true owner.[71] In such a case it is not necessary, as

[65] Union Bank v. Laird, 2 Wheat. (U. S.) 390, 4 L. Ed. 269. See Bank of Attica v. Manufacturers' & Traders' Bank, 20 N. Y. 501.

[66] Marlborough Mfg. Co. v. Smith, 2 Conn. 579, 583; Russell v. Easterbrook, 71 Conn. 50, 40 Atl. 905.

[67] Man v. Boykin, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830.

[68] See Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644.

[69] Isham v. Buckingham, 49 N. Y. 216. And see American Nat. Bank v. Oriental Mills, 17 R. I. 551, 23 Atl. 795; Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644. Compare Perkins v. Lyons, 111 Iowa, 192, 82 N. W. 486.

[70] Chouteau Spring Co. v. Harris, 20 Mo. 383. Cf. Russell v. Easterbrook, supra.

[71] Post, p. 544.

against the true owner that their transfer shall have been registered.[72]

Necessity as against Prior Equities of Third Persons

The fact that a transfer by one who has the legal title to shares, and the apparent absolute power to dispose of the same, is not registered, does not affect the right of the transferee to prevail against prior equities of third persons. Thus a bona fide purchaser of certificates of stock, upon which a power of attorney, authorizing their transfer to any person, is indorsed by the person in whose name the certificates were issued, and who was the last registered holder of the shares, takes them relieved of a secret trust existing back of the registry, though his transfer is not registered.[73]

Necessity as against Creditors of Corporation

It is very generally held, even in those states where an unregistered transfer conveys the legal as well as the equitable title, that the statutory requirement of registration is intended for the protection of the creditors of the corporation, as well as of the corporation. And it is therefore held that a stockholder who has transferred his shares is not relieved from liability to creditors of the corporation until the transfer is registered. This question will be considered in a subsequent chapter.[74]

Necessity as against Bona Fide Purchasers and Pledgees

In those jurisdictions where it is held that an unregistered transfer does not convey the legal title, it is clear that an unregistered transferee cannot set up the transfer as against a bona fide purchaser or pledgee from the person who appears as owner on the books of the corporation. And even in those jurisdictions where it is held that an unregistered transfer passes the legal as well as the equitable title, as between the parties, the transferee will lose the shares by a fraudulent transfer on the books by the registered owner to a bona fide purchaser, though the transferee may hold a

[72] Otis v. Gardner, 105 Ill. 436; NATIONAL SAFE DEPOSIT SAVINGS & TRUST CO. v. HIBBS, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241, Wormser Cas. Corporations, 332; and other cases cited post, p. 544.

[73] Winter v. Montgomery Gaslight Co., 89 Ala. 544, 7 South. 773.

[74] Shellington v. Howland, 53 N. Y. 371; Dane v. Young, 61 Me. 160; McClaren v. Franciscus, 43 Mo. 452; Pine v. Western Nat. Bank, 63 Kan. 462, 65 Pac. 690; Man v. Boykin, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830; post, p. 718. But in Laing v. Burley, 101 Ill. 591, it was held that, where a corporation issues a certificate to a transferee of shares in lieu of the certificate issued to the prior owner, the transferee becomes a stockholder, and liable as such to creditors of the corporation, though the corporation fails to register the transfer as required by its by-laws.

certificate.[75] But in such a case the unregistered transferee will have a right of action against the corporation for allowing, without the production and surrender of the outstanding stock certificate, as required by the by-laws of the corporation, a transfer on the books in violation of his rights.[76]

An unregistered transfer is not good as against subsequent bona fide purchasers of the stock at a sale on execution against the transferror, who appears on the books of the corporation as owner, where they have no notice of the transfer.[77] It is otherwise if they have such notice.[78]

By express provisions of the statute in some states, transfers of stock, if not registered within a certain time on the books of the corporation, are declared to be void as to bona fide creditors or purchasers without notice.

Necessity as against Creditors of Registered Owner

In some of those states where an unregistered transfer does not convey the legal title it is held that an attachment or execution by a creditor of the transferror and registered owner of shares will prevail against the transfer if it is not registered, or at least deposited for registration. These cases are based solely upon the ground that the legal title in such a case remains in the transferror, and is subject to attachment and execution for his debts, and does not rest on any idea of fraud, actual or constructive.[79] And it is further held

[75] New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 80.

[76] New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 80.

[77] Naglee v. Pacific Wharf Co., 20 Cal. 529.

[78] Newberry v. Detroit & L. S. Iron Mfg. Co., 17 Mich. 141; May v. Cleland, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163; George R. Barse Live Stock Co. v. Range Valley Cattle Co., 16 Utah, 59, 50 Pac. 630.

[79] Fisher v. President, etc., of Essex Bank, 5 Gray (Mass.) 373; Williams v. Mechanics' Bank, 5 Blatchf. (U. S.) 59, Fed. Cas. No. 17,727; People's Bank of Bloomington v. Gridley, 91 Ill. 457; Northrop v. Newton & B. Turnpike Co., 3 Conn. 544; Oxford Turnpike Co. v. Bunnel, 6 Conn. 552; Skowhegan Bank v. Cutler, 49 Me. 315; Ft. Madison Lumber Co. v. Batavian Bank, 71 Iowa, 270, 32 N. W. 336, 60 Am. Rep. 789; Isbell v. Graybill, 19 Colo. App. 508, 76 Pac. 550. In Massachusetts, the rule has been changed by statute, which makes the delivery of a certificate to a bona fide purchaser or pledgee for value received, together with a written transfer or written power of attorney to transfer, signed by the person named as owner in the certificate, a sufficient delivery to transfer the title as against all persons. This statute authorizes the transfer of certificates by indorsement in blank and delivery, without inquiry as to the rights, if any, of third persons. Under this statute it has been held that an unregistered transferee of a stock certificate acquires title even against a previous attaching creditor. Clews v. Friedman, 182 Mass. 555, 66 N. E. 201. Similar statutory changes have been made in many states where the rule formerly prevailed. See Rice v. Gilbert, 173 Ill. 348, 50 N. E. 1087; Magerstadt v. Schaefer, 213 Ill. 351, 72 N. E. 1063. The intent of

that, as against the execution or attachment, it can make no difference that the corporation had notice of the transfer before the levy.[80] It has been held that, where registration is required, actual registration is necessary as against an execution or attaching creditor, and deposit for record is not sufficient.[81] But actual registration is not necessary if receipt for record be made sufficient to pass the title.[82]

Even if an unregistered transfer be regarded as insufficient to pass the legal title, it passes an equitable title, and may be upheld as an equitable assignment. An equitable assignment should prevail as against creditors of the transferror who attach the shares with full knowledge of the transfer,[83] and many cases so hold. It is otherwise if they have no notice of the transfer.[84] So the corporation itself, being a creditor of a stockholder, cannot, if it has notice of an equitable assignment of his shares, attach them before the transfer is registered, and so prevail as against the transferee, unless it is given a lien on shares for debts due from stockholders.[85]

By the weight of authority, however, it is held that, when shares are sold or pledged, there is no necessity to have the transfer registered on the books of the corporation, in order to make it good as against subsequent attaching creditors of the transferror, unless such a step is expressly required as against creditors by the charter of the corporation, or by some statute; and that, in the absence of a charter or statutory provision clearly showing an intention on the

these statutes is to make stock certificates as nearly negotiable as possible in character. Compare Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515; Colt v. Ives, 31 Conn. 25, 81 Am. Dec. 161.

[80] Fisher v. President, etc., of Essex Bank, supra; Ottumwa Screen Co. v. Stodghill, 103 Iowa, 437, 72 N. W. 669.

[81] Northrop v. Newton & B. Turnpike Co., supra; Perkins v. Lyons, 111 Iowa, 192, 82 N. W. 486. But see Colt v. Ives, 31 Conn. 25, 81 Am. Dec. 161.

[82] Oxford Turnpike Co. v. Bunnel, supra.

[83] Black v. Zacharie, 3 How. (U. S.) 483, 11 L. Ed. 690; Scripture v. Francestown Soapstone Co., 50 N. H. 571; Buttrick v. Nashua & L. R. R. Co., 62 N. H. 413, 13 Am. St. Rep. 578; Weston v. Bear River & Auburn Water & Mining Co., 6 Cal. 425; State Ins. Co. v. Gennett, 2 Tenn. Ch. 100; State Ins. Co. v. Sax, 2 Tenn. Ch. 507; Newberry v. Detroit & L. S. Iron Mfg. Co., 17 Mich. 141; George R. Barse Live Stock Co. v. Range Val. Cattle Co., 16 Utah, 59, 50 Pac. 630. Contra, Ottumwa Screen Co. v. Stodghill, 103 Iowa, 437, 72 N. W. 669; Perkins v. Lyons, 111 Iowa, 192, 82 N. W. 486; Shenandoah Val. R. Co. v. Griffith, 76 Va. 913.

[84] Weston v. Bear River & Auburn Water & Mining Co., 5 Cal. 186, 63 Am. Dec. 117; State Ins. Co. v. Gennett, supra; State Ins. Co. v. Sax, supra; Buttrick v. Nashua & L. R. R. Co., supra; West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 65 Pac. 622, 85 Am. St. Rep. 171; Boone v. Van Gorder, 164 Ind. 499, 74 N. E. 4, 108 Am. St. Rep. 314.

[85] Scripture v. Francestown Soapstone Co., supra.

part of the Legislature to make a transfer void as against creditors unless registered, a transfer as at common law will be sufficient.[86] In these states, therefore, in the absence of such an express provision, there must be some element of fraud or estoppel to defeat the rights of an unregistered transferee, and to give the claims of creditors of the transferror priority. These decisions are sound on principle, since creditors take their debtor's property subject to all honest and bona fide liens and equitable transfers, and because the tendency of the modern law is to regard certificates of stock, attached to an executed blank assignment and power to transfer, as approximating to negotiable securities, though neither in form nor character negotiable. Hence it is that the better reasoned cases have given unrecorded transfers of stock for value precedence over subsequent attachments in behalf of creditors of the transferror of the stock or over the claims of the transferror's creditors. An analogy is found in the familiar line of cases holding that the assignee of even an ordinary chose in action prevails over subsequent attaching creditors of the assignor.[87]

Of course, in those jurisdictions where it is held that an unregistered transfer conveys the legal as well as the equitable title, the transfer will prevail as against an attaching creditor of the transferror, even though he has no notice of the transfer, unless there is some element of fraud or estoppel.

The Uniform Stock Transfer Act prohibits any attachment or

[86] Broadway Bank v. McElrath, 13 N. J. Eq. 24; Boston Music Hall Ass'n v. Cory, 129 Mass. 435; Scott v. Pequonnock Nat. Bank (C. C.) 15 Fed. 494; Continental Nat. Bank v. Eliot Nat. Bank (C. C.) 7 Fed. 369; Lund v. Wheaton Roller Mill Co., 50 Minn. 36, 52 N. W. 268, 36 Am. St. Rep. 623; Haslam v. First Nat. Bank, of Minneapolis, 79 Minn. 1, 81 N. W. 535; May v. Cleland, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163; Masury v. Arkansas Nat. Bank, 93 Fed. 603, 35 C. C. A. 476; Allen v. Stewart, 7 Del. Ch. 287, 44 Atl. 786; Mapleton Bank v. Standrod, 8 Idaho, 740, 71 Pac. 119, 67 L. R. A. 656; Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938; Flostroy v. Corby Coal Co., 80 N. J. Eq. 547, 85 Atl. 578. See note, 16 Harv. Law Rev. 312. In Broadway Bank v. McElrath, supra, M. had delivered to the complainants certificates of stock in a corporation, accompanied by an assignment, and an irrevocable power of attorney for the transfer thereof, as security for certain debts. The charter of the corporation provided that its capital stock should be deemed personal property, and be transferable on the books of the corporation, and also that books of transfer of stock should be kept, and should be evidence of ownership of said stock in all elections and other matters submitted to the decision of the stockholders of the corporation. It was held that, notwithstanding such provisions, the transfer by M., though unregistered, was good as against an attachment subsequently levied by his creditor.

[87] Williams v. Ingersoll, 89 N. Y. 508, 522; Fortunato v. Patten, 147 N. Y. 277, 283, 41 N. E. 572.

levy upon shares unless the certificate is surrendered or its transfer enjoined. Section 13 reads as follows: "No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it."

This section, like similar provisions in the Uniform Sales Act and Warehouse Receipts Act, is a desirable advance upon the common law. It is even more essential in the case of stock certificates than in the cases of bills of lading and warehouse receipts.[88]

Where stock is held in trust by the registered holder, and the whole beneficial interest is in another, the stock does not pass to the registered holder's assignee in bankruptcy or insolvency.[89]

In some states it is provided by statute that no transfer shall be valid as against creditors of the transferror until the certificate shall have been filed for record in a public office.[90]

Same—Failure to Register as Evidence of Secret Trust

Transfers of stock, if made with intent to hinder, delay, and defraud creditors, and not in good faith, are void as to creditors of the transferror to the same extent as a transfer of any other property with such intent would be. In some jurisdictions, retention of possession of property by the seller is evidence of a secret trust, and, if unexplained, the sale will be held fraudulent and void as to creditors of the seller. In other jurisdictions, retention of possession renders the sale, not merely prima facie fraudulent, but conclusively so. These doctrines as to the effect of retention of possession by the seller of property apply to sales of shares of stock. Unless there is such a change of possession as the nature of the property will permit, the sale, in some jurisdictions, will be conclusively fraudulent as to creditors; in others, prima facie so. The question therefore arises: What is a sufficient change of possession on a sale of shares? The Supreme Court of New Hampshire has held that, upon a sale or pledge of stock, there should be such a delivery as the nature of the thing allows; that, as against a subsequent attaching creditor, the transferee must be clothed with all

[88] See the notes of the commissioners to sections 13 and 14 of the act.

[89] Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515.

[90] See Fahrney v. Kelly (C. C.) 102 Fed. 403; Masury v. Arkansas Nat. Bank (C. C.) 87 Fed. 381; Scott v. Houpt, 73 Ark. 78, 83 S. W. 1057; Hudson v. Bank of Pine Bluff, 75 Ark. 493, 87 S. W. 1177. And see Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644.

the usual muniments and indicia of ownership; that the delivery will not be complete until an entry of the transfer is made upon the stock record, or notice is sent to the office of the corporation for that purpose; and that the omission to thus perfect the delivery will be prima facie, and, if unexplained, conclusive, evidence of a secret trust, and therefore, as a matter of law, fraudulent and void as to the transferror's creditors.[91]

If the failure to register a transfer of shares is explained, and the presumption of fraud rebutted, in those jurisdictions, at least, where it is rebuttable, the title of the transferee will prevail as against creditors of the transferror, even though they may attach the shares in ignorance of the transfer.[92] "The ground," said the Connecticut court, "on which stock sold, but not legally transferred (that is, on the books), is open to attachment by the creditors of the vendor, is the same upon which personal chattels sold but retained in the possession of the vendor are liable to attachment by the vendor's creditors. The principle in each case is, that the retention of possession is a badge of fraud; that is, is evidence of a fraudulent secret trust. * * * But it is well settled that this retention of possession in every case is only a badge; that is, is evidence of fraud, to be regarded as conclusive where the retention of possession is voluntary and unnecessary." [93]

Issuance of New Certificate

A transfer on the books of the corporation is sufficient to vest the title in the transferee without the issuance of a new certificate in

[91] Pinkerton v. Manchester & L. R. R., 42 N. H. 424. Where a transfer is made at a distance from the office of the corporation, and in another state, and the old certificates are surrendered, and new ones issued by the transfer agent of the corporation appointed for that purpose in such state, proof that the proper evidence of such transfer was sent to the keeper of the stock record, to be entered, by the earliest mail, although not received until an attachment was levied, will be a sufficient explanation of the want of delivery, and the transfer will be good as against the attaching creditor. Pinkerton v. Manchester & L. R. Railroad Co., supra. But where a pledge of stock was made in Boston by a transfer of the certificates to the pledgee, and nothing more was done for nearly a month, and then the old certificates were surrendered, and new ones issued by the transfer agent there, and notice given by the first mail to the office of the corporation in New Hampshire, it was held that the transfer was not good as against an attachment levied on the shares in New Hampshire before the issuance of the new certificates, and the notice to the office. Pinkerton v. Manchester & L. R. R. supra.

[92] Colt v. Ives, 31 Conn. 25, 81 Am. Dec. 161; U. S. v. Vaughan, 3 Bin. (Pa.) 394, 5 Am. Dec. 375; Scott v. Pequonnock Nat. Bank, 15 Fed. 494, 21 Blatchf. (U. S.) 203. See Hotchkiss & Upson Co. v. Union Nat. Bank, 68 Fed. 76, 15 C. C. A. 264; Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273.

[93] Colt v. Ives, supra.

the name of the transferee.[94] The certificate, as we have seen, is merely evidence of title to shares, and is not at all necessary to constitute one a stockholder.[95] But, however true this is at the common law, it is now altered by the express provisions of the Uniform Stock Transfer Act as to certificates issued after said act takes effect.[96]

Uniform Stock Transfer Act

Whereas at common law it required registry on the books of the corporation to make the transfer complete, at least as between the corporation and the parties to the transfer, the uniform act makes the transfer of the stock certificate operate to complete the transfer.[97] This accords with the purpose of the act to make the stock certificate the full representative of the shares, and is in line with the usage and custom of the business world. The transfer on the corporate books becomes, therefore, merely like the record of a conveyance of realty under a recording system.

The necessary protection, however, is furnished to the corporation by the insertion of a provision whereby the corporation is not forbidden to treat the registered holder of the stock as its owner, and reading as follows:[98] "Nothing in this act shall be construed as forbidding the corporation: (a) To recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, or (b) to hold liable for calls and assessments a person registered on its books as the owner of shares."

FORGED AND UNAUTHORIZED TRANSFERS

163. Certificates of stock are not negotiable instruments, unless expressly made so by statute, though they possess attributes of negotiability to a certain limited extent. Therefore a transferee under a forged assignment and power of attorney acquires no title as against the true owner. And the same is true of an unauthorized transfer by one who has stolen or found a certificate indorsed in blank by the true owner.

[94] Chouteau Spring Co. v. Harris, 20 Mo. 383. The seller fulfills his contract by causing the stock to be transferred on the books without delivery of the certificate. White v. Salisbury, 33 Mo. 150.

[95] Ante, p. 390.

[96] Uniform Stock Transfer Act, §§ 1, 2, 3, 22, 23.

[97] Uniform Stock Transfer Act, § 1.

[98] Uniform Stock Transfer Act, § 3.

164. A transfer of certificates of stock by one who holds the legal title in trust, but who appears as absolute owner on the books of the corporation, conveys a good title, as against the cestui que trust, if the transferee is an innocent purchaser for value and without actual or constructive notice of the trust but not otherwise.

165. If the owner of a certificate of stock allows another to appear as the apparent owner, with full power to dispose of it, and innocent third persons are thus led into dealing with the apparent owner, they will acquire title, as against him, by estoppel.

165a. Under the Uniform Stock Transfer Act, full negotiability is apparently given to certificates of stock. This is in accordance with mercantile custom.

166. The doctrine of lis pendens, as constructive notice, does not apply to transfers of stock.

Certificates of shares of stock in a corporation, though they possess certain attributes of negotiability,[99] are not negotiable instruments, like bills and notes, unless, as is the case in some jurisdictions, and under the new Uniform Stock Transfer Act, they are expressly made so by statute. And no mere usage among stockbrokers or others can make them so, for no usage is good if it conflicts with an established principle of law.[1] Certificates of stock are on the same footing as other nonnegotiable choses in action, and they are subject, therefore, to the general rule that an assignor can transfer no better title than he has himself.[2] It follows from

[99] Central Trust Co. of New York v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387; NATIONAL SAFE DEPOSIT SAVINGS & TRUST CO. v. HIBBS, 220 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241, Wormser Cas. Corporations, 332. In the first case cited, Judge Cullen said: "Certificates of stock are neither choses in action nor negotiable instruments; but both in England and in this country it has been sought to render dealings in stocks practicable and to secure the rights of purchasers by giving to stock certificates attributes of negotiability to a certain limited extent." In the latter case, Justice Day said: "Stock certificates are a peculiar kind of property. Although not negotiable paper, strictly speaking, they are the basis of commercial transactions large and small, and are frequently sold in open market as negotiable securities are."

[1] East Birmingham Land Co. v. Dennis, 85 Ala. 565, 5 South. 317, 2 L. R. A. 836, 7 Am. St. Rep. 73; Geyser-Marion Gold Min. Co. v. Stark, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684. Cf. Russell v. American Bell Tel. Co., 180 Mass. 467, 62 N. E. 751; Clews v. Friedman, 182 Mass. 555, 66 N. E. 201.

[2] East Birmingham Land Co. v. Dennis, supra. And see Sewall v. Boston Water Power Co., 4 Allen (Mass.) 277, 282, 81 Am. Dec. 701; Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Pollock v. National Bank,

this principle that, in the absence of negligence or other conduct on the part of the owner of stock sufficient to operate as an estoppel against him, a transfer by a person who has no title to shares, and no authority from the owner to transfer the same, gives the transferee no title, as against the owner, though he may have purchased them in good faith for value, and without notice of the want of title or authority in the transferror. It is accordingly well settled that, in the absence of negligence, a forged indorsement and transfer of certificates of stock cannot divest the owner of his title, nor confer any rights, as against him, upon the transferee; and if the corporation recognizes the forged indorsement, and transfers the stock so that the certificate is lost to the real owner, it may be compelled to replace it, or to pay him its value.[3] On the same principle, an innocent purchaser of a certificate of stock indorsed in blank by the owner, and stolen from him, or lost by him, without negligence on his part, acquires no title, as against the owner.[4] "Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the processes of the

7 N. Y. 274, 57 Am. Dec. 520; President, Directors & Co. of Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599; Barstow v. Savage Min. Co., 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; Hall v. Rose Hill & E. Road Co., 70 Ill. 673; Western Union Tel. Co. v. Davenport, 97 U. S. 369, 24 L. Ed. 1047; Scollans v. Rollins, 179 Mass. 346, 60 N. E. 983, 88 Am. St. Rep. 386.

[3] Western Union Tel. Co. v. Davenport, 97 U. S. 369, 24 L. Ed. 1047; Hildyard v. South-Sea Co., 2 P. Wms. 76; Sewall v. Boston Water Power Co., 4 Allen (Mass.) 277, 81 Am. Dec. 701; Pratt v. Taunton Copper Mfg. Co., 123 Mass. 110, 25 Am. Rep. 37; Pollock v. National Bank, 7 N. Y. 274, 57 Am. Dec. 520; Machinists' Nat. Bank v. Field, 126 Mass. 345; Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Franklin Fire Ins. Co., 181 Pa. 40, 37 Atl. 191, 37 L. R. A. 780; Chicago Edison Co. v. Fay, 164 Ill. 323, 45 N. E. 534; Geyser-Marion Gold Min. Co. v. Stark, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684; In re Bahia & S. F. R. Co., Limited, L. R. 3 Q. B. Cas. 584. Cf. First Ave. Land Co. v. Parker, 111 Wis. 1, 86 N. W. 604, 87 Am. St. Rep. 841. And see Taft v. Presidio & F. R. Co., 84 Cal. 131, 24 Pac. 436, 11 L. R. A. 125, 18 Am. St. Rep. 166; Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co., 213 Pa. 307, 62 Atl. 916, 5 Ann. Cas. 248.

[4] East Birmingham Land Co. v. Dennis, 85 Ala. 565, 5 South. 317, 2 L. R. A. 836, 7 Am. St. Rep. 73; Knox v. Eden Musee American Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; Barstow v. Savage Min. Co., 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; Sherwood v. Meadow Val. Min. Co., 50 Cal. 412; O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411; Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St. 367, 64 N. E. 518, 58 L. R. A. 620, 90 Am. St. Rep. 586; Shattuck v. American Cement Co., 205 Pa. 197, 54 Atl. 785, 97 Am. St. Rep. 735.

law, requires, in the cases mentioned, that the property wrongfully transferred or stolen should be restored to its rightful owner." [5]

One who is entitled to stock, certificates for which have been wrongfully transferred to another, may maintain a bill in equity to have the wrongful certificates canceled, and certificates issued to himself, if the loss of the stock cannot be adequately compensated in a common-law action.[6]

Liability of Transferee

A corporation may maintain an action for damages against a person who presents a forged or unauthorized power of attorney to transfer stock, upon the faith of which the corporation transfers the stock and suffers loss, though such person acted in good faith.[7] This rule is based on the reason that "there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty." [8]

The Uniform Stock Transfer Act provides that the transferror warrants, unless a contrary intention appears: (a) That the certificate is genuine; (b) that he has a legal right to transfer it; and (c) that he has no knowledge of any fact which would impair the validity of the certificate." [9]

There seems no reason why the implied warranties where certificates of stock are transferred should not be the same as in the case of negotiable paper. This also conforms to the tendency of the cases on implied warranty.

Transfers by Trustees

Where the person who appears on the books of the corporation as the absolute owner of stock holds the stock in trust, a purchaser and transferee from him, if he has actual or constructive notice of the trust, takes subject to the equitable rights of the cestui que trust.[10] And, if the certificate shows on its face that it is held in

[5] Western Union Tel. Co. v. Davenport, supra.

[6] Walker v. Detroit Transit Ry. Co., 47 Mich. 338, 11 N. W. 187. Where plaintiff held bank stock as security, and the bank illegally levied an assessment thereon, and sold it for delinquency at public auction, plaintiff could obtain relief in equity to compel the bank to recognize it as a stockholder. Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 65 Pac. 143. See post, p. 550.

[7] Boston & A. R. Co. v. Richardson, 135 Mass. 473.

[8] Sheffield Corporation v. Barclay, [1905] App. Cas. 392. See articles by J. L. Thorndyke and J. B. Ames, 17 Harv. Law Rev. 373, 543, discussing this case. And see Leurey v. Bank of Baton Rouge, 131 La. 30, 58 South. 1022, Ann. Cas. 1913E, 1168.

[9] Section 11.

[10] First Nat. Bank of Paterson v. National Broadway Bank, 156 N. Y. 459, 51

trust, transferees are charged with notice of the trust, and with the duty of inquiring into the authority of the holder to transfer the same.[11] The rule is different where the transferee of a certificate has no notice that it is held in trust, and there is nothing to put him on inquiry. It is a general rule that when the legal title to property, and the apparent unlimited power of disposition, are vested in a person, the rights of a purchaser from him for a valuable consideration, without notice of a secret trust upon which the property, is held, are unaffected. The purchaser in such a case acquires an equity equal to the outstanding equity of which he has no notice, and this, coupled with the legal title, prevails against the prior equity. This principle is applicable to transfers of certificates of stock. If a person who holds the legal title to certificates in trust appears on the books of the corporation as the absolute owner, a purchaser and transferee of the certificates for value, and without actual or constructive notice of the trust, acquires a good title, as against the cestui que trust. And this is true whether his transfer has been registered on the books of the corporation or not.[12] This applies to transfers by executors. In the case of executors, however, purchasers of stock from them, knowing their character, are chargeable with notice of the contents of the will.[13] At common law, executors have the same power over the disposition of the

N. E. 398, 42 L. R. A. 139; Westinghouse v. German Nat. Bank, 188 Pa. 630, 41 Atl. 734; Davis v. National Eagle Bank (R. I.) 50 Atl. 530. One who accepts and pays for certificates of stock indorsed by a blank power of attorney, signed by the party to whom they were issued, is not a bona fide purchaser, if he had knowledge that the shares were in pledge and that the party from whom he received them was neither the pledgee nor the pledgor, nor entitled to act for either. New Jersey Trust & Safe Deposit Co. v. Bodine (N. J. Ch.) 60 Atl. 387.

[11] Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115. But see Albert v. Savings Bank of Baltimore, 1 Md. Ch. 407; O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411; Geyser-Marion Gold Min. Co. v. Stark, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684; Johnson v. Amberson, 140 Ala. 342, 37 South. 273.

[12] Winter v. Montgomery Gaslight Co., 89 Ala. 544, 7 South. 773. And see Weyer v. Second Nat. Bank of Franklin, 57 Ind. 198; Albert v. Savings Bank of Baltimore, 1 Md. Ch. 407; Lowry v. Commercial & Farmers' Bank, Taney (U. S.) 310, Fed. Cas. No. 8,581. Where, for the purpose of qualifying a person to be a director, a corporation issued to him a certificate of stock, he agreeing to reassign it when he ceased to be a director, the trust being secret, and he agreed to assign it to another as collateral on the latter becoming surety on a note, and the latter did so on this promise and without notice of the trust, as between the company and the surety the equity of the latter was superior. Dueber Watch Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 445.

[13] See Lowry v. Commercial & Farmers' Bank, Taney (U. S.) 310, Fed. Cas. No. 8,581.

testator's personal property as the testator himself would have, except in so far as there may be restrictions in the will; and, where such is the case, he has power to sell stock belonging to the estate, and innocent purchasers will acquire title, though he may be selling the same to convert it to his own use.[14] If his powers are restricted by statute, as is now generally the case, a sale of stock must be made in compliance with the statute, or no title will pass. Thus, if an executor sells stock belonging to the estate at a private sale, without an application to the court, when a statute authorizes a sale at public auction only, unless an order of court is obtained authorizing a private sale, the sale passes no title to the stock, though the transfer is entered on the books of the corporation.[15]

Estoppel of True Owner in Case of Unauthorized Transfer

Certificates of stock and unauthorized transfers are subject to the doctrine of equitable estoppel. According to this doctrine, if the true owner of certificates of stock holds out another, or allows him to appear, as having full power of disposition thereof, and innocent third persons are thus led into dealing with the apparent owner, they will be protected, as against any claim by the true owner.[16] Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are based upon the conduct of the real owner, which precludes him from disputing, as against them, the existence of the title or authority which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the transfer.[17] In McNeil v. Tenth Nat. Bank,[18] the owner of shares in a

[14] Lowry v. Commercial & Farmers' Bank, supra; Weyer v. Second Nat Bank of Franklin, 57 Ind. 198.

[15] Weyer v. Second Nat. Bank of Franklin, supra.

[16] McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Cherry v. Frost, 7 Lea (Tenn.) 1; Jarvis v. Rogers, 13 Mass. 105; Colonial Bank v. Cady, 15 App. Cas. 267; Otis v. Gardner, 105 Ill. 436; Mt. Holly Lumberton & Medford Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Prall v. Tilt, 28 N. J. Eq. 479; Walker v. Detroit Transit Ry. Co., 47 Mich. 338, 11 N. W. 187; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; Pennsylvania R. Co.'s Appeal, 86 Pa. 80; Westinghouse v. German Nat. Bank, 196 Pa. 249, 46 Atl. 380; Russell v. American Bell Tel. Co., 180 Mass. 467, 62 N. E. 751; Shattuck v. American Cement Co., 205 Pa. 197, 54 Atl. 785, 97 Am. St. Rep. 735; Jennie Clarkson Home for Children v. Missouri, K. & T. R. Co., 182 N. Y. 47, 74 N. E. 571, 70 L. R. A. 787; American Exchange Nat. Bank v. Woodlawn Cemetery, 194 N. Y. 116, 87 N. E. 107; NATIONAL SAFE DEPOSIT SAVINGS & TRUST CO. v. HIBBS, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241, Wormser Cas. Corporations, 332.

[17] McNeil v. Tenth Nat. Bank, supra; Elyea v. Lehigh Salt Min. Co., 169 N. Y. 29, 61 N. E. 992; In re Mills, 125 App. Div. 730, 110 N. Y. Supp. 314, affirmed short 193 N. Y. 626, 86 N. E. 1128.

[18] Supra.

corporation delivered to his brokers, to secure a balance of account, the certificates of the shares, indorsed with a blank assignment and irrevocable power to transfer the same on the books of the corporation, signed and sealed by himself, and expressed to be "for value received"; and the brokers, without his knowledge or consent, pledged the shares, for their own indebtedness, to one who had no actual knowledge of the title under which they held. It was held that the pledgee of the brokers acquired a good title to the shares, as against the owner, who was estopped to deny the apparent title of the brokers under his own indorsement and irrevocable power of attorney. The owner had given to the brokers all the external indicia of title to the stock and an apparently unlimited power of disposition over it, and had to take the consequences of their betrayal of his trust.

The United States Supreme Court recently rendered a similar decision.[19] A bank's trusted clerk wrongfully took certain stock certificates in his charge belonging to the bank, indorsed and authenticated with evidence of title, to a stockbroker, who in the ordinary course of business and in good faith sold them to third parties for full value and paid over the proceeds to the clerk. Suit was brought by the bank against the broker. After declaring that where, of two innocent parties, one must suffer because of the act of a third person, he who enabled the third person to occasion the loss must sustain it, the court held that, under the principle of equitable estoppel, the bank was estopped to make any claim against the stockbroker. Justice Day said: "These principles are well known to business men and are constantly acted upon by them. This circumstance should be given due weight in determining the rights of the parties in this case." [20]

The theory of these decisions is that the true owner, having conferred on the clerk, or trustee, or pledgee, or broker, all the outward and ostensible appearances of the ownership of the stock certificate, is not allowed in good conscience to assert his title thereto as against a purchaser of the stock in good faith and for value. The owner put it into the power of the person to whom the indorsed stock certificate was intrusted, to deceive people.

This doctrine applies only on the ground that the owner of the stock allows the holder of the certificate to appear as owner. It

[19] NATIONAL SAFE DEPOSIT SAVINGS & TRUST CO. v. HIBBS, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241, Wormser Cas. Corporations, 332.

[20] NATIONAL SAFE DEPOSIT SAVINGS & TRUST CO. v. HIBBS, supra, 229 U. S. at p. 395, 33 Sup. Ct. 818, 57 L. Ed. 1241, Wormser Cas. Corporations, 332. See, also, Russell v. American Bell Tel. Co., 180 Mass. 467, 62 N. E. 751, per Holmes, C. J.

does not apply, therefore, where the holder of the certificate, in transferring it without authority, does not pretend to own the stock and to act for himself, but claims to act for the owner, and under authority from him. In such a case the owner would not be estopped unless he held the transferror out as having the particular authority claimed. In Merchants' Bank of Canada v. Livingston,[21] a pledgee of a certificate of stock which was indorsed by the owner in blank, with an irrevocable power of attorney to transfer the same on the books of the corporation, applied to the plaintiff for a loan, offering the stock as security. He did not claim to own the stock, nor ask the loan on his own account, but stated that he wanted it for his client. The plaintiff, in good faith, made the loan, and took the certificate as security, and contended that the owner was estopped, under the doctrine of McNeil v. Tenth Nat. Bank. It was held that there was no estoppel, as the owner had not held the pledgee out as having authority to borrow money for him and pledge the stock as security, though he would have been estopped if the pledgee had sold or pledged the stock as his own, as he was clothed with apparent ownership.

In cases where the stock certificate, indorsed in blank, has been stolen from the owner or lost without negligence on his part, it is settled law that the owner may reclaim the stock from any party into whose possession the stock may thereafter come, although said party may have purchased the stock in good faith and for full value. The reason is because the principle of estoppel cannot be asserted against the owner, who has been guilty of no conduct upon which an estoppel may be predicated.[22] Accordingly, where stock certificates, indorsed in blank, were placed by a corporation in its safe, of which a servant had a key, and the servant thereafter stole the certificates from the safe and sold them to a bona fide purchaser, the court held that the corporation was not estopped from reclaiming them.[23] The reason for the decision, which has sometimes been criticized, was thus expressed: "There must be something more than the mere intrusting to a servant of the custody of a chattel and the consequent opportunity for theft, in order to preclude the master from reclaiming it, if stolen by the servant and sold to another."

[21] 74 N. Y. 223.

[22] Knox v. Eden Musee American Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; American Exchange Nat. Bank v. Woodlawn Cemetery, 194 N. Y. 116, 87 N. E. 107; Scollans v. Rollins, 179 Mass. 346, 60 N. E. 983, 88 Am. St. Rep. 386.

[23] Knox v. Eden Musee American Co., supra.

The distinction, though often difficult to apply, is clear. On the one hand are cases like the decision last cited where a servant simply has access to a stock certificate remaining in the possession of the owner; on the other hand are cases like McNeil v. Tenth Nat. Bank, where possession is intrusted to an agent—e. g., a stockbroker—for one purpose, and he uses it for another.[24] In the former class of cases, no estoppel arises; in the latter class, the true owner is estopped to assert his title.

Simply intrusting the possession of a mere certificate of stock to another as depositary, pledgee, or other bailee, or even under a conditional, executory contract of sale, will not preclude the owner from asserting his title in case of an unauthorized disposition of it by the person so intrusted; for the mere possession of chattels, by whatever means acquired, if there is no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title.[25] But if the owner intrusts to another, not merely the certificate, but also written evidence over his own signature of an unconditional power of disposition over it—e. g., by a blank assignment and power to transfer indorsed on the certificate—the case is very different, and, as we have seen, an estoppel to assert his title is raised against the true owner in favor of a purchaser for value without notice.[26]

If an indorsement of assignment and power of attorney on a certificate of stock is sufficient to put persons dealing with the holder upon inquiry as to his title, or if it may mean on its face either an absolute transfer, or a transfer for a particular purpose only, persons who take the stock from the holder are chargeable with notice of his title, and the owner will not be estopped, as against them to deny that the transfer was absolute. This principle was applied in Colonial Bank v. Cady,[27] where the executors of the former owner of shares indorsed the certificates with an assignment and power of attorney in blank, and sent them to a broker for the purpose of having them registered in their names as executors. The broker fraudulently deposited the certificates with a bank as security for advances. It was held that the bank acquired no title to the stock, as against the executors, though it took the certificates

[24] See opinion of Holmes, C. J., in Russell v. American Bell Tel. Co., 180 Mass. 467, 62 N. E. 751, followed in NATIONAL SAFE DEPOSIT SAVINGS & TRUST CO. v. HIBBS, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241, Wormser Cas. Corporations, 332.

[25] McNeil v. Tenth Nat. Bank, supra.

[26] McNeil v. Tenth Nat. Bank, supra; NATIONAL SAFE DEPOSIT SAVINGS & TRUST CO. v. HIBBS, supra.

[27] 15 App. Cas. 267.

in perfect good faith, and without actual notice of the character in which the broker held them, and for these two reasons: In the first place, certificates so indorsed by executors were not treated on the stock exchange as being in order, or received as sufficient security for advances, unless duly authenticated, and this was sufficient to put the bank upon inquiry. In the second place, the conduct of the executors in delivering the transfers indorsed by them as executors was consistent either with an intention to sell or pledge the shares, or with an intention merely to have themselves registered as the owners, and therefore they were not estopped to assert that they did not intend an absolute transfer.

Effect of Uniform Stock Transfer Act

The act apparently confers full negotiability upon stock certificates. In doing this it goes far beyond the existing law, the courts having taken the position that if public policy required that stock certificates should be completely assimilated to commercial paper in the qualities of negotiability, the Legislatures and not the courts should so declare the rule. In conferring such attribute of negotiability, the Uniform Act is well in accordance, however, with business custom. As we have seen, in many cases a similar result has been reached, even under the common law, where the conduct or neglect of the true owner contributed to the unauthorized dealing with the indorsed stock certificate. Section 5 of the act reads: "The delivery of a certificate to transfer title in accordance with the provisions of section 1 shall be effectual, except as provided in section 1, *though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title.*"

Section 7 reads:

"If the indorsement or delivery of a certificate,

"(a) Was procured by fraud or duress, or

"(b) Was made under such mistake as to make the indorsement or delivery inequitable; or

"If the delivery of a certificate was made

"(c) Without authority from the owner, or

"(d) After the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless:

"1. The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful, or,

"2. The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights.

"Any court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate or to rescind the transfer thereof and, pending litigation, may enjoin the further transfer of the certificate or impound it."

The theory seemingly is that no title to a stock certificate shall be valid as against the claims of the original owner, unless a bona fide purchaser for value has gotten the certificate.

The Uniform Act does not apply to existing certificates, but by section 23 thereof, applies "only to certificates issued after the act takes effect." It would probably have been unconstitutional to make the act apply in this respect to existing certificates. The date of the stock certificate gives the purchaser notice and evidence of the applicability of the act.

Effect of Judicial Proceedings

The question how far a purchaser of stock, where a certificate therefor is outstanding, is affected by previous or pending judicial proceedings concerning the ownership of the stock, is not altogether clear. It has been held in New York that the doctrine of lis pendens does not apply to a sale of shares of stock, and, therefore, that the pendency of an action concerning the title to shares, the certificate of which is outstanding, is not constructive notice to one who purchases the certificate, and that a judgment rendered after the transfer does not defeat his title.[28] As said in a recent New York case, "the doctrine in equity of notice by lis pendens does not apply to shares of corporate stock."[29] It was held by Judge Woodruff, in the Circuit Court of the United States for the Southern District of New York, that a decree of a court having jurisdiction of the subject-matter and of the parties, vesting the title to stock in a person other than the holder of the outstanding certificate, and a transfer made by a master in pursuance thereof, and made known to the corporation, is a complete protection to the corporation against purchasers of the outstanding certificate, though they pay value and have no notice of the decree.[30] Such a decree and trans-

[28] Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Leitch v. Wells, 48 N. Y. 585. See, also, Davis v. Miller Signal Co., 105 Ill. App. 657; Foss v. People's Gaslight & Coke Co., 145 Ill. App. 215; Crow v. Oxford, 119 U. S. 215, 7 Sup. Ct. 180, 30 L. Ed. 388. The pendency of an action in another state concerning the title to stock would not be notice to a purchaser of the outstanding certificate, even if the doctrine of lis pendens were applicable to a sale of shares. Holbrook v. New Jersey Zinc Co., supra.

[29] American Press Ass'n. v. Brantingham, 75 App. Div. 435, 78 N. Y. Supp. 805, per Patterson, J.

[30] Sprague v. Cocheco Mfg. Co., 10 Blatchf. (U. S.) 173, Fed. Cas. No. 13,249. A suit to adjust equitable interests in the stock of a domestic cor-

fer could not affect the title of one who purchased the outstanding certificate before commencement of the action, nor, if the New York cases are sound, after the commencement of the action, but before the decree.[31] It will be noted that in the federal decision the decree had been already rendered. And the later cases tend to hold that a purchaser of outstanding certificates, without notice, even after a decree in a suit to which he was not a party, declaring them void and canceling them, would not be affected by the decree, but could hold the corporation liable.[32]

LIABILITY OF INDORSER OF FORGED CERTIFICATE

167. Though there is authority to the contrary, by the better opinion one who indorses a certificate of stock in blank thereby warrants its genuineness, and will be liable to subsequent bona fide purchasers. The Uniform Stock Transfer Act provides for such an implied warranty on the part of the transferror of a certificate of stock.

It has been held that the signing of a transfer in blank on a certificate of stock is a warranty of the genuineness of the certificate, and that a transferror, therefore, who indorses a forged certificate in blank, though he may have taken the same in good faith, and may be ignorant of the forgery, is liable to subsequent bona fide purchasers. In Matthews v. Massachusetts Nat. Bank,[33] a stock certificate originally for 2 shares of stock in the name of one Coe, which had been fraudulently altered so as to purport to be for 200 shares in the name of the defendant as collateral, was received in good faith by the defendant from Coe as collateral security for a loan from him. On payment of the loan by Coe the defendant signed a transfer in blank upon the back of the certificate, and delivered it to Coe. Afterwards the plaintiff, in good faith, received the same certificate from Coe as collateral security for a loan then made to him. The plaintiff's debt was not paid by Coe, and, the certificate

poration, and to compel registry on the company's books of the legal title in the owner as determined by the court, is in the nature of a proceeding in rem, so that the decree will bind the interests of nonresident defendants who are given statutory notice. Patterson v. Farmington St. Ry. Co., 76 Conn. 628, 57 Atl. 853. See, also, Andrews v. Guayquil & Q. Ry. Co. (N. J. Ch.) 60 Atl. 568.

[31] Holbrook v. New Jersey Zinc Co., supra; Joslyn v. St. Paul Distilling Co., 44 Minn. 183, 46 N. W. 337; Bean v. American Loan & Trust Co., 122 N. Y. 622, 26 N. E. 11.

[32] Cases cited in the preceding note. See post, p. 558.

[33] Holmes (U. S.) 396, Fed. Cas. No. 9,286.

proving worthless, the plaintiff sued the defendant for damages, on the ground that the defendant, by its indorsement, warranted the certificate to be genuine. It was held that he could recover.[84] In accordance with the tendency of the decisions on implied warranties, the Uniform Stock Transfer Act provides for such warranty on the part of the transferror of a stock certificate.[85]

LIABILITY OF CORPORATION ARISING FROM UNAUTHORIZED OR INVALID TRANSFER

168. A corporation is liable to the owner of stock if it registers a forged or unauthorized or invalid transfer, unless the owner is estopped by negligence.

169. If the holder of the legal title to a certificate of stock appears to be the absolute owner, and the corporation has no notice that the fact is otherwise, it will incur no liability to the equitable owner by recognizing a transfer from the holder.

As we have just seen, in the absence of elements of estoppel a forged or unauthorized indorsement or transfer of certificates of stock cannot divest the owner of his title, nor confer any rights, as against him, upon the transferee. If, therefore, a corporation recognizes a forged or unauthorized indorsement and transfer, and transfers the stock and issues a new certificate, so that the certificate is lost to the real owner, it may be compelled to replace it, or pay him its value. And it can make no difference whatever that the corporation has not been guilty of fraud or negligence.[86] No liability, however, will attach to the corporation where the owner of the stock has been negligent. In such a case he will be estopped to deny the title of the transferee, and this estoppel will inure to the benefit of the corporation.[87]

Not only does a corporation, in permitting a transfer of stock to be made under a power of attorney, take the risk of the power of at-

[84] See, also, McClure v. Central Trust Co. of New York, 165 N. Y. 108, 126–128, 58 N. E. 777, 53 L. R. A. 153.

[85] Sections 11, 12.

[86] Western Union Telegraph Co. v. Davenport, 97 U. S. 369, 24 L. Ed. 1047; Taft v. Presidio & F. R. Co., 84 Cal. 131, 24 Pac. 436, 11 L. R. A. 125, 18 Am. St. Rep. 166; Geyser-Marion Gold Min. Co. v. Stark, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684. Compare Uniform Stock Transfer Act, §§ 1, 5, 7, 16. See ante, pp. 540–541, where the cases are collected.

[87] Ante, p. 544.

torney being genuine and not a forgery, and of its being authorized, but it also takes the risk of its validity in other respects; and it will be liable if it was void because executed by a married woman, or if it was executed by an infant or insane person, and has been avoided.[38] And it makes no difference that the corporation was not guilty of actual fault.[39] The corporation has ample means to protect itself, for it may refuse to recognize a power of attorney until satisfied of its genuineness and validity, and may require the personal attendance of the party for the purpose of determining such questions of fact as may give rise to disputes.[40]

If the holder of a certificate of stock appears to be the absolute owner, and the corporation has no notice that the fact is otherwise, it may safely issue a new certificate to his transferee, which, if taken in good faith and for value, will vest a perfect title in him; and in such a case no liability attaches to the corporation, in favor of an equitable owner of the shares, for permitting the transfer and issuing the new certificate.[41] But, for the protection of the equitable owner of shares, the corporation is bound to use reasonable care in recognizing transfers and issuing new certificates; and if, by the form of the certificate or otherwise, the corporation has notice that the transferror is not the absolute owner, but holds the shares by such a title that he may not have authority to transfer them, the corporation is not obliged, without evidence of such authority, to issue a certificate to his assignee; and if, without making any inquiry, it does issue a new certificate, and the equitable owner is injured thereby, he may hold the corporation liable, and this without proof of fraud or collusion. All the authorities agree that the corporation is liable where it has notice that the transferror holds the stock in trust, and issues a new certificate without inquiry as to whether the transfer is authorized.[42]

[38] Though a corporation may, at the instance of a married woman, transfer to her husband shares of its stock which had been issued to her, but which she had, without an order of court, sold to him, it cannot be accountable to her therefor, unless, when it made the transfer, or before the stock got into the hands of an innocent purchaser, it had notice of the relation existing between her and the person to whom she directed the transfer to be made, and the resulting incapacity on her part to make such sale to her husband. Bigby v. Atlanta & W. P. R. Co., 119 Ga. 685, 46 S. E. 827.

[39] Chew v. Bank of Baltimore, 14 Md. 299.

[40] Chew v. Bank of Baltimore, supra. And see opinion of Blackburn, J., in In re Bahia & S. F. R. Co., Lim., L. R. 3 Q. B. Cas. 584.

[41] Loring v. Salisbury Mills, 125 Mass. 150; Hughes v. Drovers' & Mechanics' Nat. Bank, 86 Md. 418, 38 Atl. 936.

[42] Loring v. Salisbury Mills, supra; Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Cooper v. Illinois Cent. R. Co., 38 App. Div.

In case of transfers by an executor, the corporation is chargeable with notice of the will and its contents. But, since an executor has authority to sell stock to pay debts of the testator, the corporation does not render itself liable by registering a transfer by him, if it has no reasonable ground for supposing that he is misapplying the assets, though the stock may be specifically bequeathed.[43] It would seem, however, that under such circumstances the corporation is placed upon its guard and should investigate. If it has reasonable grounds for supposing the executor is misapplying the assets, and permits a transfer, it certainly will be liable.[44]

LIABILITY OF CORPORATION ON CERTIFICATES ISSUED FRAUDULENTLY, WITHOUT AUTHORITY, ETC.

170. If the officers of a corporation, having apparent authority to issue certificates, issue certificates fraudulently, or without actual authority, or by mistake, to persons not entitled thereto, it will be liable to bona fide purchasers and transferees thereof.

171. If a corporation registers a transfer and issues a new certificate without surrender of the outstanding certificate, it will be liable on both certificates to bona fide purchasers and transferees thereof.

A corporation, by issuing a certificate of stock affirming that the person designated therein is the owner of a certain number of shares, transferable in the manner indicated thereon, becomes estopped, as against bona fide purchasers of the certificate, to say that it was issued without authority, or to a person not entitled. Therefore, if a corporation recognizes a forged or unauthorized transfer, and registers the same in the name of the transferee, and issues a new certificate to him, it will be liable to bona fide purchasers from the transferee, unless there is some element of estoppel, as against the real owner, which will prevent him from denying the transferee's title. It is not necessary that the corporation shall have been guilty of fraud or negligence, since the corporation

22, 57 N. Y. Supp. 925; WOOTEN v. WILMINGTON & W. R. CO., 128 N. C. 119, 38 S. E. 298, 56 L. R. A. 615, Wormser Cas. Corporations, 336; Spellissy v. Cook & Bernheimer Co., 58 App. Div. 283, 68 N. Y. Supp. 995.

[43] Lowry v. Commercial & Farmers' Bank, Taney (U. S.) 310, Fed. Cas. No. 8,581.

[44] Lowry v. Commercial & Farmers' Bank, supra. And see Cox v. First Nat. Bank, 119 N. C. 302, 26 S. E. 22.

had power and opportunity to inquire into the matter. By thus holding the transferee out as the owner of stock, it is estopped to deny his title, as against bona fide purchasers.[45]

Such a transfer cannot affect the title of the real owner, where there is no element of estoppel against him, and therefore it cannot substitute the purchaser as a stockholder in his stead.[46] If the corporation had power to issue new shares, the certificate issued to the transferee will be valid, and will make the holder a stockholder. If it had already issued the full amount of stock authorized by its charter, the certificate cannot confer rights of membership, for an increase of stock would be ultra vires and void; and the remedy of a purchaser is by action against the corporation for damages, in which he may recover the value of the stock.[47]

It has been held that by registering a forged or unauthorized transfer, and issuing a new certificate to the transferee, the corporation is estopped to deny the validity of the transfer, even as against the transferee himself;[48] but this seems unsound, and, by the better opinion, the estoppel does not operate in favor of the transferee, for he has not taken the certificate on the faith of the corporation's conduct in issuing it and recognizing the transfer as valid, but on the faith of the forged or unauthorized assignment and power of attorney.[49] And the corporation in such a case may maintain an action against him for the damages it may have sustained.[50] This is based on the ground that the party demanding the transfer impliedly warrants the genuineness of the document to the corporation. A corporation, by registering a forged or unauthorized transfer and issuing a new certificate, does not become lia-

[45] Mandlebaum v. North American Min. Co., 4 Mich. 465; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Simm v. Telegraph Co., 5 Q. B. Div. 188; Machinists' Nat. Bank v. Field, 126 Mass. 345; In re Bahia & S. F. R. Co., L. R. 3 Q. B. 584; Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 47 N. E. 249, 43 L. R. A. 777. And see Philadelphia Nat. Bank v. Smith, 195 Pa. 38, 45 Atl. 655. Compare First Ave. Land Co. v. Parker, 111 Wis. 1, 86 N. W. 604, 87 Am. St. Rep. 841.

[46] See dictum in Moores v. Citizens' Nat. Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385.

[47] See the cases cited in note 45, supra.

[48] Ashby v. Blackwell, 2 Eden, 299; decision of Lindley, J., in Simm v. Telegraph Co., 5 Q. B. Div. 188.

[49] Decision of Court of Appeal in Simm v. Telegraph Co., 5 Q. B. Div. 188; Hildyard v. South Sea Co., 2 P. Wms. 76; Boston & A. R. Co. v. Richardson, 135 Mass. 473. See Hall v. Rose Hill & E. Road Co., 70 Ill. 673.

[50] Boston & A. R. Co. v. Richardson, 135 Mass. 473; Sheffield Corporation v. Barclay, [1905] App. Cas. 392. Compare Oliver v. Bank of England, [1902] 1 Ch. Div. 610, on appeal Starkey v. Bank of England, [1903] App. Cas. 114; Uniform Stock Transfer Act, § 11.

ble to one who takes the certificate with notice of the forgery or want of authority, or of facts sufficient to put him upon inquiry.[51]

If an officer of a corporation, whose duty or apparent duty it is to issue certificates of stock, issues spurious certificates to himself or to another, the corporation will be liable to bona fide purchasers or pledgees of the certificates for the damages sustained by them.[52] There will be no liability, however, to persons who take the certificates with notice of their invalidity, or with knowledge of facts sufficient to put them on inquiry.[53] If the corporation had authority under its charter to issue additional shares of stock, such certificates will be binding, and will make the purchasers stockholders. If, however, the full amount of stock authorized by the charter had already been issued, the certificates are void, and the purchaser's only remedy against the corporation is an action for damages.[54]

No liability will attach to a corporation, in the absence of negligence, on account of certificates fraudulently issued by an officer,

[51] See Moores v. Citizens Nat. Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385.

[52] New York & N. H. R. Co. v. Shuyler, 34 N. Y. 30; Titus v. President, etc., of Great Western Turnpike Road, 61 N. Y. 237; Tome v. Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540; Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712; Bank of Batavia v. New York, L. E. & W. R. Co., 106 N. Y. 199, 12 N. E. 433, 60 Am. Rep. 440; Manhattan Beach Co. v. Harned (C. C.) 27 Fed. 484; Shaw v. Mining Co., 13 Q. B. Div. 103; Allen v. South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; Farrington v. South Boston R. Co., 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222; Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 47 N. E. 249, 43 L. R. A. 777; post, p. 658, note 55.

[53] Moores v. Citizens' Nat. Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385. In this case the plaintiff lent money to the cashier of the defendant bank on his representation that he owned stock in the bank which he would transfer to her as collateral to secure the loan. He fraudulently signed and issued a certificate directly to her, using blank certificates which had been signed by the president, and left with him to be used if needed, and marked the stub in the certificate book so as to show that the blank had been destroyed. The certificate showed on its face that stock was transferable only on the books of the bank, and on surrender of the original certificate. Of course, the plaintiff never saw any original certificate, and no certificate was or could have been surrendered, and there was no evidence that the bank had ever ratified the transaction, or received any benefit from it. It was held that the plaintiff could not hold the bank liable. And see Farrington v. South Boston R. Co., 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222; Hill v. C. F. Jewett Pub. Co., 154 Mass. 172, 28 N. E. 142, 13 L. R. A. 193, 26 Am. St. Rep. 230. Compare Allen v. South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; Shaw v. Mining Co., 13 Q. B. Div. 103.

[54] See the cases above cited.

if the issuance of them had no relation to the authority conferred upon him.[55]

A stock certificate issued by a corporation having power to issue the same, in which it is stated that a designated person is the owner of a certain number of shares of stock transferable on the books of the corporation, on the indorsement and surrender of the certificate, is a continuing affirmation as to the ownership of the stock, and that the corporation will not transfer the stock upon its books unless the certificate is first surrendered. It is an assurance to the commercial world that the shares of stock are the property of the person designated, and that he has the power and right to transfer and sell the stock, until this power and right has been lawfully terminated.[56] It is therefore not only the right, but the duty, of a corporation not to register a transfer on its books and issue a new certificate to the transferee without production and surrender of the original certificate. This is generally expressly required by the terms of certificates, or by the charter or by-laws of the corporation, but the duty is the same where there is no such express requirement.[57] If a corporation does register a transfer and issue a new certificate without surrender of the outstanding certificate, a bona fide purchaser of the new certificate may hold it liable thereon. If the corporation had the power to increase its stock, he will be entitled to shares. If it had no such power, the purchaser may maintain an action for damages. Purchasers of the outstanding certificates in such cases have a right to assume that no transfer has been made by the corporation, and cannot be affected by a transfer on its books of which they had no notice.[58] If the corporation refuses to recognize them as stockholders by reason of their ownership of the outstanding certificate, they may maintain an action against it for damages, and recover the value of the stock.[59]

If the corporation registers a transfer and issues a new certificate to a purchaser of stock, who did not receive the certificate and consequently did not surrender it, the transferee is not liable in dam-

[55] Post, p. 659, and cases there referred to. Cf. Whitechurch v. Cavanagh, H. L. 17 Law Times R. 746.

[56] Joslyn v. St. Paul Distilling Co., 44 Minn. 183, 46 N. W. 337.

[57] 1 Cook, Stock, Stockh. & Corp. Law, §§ 358-360; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341.

[58] See Hall v. Rose Hill & E. Road Co., 70 Ill. 673.

[59] First Nat. Bank v. Lanier, 11 Wall. 369, 20 L. Ed. 172; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Bean v. American Loan & Trust Co., 122 N. Y. 622, 26 N. E. 11; Joslyn v. St. Paul Distilling Co., 44 Minn. 183, 46 N. W. 337.

ages to the holder of the old certificate, unless he obtained the registry with knowledge that the old certificate had been sold to another.[60] He may insist as a condition of purchase that the old certificate be surrendered; and, if he fails to do so, he assumes the risk which arises from the outstanding certificate.[61]

REMEDY AGAINST CORPORATION FOR REFUSAL TO RECOGNIZE TRANSFER

172. If a corporation, without legal ground, refuses to recognize and register a transfer, the transferee may sue in equity to compel it to do so, or may sue at law to recover the value of the stock. Some of the courts hold that mandamus is not a proper remedy, but it is allowed in a few states.

If a corporation whose shares of stock are transferable only on its books refuses to register a transfer, without legal ground for such refusal, a court of equity may compel it to register the transfer, in a suit brought by the transferee for that purpose.[62] Or the transferee may maintain an action at law to recover damages for such refusal, and recover the value of the stock. He may maintain an action ex delicto, or he may maintain assumpsit, for the law implies a promise by the corporation to perform the duty which it owes to transferees of shares.[63]

[60] Scripture v. Francestown Soapstone Co., 50 N. H. 571; Baker v. Wasson, 53 Tex. 150.

[61] Boatmen's Ins. & Trust Co. v. Able, 48 Mo. 136.

[62] Mechanics' Bank v. Seton, 1 Pet. 299, 7 L. Ed. 152; Rice v. Rockefeller, 134 N. Y. 174, 31 N. E. 907, 17 L. R. A. 237, 30 Am. St. Rep. 658; Walker v. Detroit Transit Ry. Co., 47 Mich. 338, 11 N. W. 187; Prince Investment Co. v. St. Paul & S. C. Land Co., 68 Minn. 121, 70 N. W. 1079; Real Estate Trust Co. v. Bird, 90 Md. 229, 44 Atl. 1048; Wetumpka Bridge Co. v. Kidd, 124 Ala. 242, 27 South. 431; Bedford v. American Aluminum & Specialty Co., 51 App. Div. 537, 64 N. Y. Supp. 856.

[63] Ang. & A. Corp. § 381; Kortright v. Buffalo Commercial Bank, 20 Wend. (N. Y.) 91; Morgan v. Bank of North America, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Case v. Citizens Bank, 100 U. S. 446, 25 L. Ed. 695; Pinkerton v. Manchester & L. R. R. Co., 42 N. H. 424; Scripture v. Francestown Soapstone Co., 50 N. H. 571; London, Paris & American Bank v. Aronstein, 117 Fed. 601, 54 C. C. A. 663; Herrick v. Humphrey Hardware Co., 73 Neb. 809, 103 N. W. 685, 119 Am. St. Rep. 917, 11 Ann. Cas. 201. Damages in tort may be recovered by the transferee for refusal to issue stock, though the corporation had already issued all the stock which its charter authorized. Fifth Ave. Bank of New York v. Forty-Second Street & G. St. Ferry R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712.

Some of the courts have held that mandamus is not a proper remedy to compel a corporation to recognize a person as a member, or to register transfers.[64] It has been allowed, however, in a few states.[65] In a recent carefully considered New York case, it was held that mandamus will not lie to compel a corporation to transfer stock on its books, and that the stockholder's true remedy is by action against the corporation which wrongfully refuses to transfer. The reason given was because a writ of this nature issuing in behalf of the people "ought not to be extended to obtain a mere article of property or to furnish evidence of title to property so that it may be more certainly possessed by the owner or more conveniently transferred by him." [66]

COMPELLING CORPORATION TO ISSUE NEW CERTIFICATES

173. A corporation, not having been guilty of fraud or wrong, cannot be compelled to issue new certificates of stock while the old certificates are outstanding, unless the decree protects it against liability on the outstanding certificates.

Since a certificate of stock is a continuing affirmation by the corporation that the person designated is the owner of the stock, and has the right to transfer the same, so long as the certificate is outstanding, and it will be liable to bona fide purchasers of the certificate, it follows that the court cannot compel it to issue a new certificate on the ground that the old certificate was issued to the wrong person (there having been no fraud on the part of the corporation), so long as the old certificate is outstanding, unless by the decree it protects the corporation against liability on the outstanding certificate.[67] The corporation would be liable to bona

[64] Lamphere v. Grand Lodge, 47 Mich. 429, 11 N. W. 268; Baker v. Marshal, 15 Minn. 177 (Gil. 136); State v. Carpenter, 51 Ohio St. 83, 37 N. E. 261, 46 Am. St. Rep. 556; Durfee v. Harper, 22 Mont. 354, 56 Pac. 582; People ex rel. Rottenberg v. Utah Gold & Copper Mines Co., 135 App. Div. 418, 119 N. Y. Supp. 852.

[65] Green Mount & State Line Turnpike Co. v. Bulla, 45 Ind. 1; State v. McIver, 2 S. C. 25; People v. Crockett, 9 Cal. 112; In re Klaus, 67 Wis. 401, 29 N. W. 582.

[66] People ex rel. Rottenberg v. Utah Gold & Copper Mines Co., 135 App. Div. 418, 119 N. Y. Supp. 852.

[67] Joslyn v. St. Paul Distilling Co., 44 Minn. 183, 46 N. W. 337; Bean v. American Loan & Trust Co., 122 N. Y. 622, 26 N. E. 11. Where it clearly appeared that the original certificate, unassigned, had been lost twelve years

fide purchasers of the outstanding certificate even pending a suit to cancel the same and to compel the issuance of the new certificate, for the doctrine of lis pendens, as we have seen, does not apply to the sale and transfer of shares of stock.[68] The later cases seem to show that not even a decree of the court declaring an outstanding certificate void, and canceling the same, would relieve the corporation from liability to bona fide purchasers of the outstanding certificate without notice of the suit or the decree.[69]

ago, and had not since been heard from, and no other claimant for the stock or dividends had appeared, the owner was entitled to a new certificate without giving a bond of indemnity. Guilford v. Western Union Tel. Co., 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407. An action may be maintained against a foreign corporation to compel it to issue a new certificate in place of one which had been lost. Guilford v. Western Union Tel. Co., supra.

[68] Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; American Press Ass'n. v. Brantingham, 75 App. Div. 435, 78 N. Y. Supp. 305.

[69] See the cases cited in note 80, supra. Contra, Sprague v. Cocheco Mfg. Co., Fed. Cas. No. 13,249.

CHAPTER XIII

MANAGEMENT OF CORPORATIONS—OFFICERS AND AGENTS

174–177. Powers of the Majority of Stockholders.
178–181. By-Laws.
182–184. Stockholders' Meetings.
185–188. Voting.
189–190. Election and Appointment of Officers and Agents.
191. Qualifications of Directors or Other Officers.
192. Powers of Directors.
193–194. Directors' Meetings and Resolutions.
195–197. Authority of Other Officers and Agents.
198. Notice to Officer as Notice to Corporation.
199. Contracts between Stockholder and the Corporation.
200. Relation between Officers and Corporation.
201–202. Contracts or Other Transactions between Directors or Officers and the Corporation.
203. Liability of Directors and Officers to the Corporation.
204–205. Remedies against Officers.
206. Liability of Officers and Agents on Contracts.
207–209. Liability of Corporation for Torts of Officers and Agents.
210. Liability of Officers and Agents to Third Persons for Torts.
211. Compensation of Directors and Officers.
212. Removal of Directors, Officers and Agents.
213. Relation between Officers and Stockholders.

POWERS OF THE MAJORITY OF STOCKHOLDERS

174. As a rule, each shareholder in a corporation is bound by all acts and proceedings, within the scope of the powers and authority conferred by the charter, which shall be adopted or sanctioned by a vote of the majority of the corporation, duly taken and ascertained according to law.

175. But, if the charter invests the board of directors or other agents with the power to manage the concerns of the corporation, the power is exclusive, and cannot be controlled or interfered with by the stockholders, their remedy being to elect or appoint new directors or agents. In this sense, the power of the board of directors is original and undelegated.

176. The majority ordinarily governs; but the majority cannot bind the minority by ultra vires acts; nor can they defeat or impair contract rights between the corporation and individual stockholders; nor can they act fraudulently or oppressively, as against the minority.

177. There is much conflict as to the power of the majority to bind a dissenting minority by acceptance of an amendment or alteration of its charter. The position of the courts may be shortly stated thus:

(a) Where the Legislature has not reserved the power to amend the charter—

(1) By the weight of authority, the Legislature cannot authorize the majority to alter the charter in any material respect, without the consent of the minority.

(2) Some courts hold that a material alteration, if not a great or radical one, may be made to facilitate carrying out the objects of the corporation.

(3) All the courts agree that it cannot authorize the majority to engage in a new and different enterprise.

(4) Perhaps all the courts agree that immaterial changes may be made, to facilitate carrying out the objects of the corporation.

(b) Where the Legislature has reserved the power to alter or amend the charter—

(1) The courts, including the Supreme Court of the United States, hold that the effect of the provision is to reserve to the Legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or in order to protect the rights of the public or of the corporation, its stockholders or creditors, or promote the due administration of its affairs.

(2) Some courts hold that the reservation can be exercised by the state only, and gives no greater power to the majority than if it did not exist.

It is a fundamental principle that the majority of the stockholders can regulate and control the exercise of the powers conferred upon a corporation by its charter, and that the majority has the power, by a vote duly taken and ascertained according to the law by which it is governed, to bind the minority by any act or proceeding which is within the powers of the corporation. Each and every shareholder impliedly agrees that the will of the majority shall govern in all matters coming within the limits of the charter or act of incorporation.[1] Thus, the majority of a corporation es-

[1] Durfee v. Old Colony & F. R. R. Co., 5 Allen (Mass.) 230, 242; Dudley v. Kentucky High School, 9 Bush (Ky.) 578; United States Steel Corp. v. Hodge, 64 N. J. Eq. 807, 54 Atl. 1, 60 L. R. A. 742; Metcalf v. American School Fur-

tablished solely for private objects, as a manufacturing or trading corporation, may wind up its affairs, close out its business, and sell its property, against the dissent of the minority, whenever the corporate enterprise is proving unprofitable, though some authorities, as we have seen, hold this may be done whenever, in any case, in the exercise of a sound and honest discretion, the majority finds it expedient to do so.[2]

Of course, the majority of the stockholders have no power to bind the minority by any act or proceeding that is not within the powers conferred upon the corporation by its charter. The majority represents the corporation, and it can legally do nothing that the corporation cannot do under its grant of power. The majority cannot, at least in the absence of legislative authority, binding upon the stockholders, change the articles of association or charter. They cannot, by resolution, dissolve the corporation before expiration of the time fixed in the charter or articles of association, without the consent of all the members, unless express authority is conferred by the charter.[3]

And, while a majority of the stockholders may bind the individual stockholders in all matters legitimately within the powers of the company, and subject to the law of the land, they cannot impair or defeat contract rights between the corporation and individual stockholders.[4] Thus, where a corporation has issued to a stockholder a certificate in the form of an ordinary certificate of stock, but containing a promise by the corporation to pay interest thereon until the happening of a specified event, it cannot, by vote of a majority of the stockholders, without his consent, oblige him to receive the bond of the corporation, instead of money, for the interest on such certificate.[5]

Nor can the holders of a majority of the stock of a corporation so conduct and manage its affairs in their own interest, or in the interest of others, as to oppress the minority, or commit a fraud upon their rights. If they attempt to do so, a court of equity will, in a proper case, grant relief, at the suit of the minority.[6] However, the

niture Co. (C. C.) 122 Fed. 115; Flynn v. Brooklyn City R. Co., 158 N. Y. 493, 53 N. E. 520.

[2] As to the power of a corporation to sell its property, and the limitations thereon, see ante, p. 167.

[3] Barton v. Enterprise Loan & Bldg. Ass'n, 114 Ind. 226, 16 N. E. 486, 5 Am. St. Rep. 608. But compare, Bowditch v. Jackson Co., 76 N. H. 351, 82 Atl. 1014, Ann. Cas. 1913A, 366.

[4] Durfee v. Old Colony & F. R. R. Co., supra.

[5] McLaughlin v. Detroit & M. Ry. Co., 8 Mich. 100.

[6] Ante, p. 482, and cases there cited; Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; Chicago Hansom Cab Co. v. Yerkes, 141

judgment of the majority is not lightly to be set aside, and fraud or oppression must clearly appear.[7] "The holders of a majority of the stock of a corporation may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests, to the injury of other stockholders." [8] It is not every question of mere administration or of policy in which there is a difference of opinion among the shareholders that gives the minority a right to claim that the action of the majority is oppressive, and to come into a court of equity for relief. Generally, the will of the majority must govern, if its action is within its corporate powers. "The court," it was said in a New York case, "would not be justified in interfering, even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint-stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interests. Otherwise the court might be called upon to balance probabilities or profitable results to arise from the carrying out of the one or the other of different plans proposed by or on behalf of different shareholders in a corporation, and to decree the adoption of that line of policy which seemed to it to promise the best results, or at least to enjoin the carrying out of the opposite policy. This is no business for any court to follow." [9] Corporate elections fur-

Ill. 320, 30 N. E. 667, 33 Am. St. Rep. 315; Farmers' Loan & Trust Co. v. New York & N. R. Co., 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; Armington v. Palmer, 21 R. I. 109, 42 Atl. 308, 43 L. R. A. 95, 79 Am. St. Rep. 786; Mumford v. Ecuidor Development Co. (C. C.) 111 Fed. 639; Wheeler v. Abilene Nat. Bank Bldg. Co., 159 Fed. 391, 89 C. C. A. 477, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917; Geddes v. Anaconda Copper Min. Co. (D. C.) 197 Fed. 860.

[7] Wolf v. Pennsylvania R. Co., 195 Pa. 91, 45 Atl. 936.

[8] Meeker v. Winthrop Iron Co. (C. C.) 17 Fed. 48.

[9] Per Peckham, J., in Gamble v. Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527. Where a contract between two corporations, made by the directors, several of whom were common to both corporations, was

nish the only remedy for internal dissensions, since the majority must rule so long as it keeps within its powers and acts honestly.[10]

Where Power of Management is in the Directors

When the charter invests a board of directors or trustees with the power to manage the concerns of the corporation, the power is exclusive in its character. The stockholders, as such, in their collective capacity, can do no corporate act. The directors are their representatives, and they only are authorized to act.[11] Thus, conferring authority to sell and convey or to lease the property of the corporation, or to execute corporate obligations, or to declare dividends, is the exercise of a corporate power, and, if the charter or articles of incorporation, or statutes, require such powers to be exercised by the board of directors or trustees, such authority cannot be conferred by a stockholders' meeting.[12] Nor can the stockholders, in such a case, control or interfere with the board in the exercise of its powers. The courts will not, even on the petition of a majority of stockholders, compel the board to do an act contrary to its judgment.[13] A recent federal case is difficult to reconcile with these rules. The articles of a corporation provided for the declaration of dividends by the directors. All the stockholders, including the directors, met and agreed to a division of profits, which were then credited to the individual stockholders. Subsequently the corpora-

ratified by a majority of the stockholders of each, it could not, in the absence of any proof that it was calculated to defraud the minority stockholders, be set aside at their suit. Continental Ins. Co. v. New York & H. R. Co., 103 App. Div. 282, 93 N. Y. Supp. 27, affirmed 187 N. Y. 225, 79 N. E. 1026.

[10] Flynn v. Brooklyn City R. Co., 158 N. Y. 493, 53 N. E. 520.

[11] McCullough v. Moss, 5 Denio (N. Y.) 575; Sellers v. Greer, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589. The Court of Appeals of New York has said: "But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke, those powers. They are derivative only in the sense of being received from the state in the act of incorporation." Hoyt v. Thompson's Ex'r, 19 N. Y. 207, 216, per Comstock, J., writ of error dismissed 1 Black (U. S.) 518, 17 L. Ed. 65. And see Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648.

[12] Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27; McCullough v. Moss, 5 Denio (N. Y.) 575; Colorado Springs Co. v. American Pub. Co., 97 Fed. 843, 38 C. C. A. 433; Hamblock v. Clipper Lawn Mower Co., 148 Ill. App. 618; Loewenthal v. Rubber Reclaiming Co., 52 N. J. Eq. 440, 28 Atl. 454; Moore v. Moore Mica Paint Co., 150 App. Div. 792, 135 N. Y. Supp. 210; Automatic Syndicate Co., Limited, v. Cunninghame, L. R. [1906] 2 Ch. Div. 34.

[13] McCullough v. Moss, 5 Denio (N. Y.) 575; Wright v. Lee, 2 S. D. 596, 51 N. W. 706, 713, 714; Ellerman v. Chicago Junction Railways & Union Stockyards Co., 49 N. J. Eq. 219, 23 Atl. 287; Automatic Syndicate Co., Limited, v. Cunninghame, L. R. [1906] 2 Ch. Div. 34.

tion became insolvent and the question of the validity of the dividend arose. It was held that a valid dividend had been declared.[14]

Power to Accept Amendment or Alteration of Charter

Difficult questions arise as to the power of the majority of the members of a corporation to bind a dissenting minority by acceptance of an act amending or altering the charter. On some points the courts agree, while on others there is a conflict in the decisions. We considered in a previous chapter the power of the state to amend a charter irrespective of the consent of the corporation. We are to consider here the power of a majority of the corporation where the Legislature merely authorizes a change, leaving it optional with the corporation whether it will make the change, or continue under the original charter.

Even where the Legislature has not reserved the power to alter or amend a charter, there is nothing to prevent it from doing so with the consent of all the members. It would be just like the case where both parties to a contract rescind it by mutual agreement, and substitute a new contract. It seems clear, however, that the Legislature cannot, where it has not reserved the power, alter a charter in any material respect—that is, make any material, a fortiori any fundamental, change—if any one of the stockholders or members dissent, for it would thereby impair the obligation of the contract between the dissenting member and the corporation. Nor can it authorize a majority of the members to make the alteration. A person, in becoming a member of a corporation, does not impliedly agree that the majority of the members shall have the power to bind him by alteration of the objects of the incorporation, or by altering his contract of membership. The majority of the members have no more power to alter the charter, and engage in a new or different enterprise, against the dissent of the minority, than two members of a partnership of three would have the power to change the partnership agreement without the consent of the third.

A leading case on this point is Natusch v. Irving.[15] In this case a partnership had been formed for life insurance, and, after it was entered into, an act of parliament made it lawful for such a firm to enter upon the business of marine insurance, which was prohibited

[14] Spencer v. Lowe, 198 Fed. 961, 117 C. C. A. 497. A corporate conveyance authorized at a meeting of all the stockholders has been upheld. Manhattan Brass Co. v. Webster Glass & Queensware Co., 37 Mo. App. 145.

[15] 2 Coop. t. Cott. 358, Gow, Partn. (3d Ed.) 576, and referred in Zabriskie v. Hackensack & N. Y. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617. It should be noted, moreover, that there are no fundamental constitutional limitations in England, as there are in this country.

to them before. A majority of the partners determined to embark in this new business, but Lord Eldon held that they were barred from doing so by the contract of partnership, unless all the partners agreed. And in England the same doctrine has been applied to corporations. And so it has been held in this country.[16] The Legislature, if it has not reserved the power to alter or amend the charter of a corporation, cannot authorize a material or, a fortiori, a fundamental amendment, and put it in the power of a majority of the members, even by express provision to that effect, to bind the minority against their dissent; for this would be to impair the contract between such dissenting members and the corporation, and the act would be unconstitutional.

In Proprietors of Union Locks & Canals v. Towne,[17] the original charter of a corporation empowered it to render the Merrimack river navigable between certain points, and for that purpose to purchase lands, not exceeding six acres, and to collect tolls, for 40 years, not averaging over 12 per cent. on the capital invested. Afterwards an amendatory act was passed, on the petition of the corporation, abolishing all limitation upon the amount and duration of the toll collected, and authorizing the corporation to purchase and hold 100 acres of land. It was held that this amendment was a material alteration of the charter, and discharged a dissenting subscriber to stock in the corporation from liability on his subscription. On the same principle it has been held that a subscriber to stock in a railroad company, where there was no reserved power, was released from liability on his subscription by an amendment of the charter, without his consent, superadding to the original object of the corporation an authority to establish a line of water communication in connection with the railroad, and to increase the capital stock for that purpose.[18] Like decisions have been made where the charter of a railroad or turnpike corporation was amended so as to allow it to materially change the location of the road;[19] where the capital stock of a corporation was increased from $50,000 to

[16] In Ashton v. Burbank, 2 Dill. 435, Fed. Cas. No. 582, a charter authorizing a company to transact a "life and accident insurance" business was amended so as to authorize it to do the business of "fire, marine, and inland insurance," and the amendatory act was accepted by a majority of the stockholders. It was held that this released a dissenting member from liability on a note given by him for an assessment on his stock. See, also, Woods Motor Vehicle Co. of Buffalo v. Brady, 181 N. Y. 145, 73 N. E. 674; West End Real Estate Co. v. Nash, 51 W. Va. 341, 41 S. E. 182.

[17] 1 N. H. 44, 8 Am. Dec. 32.

[18] Hartford & N. H. R. Co. v. Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354.

[19] Middlesex Turnpike Corp. v. Locke, 8 Mass. 268; Kenosha, R. & R. I. R. Co. v. Marsh, 17 Wis. 13.

$150,000,[20] where railroad corporations were authorized to consolidate;[21] where a railroad company was authorized to extend its road;[22] even though, as appears from the facts of some of these cases, the power to amend or alter the corporate charter had been reserved.[23]

The rule, however, seems to be settled that a member of a corporation cannot claim release from liability on his subscription, or otherwise object, because the majority have made an immaterial alteration or amendment under legislative authority. But there is much diversity of opinion as to what alterations are immaterial. If the alteration does not materially affect the contract between the corporation and its members, the majority have the power to make it under legislative sanction, and they will not be enjoined at the suit of a dissenting member, nor will he be released from liability on his subscription. This principle has been applied to amendatory acts, accepted by the majority, changing the name of the corporation,[24] enlarging the time within which a railroad company may commence and complete its road,[25] or an hotel company may construct its hotel;[26] changing to a slight extent the location or grade of the road of a turnpike or railroad company;[27] authorizing the issue of preferred stock for the purpose of raising money;[28] increasing the number of directors.[29] In the latter case it was said

[20] Hughes v. Antietam Mfg. Co. of Washington County, 34 Md. 316, 330. But see Schenectady & S. Plank Road Co. v. Thatcher, 11 N. Y. 102.

[21] Clearwater v. Meredith, 1 Wall. 25, 17 L. Ed. 604; Kenosha, R. & R. I. R. Co. v. Marsh, 17 Wis. 13; Mowrey v. Indianapolis & C. R. Co., 4 Biss. 78, Fed. Cas. No. 9,891.

[22] Stevens v. Rutland & B. R. Co., 29 Vt. 545. And see Zabriskie v. Hackensack & N. Y. R. Co., post, p. 570. But see Durfee v. Old Colony & F. R. R. Co., post, p. 569.

[23] Kenosha, R. & R. I. R. Co. v. Marsh, 17 Wis. 13. Accord, Avondale Land Co. v. Shook, 170 Ala. 379, 54 South. 268; Mills v. Central R. Co., 41 N. J. Eq. 1, 2 Atl. 453, semble. Contra, Schenectady & S. Plank Road Co. v. Thatcher, 11 N. Y. 102; Troy & R. R. Co. v. Kerr, 17 Barb. (N. Y.) 581.

[24] Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Clark v. Monongahela Nav. Co., 10 Watts (Pa.) 364.

[25] Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Milford & Chillicothe Turnpike Co. v. Brush, 10 Ohio, 111, 36 Am. Dec. 78; Agricultural Branch R. Co. v. Winchester, 13 Allen (Mass.) 29.

[26] Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536. In this case, however, the state had reserved the right to repeal, alter, or amend the charter of the corporation. The decision, therefore, is no authority as to the New York rule, in the absence of such a reserved power clause.

[27] Milford & Chillicothe Turnpike Co. v. Brush, 10 Ohio, 111, 36 Am. Dec. 78; Banet v. Alton & S. R. Co., 13 Ill. 504; Irvin v. Susquehanna & P. Turnpike Co., 2 Pen. & W. (Pa.) 466, 23 Am. Dec. 53.

[28] Rutland & B. R. Co. v. Thrall, 35 Vt. 536; Everhart v. West Chester & P. R. Co., 28 Pa. 339.

[29] Mower v. Staples, 32 Minn. 284, 20 N. W. 225.

that alterations which change the nature and purposes of the corporation, or of the enterprise for which it was created, are fundamental, while those which work no material change are not fundamental, and that an alteration increasing the number of directors, not being a change of the nature, purpose, or character of the corporation, or of the enterprise, but of the machinery by which that purpose is to be effected, and that enterprise carried on, is not fundamental, and may therefore be accepted by a majority of the stockholders. On principle, it would seem that even in the absence of a clause reserving to the state the power to amend or alter the charter, an immaterial change may legally be adopted over the dissent of the minority.

Some of the courts have gone further than this, and despite the absence of the reserved power have held that a majority of the stockholders of a corporation may bind the minority by acceptance of an act even materially altering the charter, if the alteration is made in order to facilitate the execution of the object for which the corporation was originally established, and which is beneficial to the stockholders, or clearly not prejudicial, while some have said that they may make a change if it is not a great or radical one. Such seems to be the rule in Illinois and Missouri, and it perhaps extends to other states.[80] In Banet v. Alton & S. R. Co.,[81] where a change in an intermediate point in the route of a proposed railroad was made, but the termini were not altered, it was said: "An alteration in a charter may be so extensive as to work a dissolution of the contract of subscription. An amendment which essentially changes the nature or objects of a corporation will not be binding on the stockholders. A corporation formed for the purpose of constructing a railroad cannot be converted into a company to construct an improvement of a different character, without the consent of all the corporators. A road intended to secure the advantages of a particular line of travel and transportation cannot be so changed as to defeat that general object. The corporation must remain substantially the same, and be designed to accomplish the same general purposes and subserve the same general interests. But such amendments of the charter as may be considered useful to the public and beneficial to the corporation, and which will not divert its property to new and different purposes, may be made, without absolving the subscribers from their engagements. The straightening of the line of the road, the location of a bridge at a different place on a stream,

[80] Illinois River R. Co. v. Zimmer, 20 Ill. 654; Banet v. Alton & S. R. Co., 13 Ill. 504; Pacific R. R. v. Renshaw, 18 Mo. 210; Pacific R. R. v. Hughes, 22 Mo. 291, 64 Am. Dec. 265.

[81] 13 Ill. 504.

or a deviation in the route from an intermediate point, will not have the effect to destroy or impair the contract between the corporation and the subscribers. We regard these conclusions as reasonable and just, and as well calculated to facilitate the construction of improvements and promote the best interests of the public and of stockholders. The incidental benefits which a few subscribers may realize from a particular location ought not to interfere with the general interests of the public and of the great mass of the corporators. These interests of the public and of the corporation may with propriety be consulted and encouraged, especially where the alteration will not operate to depreciate the value of the stock. A shareholder has no cause to complain of the loss of a mere incidental benefit, which formed no part of the consideration of his contract of subscription."

The same questions arise where the Legislature has reserved the power to alter, amend, or repeal a charter, and offers the corporation an amendment of its charter authorizing it to engage in an enterprise not originally contemplated. On this point, also, the courts do not agree.

Some courts have taken the view that a person who becomes a member of a corporation, when such power has been reserved by the Legislature, impliedly agrees that in case an amendment of its charter is offered by the Legislature, authorizing it to engage in a new enterprise of the same kind as that authorized by the charter, it shall be for the corporation, as a body, to determine whether it will accept the same, and that the will of the majority shall govern. In Durfee v. Old Colony & F. R. R. Co.,[82] the Legislature, under a reservation of power to alter, amend, or repeal the charter of a railroad company, passed an act authorizing it to engage in a new enterprise in addition to that contemplated by its charter, but of the same kind—to extend its road—and the amendment was accepted by vote of a majority of the stockholders. It was held that this was a matter in which the stockholders had impliedly agreed that the will of the majority should govern, and that the action of the majority was binding upon the dissenting minority. "When," said the court in this case, "it is expressly provided between the Legislature, on the one hand, and the corporation, on the other, as part of the original contract of incorporation, that the former may change or modify or abrogate it, or any portion of it, it cannot be said that any contract is broken or infringed when the power thus reserved is exercised with the consent of the artificial body of whose original creation and existence such reservation formed an

[82] 5 Allen (Mass.) 230.

essential part. The stockholder cannot say that he became a member of the corporation on the faith of an agreement made by the Legislature with the corporation that the original act of incorporation should undergo no change except with his assent. Such a position might be asserted with more plausibility if there was an absence of a clause in the original act of incorporation providing for an alteration in its terms. In such a case it might perhaps, be maintained that there was a strong implication that the charter should remain inviolate, and that the holders of shares invested their property in the corporation relying upon a contract entered into between it and the Legislature that the provisions of the act creating it should remain unchanged. But it is difficult to see how such a construction can be put on a contract which contains an express stipulation that it shall be subject to amendment and alteration. If it be asked by whom such amendment or alteration is to be made, the answer is obvious: By the parties to the contract—the Legislature on the one hand, and the corporation on the other; the former expressing its intention by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter. It is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the assent of the other contracting party." There are other cases, notably the New York decisions, to the same effect.[33]

Other courts repudiate this view, and hold that no material change can be made in the charter of a corporation without the consent of all the stockholders, though authorized by the Legislature under a reserved power to alter, amend, or repeal the original charter. In Zabriskie v. Hackensack & N. Y. R. Co.,[34] a railroad company, whose charter was subject to alteration, amendment, or repeal by the Legislature, was by an amendatory act authorized to extend its road, and to issue bonds for the purpose of constructing the extension, and secure them by a mortgage on its road and franchises. It was held that this act could not be accepted by the corporation where a stockholder dissented, and the corporation was enjoined, at the suit of a dissenting stockholder, from acting under it. The court said that the reservation by the state of the power to alter, amend, or repeal the charter was for the benefit of the pub-

[33] White v. Syracuse & U. R. Co., 14 Barb. (N. Y.) 560; Schenectady & S. Plank-Road Co. v. Thatcher, 11 N. Y. 102; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Troy & R. R. Co. v. Kerr, 17 Barb. (N. Y.) 581; Picard v. Hughey, 58 Ohio St. 577, 51 N. E. 133. And see note, 7 Col. Law Rev. 598–601.

[34] 18 N. J. Eq. 178, 90 Am. Dec. 617.

lic, and to be exercised by the state only, and was not intended to give a power to one part of the corporators, as against the other, which they did not have before; that the object of the provision was to avoid the rule of the Dartmouth College Case,[35] and not the rule of Natusch v. Irving.[36]

The presence of a provision in a charter or statute or state Constitution that the corporate charter shall be subject to alteration, amendment or repeal at the pleasure of the state Legislature has the effect, says the United States Supreme Court, "to reserve to the Legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the Legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs." [37] Where such power is reserved, it has been held that the Legislature has authority to pass a statute to permit each stockholder to cumulate his votes on any one or more candidates for directors;[38] to alter for the future the liability of stockholders to corporate creditors;[39] permitting mutual life associations to reincorporate as regular life insurance companies,[40] and to authorize a corporation to issue preferred stock with the

[35] Ante, p. 258.

[36] Ante, p. 565. And see South Bay Meadow Dam Co. v. Gray, 30 Me. 547; Oldtown & L. R. Co. v. Veazie, 39 Me. 571; In re Newark Library Ass'n., 64 N. J. Law, 217, 43 Atl. 435; Alexander v. Atlanta & W. P. R. Co., 108 Ga. 151, 33 S. E. 866; Avondale Land Co. v. Shook, 170 Ala. 379, 54 South. 268; Kenosha R. & R. I. R. Co. v. Marsh, 17 Wis. 13.

[37] Looker v. Maynard ex rel. Dusenbury, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79.

[38] Looker v. Maynard ex rel. Dusenbury, supra.

[39] Sherman v. Smith, 1 Black (U. S.) 587, 17 L. Ed. 163.

[40] Polk v. Mutual Reserve Fund Life Ass'n of New York, 207 U. S. 310, 325, 28 Sup. Ct. 65, 52 L. Ed. 222. A reservation of the right of amendment in the articles of association of a life insurance company, except with regard to keeping intact the fund pledged to secure payment of death losses, empowers the company to bind its members by a change in its plan of doing business from the assessment plan to the legal reserve, flat premium plan of "old line" insurance. Wright v. Minnesota Mut. L. Ins. Co., 193 U. S. 657, 24 Sup. Ct. 549; 48 L. Ed. 832. In the last case the court said: "Where the right of amendment is reserved in the statute or articles of association, it is because the right to make changes which the business may require is recognized, and the exercise of the privilege may be vested in the controlling body of the corporation. In such cases, where there is an exercise of the power in good faith, which does not change the essential character of the business, but authorizes its extension upon a modified plan, both reason and authority support the corporation in the exercise of the right." See, also, Picard v. Hughey, 58 Ohio St. 577, 51 N. E. 133.

consent of two-thirds, instead of the unanimous consent of its stockholders.[41] And it seems that in the state of New Jersey, by statute, if two-thirds in interest of the stockholders shall consent, there can be even a radical change in certain cases in the original contract among the stockholders.[42] As to the expediency, if not the constitutionality, of such legislation, there would seem to be room for serious doubt.

BY-LAWS

178. A by-law is a permanent and continuing rule for the government of a corporation and its officers. The office of a by-law is to regulate the conduct and define the duties of the members towards the corporation and between themselves. Unless taken away by the charter or by statute, the power to enact suitable by-laws rests in the stockholders of the corporation.

178a. Every private corporation for pecuniary profit has the implied power to enact by-laws for its government. But, to be valid, by-laws—

(a) Must be reasonable.

(b) Must not be inconsistent with principles of law, nor contrary to public policy.

(c) Must be general, and not directed against particular individuals.

(d) Must be consistent with the charter or articles of association, and within the purposes of the corporation.

(e) Must not impair vested contract rights of stockholders, either by depriving them of rights, or by imposing additional liabilities.

179. Authorized by-laws are binding upon all the stockholders, whether they have expressly assented to them, or knew of them, or not.

180. By-laws cannot confer rights, or impose liabilities, upon third persons, without their express or implied consent. Strangers cannot be bound by rules adopted for the government of the corporation, without their knowledge or assent.

181. By-laws may be altered or repealed by the corporation at pleasure, and they may be waived.

[41] Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. 470, 95 N. Y. Supp. 357, affirming 45 Misc. Rep. 176, 91 N. Y. Supp. 893.

[42] Corporation Law N. J. (2 Comp. St. 1910, p. 1612) § 27. Cf. Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 18.

The office of a by-law is to regulate the conduct and define the duties of the members of the corporation to the corporation and between themselves.[43] A by-law has been defined as "a permanent and continuing rule for the government of the corporation and its officers."[44] The proper office of by-laws is to regulate the transaction of the incidental business of a corporation.[45] Every private business corporation has the implied power to make by-laws. The power is often expressly conferred by the charter or by statute, but this is not at all necessary, for the power is always implied.[46] Primarily, the power to make by-laws is in the majority of the stockholders.[47] But, they, or the charter, may authorize the board of directors to make them.[48] They may also, by a by-law authorize the board to alter or amend by-laws; but the board, under such a power, has no authority to disregard or alter another by-law, which was intended to impose a limitation on their powers.[49] Usage may have the effect of a by-law.[50]

By-laws of a corporation must be proved. They cannot be judi-

[43] Flint v. Pierce, 99 Mass. 68, 96 Am. Dec. 691; Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; Davies v. Munroe Waterworks & Light Co., 107 La. 145, 31 South. 694; Flaherty v. Portland Longshoremen's Benev. Soc., 99 Me. 253, 59 Atl. 58.

[44] North Milwaukee Town Site Co. No. 2 v. Bishop, 103 Wis. 492, 79 N. W. 785, 45 L. R. A. 174.

[45] Ireland v. Globe Milling & Reduction Co., 19 R. I. 180, 32 Atl. 921, 29 L. R. A. 429, 61 Am. St. Rep. 756; Id., 21 R. I. 9, 41 Atl. 258, 79 Am. St. Rep. 769. And see, People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

[46] Sutton's Hospital Case, 10 Coke, 23a, 30b; 1 Bl. Comm. 475; 1 Kyd, Corp. 69; 2 Kent, Comm. 278; Norris v. Staps, Hob. 211a; and cases cited in the following notes.

[47] A change in the by-laws, increasing the number of directors, cannot be made at a regular or annual stockholders' meeting, without previous notice of such purpose; the amendment being of vital importance and outside the usual business transacted at such meetings. Bagley v. Reno Oil Co., 201 Pa. 78, 50 Atl. 760, 56 L. R. A. 184. A statute placing the stock, property, and affairs of corporations under the care and management of its directors does not empower them to adopt by-laws. North Milwaukee Town Site Co. No. 2 v. Bishop, 103 Wis. 492, 79 N. W. 785, 45 L. R. A. 174.

[48] Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457; Heintzelman v. Druids' Relief Ass'n, 38 Minn. 138, 36 N. W. 100. If the charter authorizes the directors to adopt by-laws, a majority may do so. Cahill v. Kalamazoo Mut. Ins. Co., supra. In Illinois, by statute, the power to adopt by-laws is vested in the directors alone. See Manufacturers' Exhibition Bldg. Co. v. Landay, 219 Ill. 168, 76 N. E. 146.

[49] Stevens v. Davison, 18 Grat. (Va.) 819, 98 Am. Dec. 692.

[50] Walker v. Johnson, 17 App. D. C. 144; Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285.

cially noticed.[51] They are to be proved by the records of the corporation, or by secondary evidence if the records cannot be produced.

Validity of By-Laws

Any by-law prescribing a rule for the government of the corporation is valid if it is reasonable, and if it is not inconsistent with the charter or articles of association, nor contrary to any statute or principle of the common law, and if it does not impair vested rights.[52] The corporation, for instance, may provide by its by-laws for the election or appointment and the removal of officers and agents, and may prescribe and limit their powers and duties.[53] So, it may prescribe how and when corporate meetings shall be held, how they shall be conducted, the number of members that constitute a quorum, the amount of stock that must be represented, the manner of voting, etc.[54] And it may prescribe, for its own protection, reasonable regulations concerning the transfer of shares, if it does not unreasonably restrict the right of transfer.[55] And corporations other than joint-stock corporations may enact reasonable by-laws providing for the expulsion of members.[56]

It is well settled that by-laws, to be valid, must be reasonable, and not in contravention of law.[57] And whether they are so or

[51] Haven v. New Hampshire Asylum for Insane, 13 N. H. 532, 38 Am. Dec. 512.

[52] Burden v. Burden, 159 N. Y. 287, 54 N. E. 17; Renn v. United States Cement Co., 36 Ind. App. 149, 73 N. E. 269; Manufacturers' Exhibition Bldg. Co. v. Landay, 219 Ill. 168, 76 N. E. 146.

[53] Com. v. Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628; Burden v. Burden, 8 App. Div. 160, 40 N. Y. Supp. 499; Hale v. Mechanics' Mut. Fire Ins. Co., 6 Gray (Mass.) 169, 66 Am. Dec. 410. They may require officers to give bond. Savings Bank of Hannibal v. Hunt, 72 Mo. 597, 37 Am. Rep. 449.

[54] State ex rel. Kilbourn v. Tudor, 5 Day (Conn.) 329, 5 Am. Dec. 162; In re Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; Com. v. Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628; Ireland v. Globe Milling & Reduction Co., 19 R. I. 180, 32 Atl. 921, 29 L. R. A. 429, 61 Am. St. Rep. 756; Id., 21 R. I. 9, 41 Atl. 258, 79 Am. St. Rep. 769. But a by-law cannot change charter or statutory provisions as to voting, nor deprive members of the right to vote secured to them by their contract of membership. Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; post, p. 598. A by-law may give stockholders a vote for each share, contrary to the common-law rule. Com. v. Detwiller, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360. Contra, Taylor v. Griswold, 14 N. J. Law, 222, 27 Am. Dec. 33. A by-law may allow voting by proxy. Com. v. Detwiller, supra; State ex rel. Kilbourn v. Tudor, supra; People ex rel. Chritzman v. Crossley, 69 Ill. 195. Contra, Taylor v. Griswold, supra.

[55] Post, p. 576.

[56] Ante, p. 506.

[57] State ex rel. Burke v. Citizens' Bank of Jennings, 51 La. Ann. 426, 25 South. 318; Wells v. Black, 117 Cal. 157, 48 Pac. 1090, 37 L. R. A. 619, 59

not is purely a question of law for the court to determine.[58] For instance, they must not be in restraint of trade, nor impose a burden without any apparent benefit.[59] Nor is a by-law valid if it is inconsistent with other general principles of law.[60] A by-law cannot affect the jurisdiction of courts, as fixed by law, nor impair the right to sue.[61] Nor can it give the corporation the power to declare shares forfeited for nonpayment of calls.[62]

To be reasonable, and therefore to be valid by-laws must be general; that is, they must not be directed against particular individuals, nor in favor of particular individuals, but must operate equally upon all to whom they may apply. In Budd v. Multnomah St. Ry. Co.,[63] the directors of a corporation passed a resolution to forfeit and sell the shares of a particular individual for nonpayment of assessments, and the sale was sought to be upheld under a statute requiring a by-law to authorize such sales. The court held that the resolution was not valid as a by-law, because it was not general. "I think," said Judge Strahan, "that any by-law enacted under this section of the Code, to be reasonable, ought to be general; that is, it ought to affect every delinquent subscriber, and all delinquent stock, alike, and it ought not to be directed against the stock or interests of a particular stockholder. These are essential requisites to a valid by-law." There are many other decisions to the same effect.[64]

Am. St. Rep. 162; Herring v. Ruskin Co-op. Ass'n (Tenn. Ch. App.) 52 S. W. 327; Darrin v. Hoff, 99 Md. 491, 58 Atl. 196; Stein v. Marks, 44 Misc. Rep. 140, 89 N. Y. Supp. 921.

[58] Com. v. Worcester, 3 Pick. (Mass.) 462; State v. Overton, 24 N. J. Law, 435, 61 Am. Dec. 671; Sayre v. Louisville Union Benev. Ass'n, 1 Duv. (Ky.) 143, 85 Am. Dec. 613; People v. Young Men's Father Matthew T. A. B. Soc., 41 Mich. 67, 1 N. W. 931; Palmetto Lodge No. 5, I. O. O. F., v. Hubbell, 2 Strob. (S. C.) 457, 49 Am. Dec. 604; Vestry of St. Luke's Church v. Mathews, 4 Desaus. (S. C.) 578, 6 Am. Dec. 619. As to reasonableness of by-laws providing grounds for expulsion of members, see ante, p. 506, et seq.

[59] Matthews v. Associated Press of State of New York, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Bailey v. Master Plumbers, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561, and cases hereafter specifically referred to.

[60] Kent v. Quicksilver Min. Co., 78 N. Y. 159, 182; Sayre v. Louisville Union Benev. Ass'n, 1 Duv. (Ky.) 143, 85 Am. Dec. 613.

[61] Nute v. Hamilton Mut. Ins. Co., 6 Gray (Mass.) 174; Amesbury v. Bowditch Mut. Fire Ins. Co., Id. 596.

[62] In re Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

[63] 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

[64] "It is plain that all corporation by-laws must stand on their own validity, and not on any dispensation granted to members. They cannot be subjected to any conditions which do not apply to all alike, and cannot be compelled to receive, as matter of grace, anything which is matter of right. Neither, on the

A corporation may adopt by-laws imposing reasonable regulations upon the mode of transferring shares but it cannot prohibit transfers. Nor can it impose unreasonable regulations. It has been held, for instance, that a by-law prohibiting the transfer of stock by a stockholder without the consent of all the stockholders, or of a particular officer, etc., is against public policy and void; and no exception can be made in the application of this rule on the ground that the stockholders are few, and were originally co-partners, and that the one against whom the by-law is invoked consented to and voted for it.[65] But in a Massachusetts case the court sustained the validity of a by-law forbidding any disposition of stock unless the stockholder, at least thirty days previous thereto, should have offered in writing to sell the stock to the board of directors upon the same terms and the offer had not been accepted.[66]

Whether or not, in the absence of express charter or statutory authority, a corporation may, by a by-law, create a lien on its shares for debts due from its stockholders, is a question upon which the courts do not entirely agree. By the weight of authority, under the general power to regulate the manner in which its stock shall be transferred and its business conducted, etc., a by-law creating a lien on shares for debts due from its stockholders will be valid as against the stockholders, and as against transferees who do not occupy the position of bona fide purchasers.[67] But such a by-law is

other hand, should there be personal exemptions of a general nature from any valid regulations that bind the mass of corporators." Per Campbell, C. J., in People v. Young Men's Father Matthew T. A. B. Soc., 41 Mich. 67, 1 N. W. 931.

[65] In re Klaus, 67 Wis. 401, 29 N. W. 582 (statutory). And see Farmers' & Merchants' Bank of Lineville v. Wasson, 48 Iowa, 336, 30 Am. Rep. 398; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Bank of Attica v. Manufacturers' & Traders' Bank, 20 N. Y. 501; Moore v. Bank of Commerce, 52 Mo. 377; Johnson v. Laflin, 5 Dill. 65, Fed. Cas. No. 7,393, affirmed Johnston v. Laflin, 103 U. S. 800, 26 L. Ed. 532; Chouteau Spring Co. v. Harris, 20 Mo. 383; ante, p. 513.

[66] Barrett v. King, 181 Mass. 476, 63 N. E. 934. And see Price v. Minot, 107 Mass. 49, 60.

[67] Morgan v. Bank of North America, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575; Vansands v. Middlesex County Bank, 26 Conn. 144; Lockwood v. Roger Williams Nat. Bank, 9 R. I. 308; Cunningham v. Alabama Life Insurance & Trust Co., 4 Ala. 652; St. Louis Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149; Child v. Hudson's Bay Co., 2 P. Wms. 207; McDowell v. President, etc., of Bank of Wilmington and Brandywine, 1 Har. (Del.) 27; Bronson Electric Co. v. Rheubottom, 122 Mich. 608, 81 N. W. 563. And see 1 Thomp. Corp. § 1032, citing, among other cases, People ex rel. Bosqui v. Crockett, 9 Cal. 112; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388; Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 330; Planters' & Merchants' Mut. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585.

not binding upon bona fide purchasers of shares, without notice of it.[68] The New York court, it seems, has held such a by-law invalid for all purposes, in the absence of legislative authority therefor, on the ground that it is unreasonable, not only because it interferes with the common rights of property, and the dealings of third persons, and prevents the free purchase and transfer or delivery of property, but also for the reason that it gives to the corporation a summary remedy which is unknown to the law, and which subjects shares to what is equivalent to an attachment or an execution without judgment or suit.[69]

In the absence of express authority, a corporation cannot, by a by-law, provide for forfeiture of stock for nonpayment of assessments thereon.[70] But it can do so if expressly authorized.[71]

A corporation has no authority to pass by-laws that are inconsistent with the charter or articles of association, or that are beyond the scope of the purposes of the corporation, as expressed in the charter or articles.[72] Thus, a corporation cannot, by a by-law, acquire a lien on its shares for debts due to it by the stockholders, if it is expressly or impliedly prohibited from acquiring a lien on shares, as are national banks by the prohibition in the National Banking Act against making loans on the security of their shares.[73]

[68] Driscoll v. West Bradley & Cary Mfg. Co., 59 N. Y. 96, 109; Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co., 118 Mo. 447, 24 S. W. 129; John C. Graffiin Co. v. Woodside, 87 Md. 146, 39 Atl. 413; Just v. State Sav. Bank, 132 Mich. 600, 94 N. W. 200; Bank of Culloden v. Bank of Forsyth, 120 Ga. 575, 48 S. E. 226, 102 Am. St. Rep. 115.

[69] Driscoll v. West Bradley & Cary Mfg. Co., supra. But a corporation, in New York, may lawfully provide for a lien in its articles of incorporation. Mohawk Nat. Bank of Schenectady v. Schenectady Bank, 78 Hun, 90, 28 N. Y. Supp. 1100. See ante, p. 521.

[70] Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457; In re Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; ante, p. 394.

[71] Budd v. Multnomah St. Ry. Co., 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169; Elizabeth City Cotton Mills v. Dunstan, 121 N. C. 12, 27 S. E. 1001, 61 Am. St. Rep. 654.

[72] Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Bergman v. St. Paul Mut. Building Ass'n, 29 Minn. 275, 13 N. W. 120; Kolff v. St. Paul Fuel Exchange, 48 Minn. 215, 50 N. W. 1036; Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593, 7 N. E. 317; Supreme Council v. Perry, 140 Mass. 580, 5 N. E. 634; Vestry of St. Luke's Church v. Mathews, 4 Desaus. (S. C.) 578, 6 Am. Dec. 619; Mutual Fire Ins. Co. v. Farquhar, 86 Md. 668, 39 Atl. 527; King v. International Building Loan & Investment Union, 170 Ill. 135, 48 N. E. 677; Steiner v. Steiner Land & Lumber Co., 120 Ala. 128, 26 South. 494.

[73] Bullard v. National Eagle Bank, 18 Wall. 589, 21 L. Ed. 923; First Nat. Bank v. Lanier, 11 Wall. 369, 20 L. Ed. 172; Conklin v. Second Nat. Bank of Oswego, 45 N. Y. 655; Bridges v. National Bank of Troy, 185 N. Y. 146, 77

Where the charter of a corporation, or a general statute applicable to it, confers power to enact by-laws for certain specified purposes, it cannot enact a by-law for any other purpose. The case is within the rule, "Expressio unius est exclusio alterius." [74] A corporation whose charter vests the management of its affairs in a board of directors cannot, by a by-law, substitute an executive committee for such board.[75]

Nor can a corporation, by a by-law, deprive a stockholder of vested contract rights, to which he is entitled by virtue of his contract of membership, or of any other contract with the corporation, or of any contract with third persons. In other words, a by-law cannot deprive a stockholder of any rights vested in him at the time it is enacted, unless he consents, or unless his contract with the company allows it.[76] Thus a by-law diverting a gratuity fund from the purposes specified in the corporate charter is not only unreasonable and void, but it also impairs vested rights, since it destroys the rights of the members secured to them by the by-laws upon which they relied when they entered into their agreement.[77] Nor can a by-law impose upon a stockholder, without his consent, any new liability. Thus, where neither the charter of a corporation, nor any general statute, imposes on the individual members a liability to pay its debts, such liability cannot be imposed by a by-law to which he does not consent.[78] A person becoming a member of a corporation after a by-law has been adopted, prohibiting members from doing certain things, is bound thereby. It is a part of his contract, and he cannot object to it on the ground that it deprives him of vested rights.[79]

A by-law which consists of several distinct and independent parts

N. E. 1005, 7 Ann. Cas. 285; Third Nat. Bank v. Buffalo German Ins. Co., 193 U. S. 581, 24 Sup. Ct. 524, 48 L. Ed. 801.

[74] Ireland v. Globe Milling & Reduction Co., 19 R. I. 180, 32 Atl. 921, 29 L. R. A. 429, 61 Am. St. Rep. 756; Id., 21 R. I. 9, 41 Atl. 258, 79 Am. St. Rep. 769; ante, p. 150.

[75] Tempel v. Dodge, 89 Tex. 69, 32 S. W. 514, 33 S. W. 222.

[76] Bergman v. St. Paul Mut. Building Ass'n, 29 Minn. 275, 13 N. W. 120; Kent v. Mining Co., 78 N. Y. 159, 179. Notice of the purpose must be given, if outside the usual business transacted at such meetings, as a change of the by-laws of vital importance. Bagley v. Reno. Oil Co., 201 Pa. 78, 50 Atl. 760, 56 L. R. A. 184.

[77] Parish v. New York Produce Exchange, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149, affirming 60 App. Div. 11, 69 N. Y. Supp. 764.

[78] Trustees of Free Schools in Andover v. Flint, 13 Metc. (Mass.) 539; Reid v. Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563; Duluth Club v. MacDonald, 74 Minn. 254, 76 N. W. 1128, 73 Am. St. Rep. 344.

[79] Matthews v. Associated Press of State of New York, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741.

may be valid as to one part, though void as to the others. Thus, where a by-law of a mutual insurance company provided that in case of loss, if the assured should not acquiesce in the determination by the directors of the amount thereof, any action for the loss claimed must be brought within four months after such determination, at a proper court in the county in which the office of the company was established, it was held valid as to the limitation of time for suing, though void in so far as it affected the jurisdiction of courts.[80]

Effect as to Stockholders

Authorized by-laws, if regularly adopted, are binding upon all the stockholders, whether they have signed them, or otherwise expressly assented to them, or not. They are chargeable with notice of them.[81] And a stockholder is bound by by-laws adopted before he became a member, though he may not have had actual knowledge of them.[82] But it has been held that a shareholder is not chargeable with constructive notice of provisions in the by-laws regulating the mode in which the corporate business shall be transacted with its customers, and that when the stockholder is dealing with the corporation as a customer his rights are not limited by its by-laws not brought to his knowledge.[83] Of course, invalid by-laws do not bind the stockholder. Mere failure of a stockholder to object to by-laws that are void because unauthorized under any of the above rules, until an attempt is made to enforce them against him, does not estop him to object to them.[84]

Effect as to Third Persons

In so far as a by-law of a corporation is in the nature of a contract, the parties thereto are the corporation, upon the one side, and the individual members, upon the other. The right of any third person to establish a legal claim through a by-law depends upon whether he contracted with reference to it. If he did not, then it does not enter into his contract, and he cannot claim the benefit of it. Thus, where the members of a corporation signed a by-law by which they pledged themselves, in their individual as well as their collective capacity, for all moneys that might be loaned to the com-

[80] Amesbury v. Bowditch Mut. Fire Ins. Co., 6 Gray (Mass.) 596.

[81] McFadden v. Board of Sup'rs of Los Angeles County, 74 Cal. 571, 16 Pac. 397; Palmetto Lodge No. 5, I. O. O. F. v. Hubbell, 2 Strob. (S. C.) 457, 49 Am. Dec. 604; Purdy v. Bankers' Life Ass'n, 101 Mo. App. 91, 74 S. W. 486.

[82] Matthews v. Associated Press of State of New York, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741.

[83] Pearsall v. Western Union Telegraph Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662.

[84] Kolff v. St. Paul Fuel Exchange, 48 Minn. 215, 50 N. W. 1036.

pany, it was held that a person who loaned money to the company could not hold a member individually liable by virtue of the by-law, where there was no evidence that the loan was made on the credit of it.[85]

Nor, on the other hand, can a by-law impose liabilities on third persons who contract with the corporation without reference to it, or deprive third persons of their legal rights against the corporation. Thus, a by-law of a bank cannot take away from a depositor the right to money deposited by him, but which, by mistake of the bank, was not credited to him.[86] Nor can a corporation bind a bona fide purchaser of certificates of stock by a by-law, of which he has no notice, reserving a lien on the shares for an indebtedness due from the holder.[87] Nor are persons dealing with an agent of a corporation bound by a by-law, of which they are uninformed, limiting the apparent authority with which the corporation has clothed him.[88] The reason is because "strangers to the company cannot be bound by the rules adopted for the government of the company." [89]

If a person enters into a contract with a corporation, with notice of a by-law, and does not, by special contract, exclude it, the by-law forms a part of his contract.[90] Thus, where a person entered into the employ of a corporation at a yearly salary, without any special contract as to the term of service, and continued in its service with notice of a by-law providing that his office should be held at the pleasure of the board of directors, he was held bound thereby.[91] It is otherwise, however, where the by-law is excluded by the terms of the contract, as it would be, in the case mentioned, by a special contract for a certain term.[92]

[85] Flint v. Pierce, 99 Mass. 68, 96 Am. Dec. 691. And see State v. Overton, 24 N. J. Law, 435, 61 Am. Dec. 671; Smith v. Smith, 62 Ill. 493.

[86] Mechanics' & Farmers' Bank v. Smith, 19 Johns. (N. Y.) 115.

[87] Ante, p. 577.

[88] Rathbun v. Snow, 123 N. Y. 343, 35 N. E. 379, 10 L. R. A. 355; Marine Bank of Buffalo v. Butler Colliery Co., 52 Hun, 612, 5 N. Y. Supp. 291, affirmed 125 N. Y. 695, 26 N. E. 751. Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187.

[89] Smith v. Smith, 62 Ill. 493.

[90] Barbot v. Mutual Reserve Fund Life Ass'n, 100 Ga. 681, 28 S. E. 498; Hallenbeck v. Powers & Walker Casket Co., 117 Mich. 680, 76 N. W. 119.

[91] Douglass v. Merchants' Ins. Co., 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822. Cf. Fowler v. Great Southern Telephone & Telegraph Co., 104 La. 751, 29 South. 271.

[92] Trustees of Soldiers' Orphans' Home v. Shaffer, 63 Ill. 243; Martino v. Commerce Fire Ins. Co., 47 N. Y. Super. Ct. 520.

Repeal and Amendment of By-Laws

A corporation generally has the power to repeal by-laws and enact new ones at pleasure,[93] but the power to alter by-laws has the same limits as the power to make them in the first instance. These limitations have just been pointed out. The power to make by-laws, as we have seen, is to make such only as are not inconsistent with the constitution of the corporation and the law. And a by-law cannot impair vested rights of a stockholder. So, alteration of a by-law is invalid if it contravenes these rules. Thus, where a by-law divided the stock of a corporation into equal shares, giving equal rights, and the stock was thus issued, a new by-law providing for the surrender of shares, and issue of preferred stock instead, on payment of a certain additional sum, was held void, as against dissenting stockholders, because it impaired their vested rights under the contract with the corporation under which they took their shares.[94]

Though, as we have seen, the directors may, by a by-law, be given the power to enact and to alter and amend by-laws, they have no authority, under such a power, to disregard or alter another by-law which was intended as a limitation on their powers.[95]

A by-law may be modified by unanimous consent of stockholders to a regular course of dealing inconsistent with it.[96]

Waiver of By-Law

A by-law may not only be repealed, but it may be waived, by the corporation. If a course of action contrary to a by-law of a private corporation is acquiesced in by the shareholders, the by-law is thereby waived, and will not affect the rights of persons dealing with the corporation in good faith.[97] This is true, even though they may be shareholders, if they did not have actual notice of the by-law.[98] And acts of the directors in violation of the by-laws may be ratified by the shareholders, and generally by the same number

[93] See Smith v. Nelson, 18 Vt. 511; Underhill v. Santa Barbara Land, Bldg. & Imp. Co., 93 Cal. 300, 28 Pac. 1049; Gold Bluff Min. & Lumber Corp. v. Whitlock, 75 Conn. 669, 55 Atl. 175.

[94] Kent v. Quicksilver Min. Co., 78 N. Y. 159, 182. See, also, Parish v. New York Produce Exchange, 60 App. Div. 11, 69 N. Y. Supp. 764, affirmed 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149.

[95] Stevens v. Davison, 18 Grat. (Va.) 819, 98 Am. Dec. 692.

[96] Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285.

[97] Clark v. New England Mut. Fire Ins. Co., 6 Cush. (Mass.) 342, 53 Am. Dec. 44; Susquehanna Mut. Fire Ins. Co. v. Elkins, 124 Pa. 484, 17 Atl. 24, 10 Am. St. Rep. 608; Blair v. Metropolitan Sav. Bank, 27 Wash. 192, 67 Pac. 609.

[98] Underhill v. Santa Barbara Land, Bldg. & Imp. Co., supra.

of shareholders as would be necessary to enact them.[99] But the officers of a corporation cannot waive by-laws adopted by the stockholders for the protection of the corporation.[1]

STOCKHOLDERS' MEETINGS

182. A majority of the stockholders can bind the corporation only at a meeting regularly held and conducted. To constitute a legal meeting, so as to render the acts and vote of the majority binding:

(a) The meeting must be regularly called by one having authority. In the absence of provision to the contrary, such authority exists in the directors or managing agents.

(b) Notice of the time and place of meeting must be given to each stockholder, unless the time and place are definitely fixed by statute, or by the charter or by-laws, or by usage. But if all the stockholders are present, in person or by proxy, want of notice is immaterial, except where the form of notice is positively prescribed by law.

(c) If the meeting is special, notice of the business to be transacted must be given. It is otherwise where the meeting is general; that is, for the transaction of any business within the powers of the corporation.

(d) The meeting must be held at a reasonable time and place. It cannot be held out of the state, unless allowed by statute; but, in the absence of express prohibition, those who participate in such a meeting cannot question its legality. Some jurisdictions hold that only the first or organization meeting need be held within the state creating the corporation.

(e) The meeting must be regularly conducted.

(f) If a statute or the charter or by-law provides that a certain number of stockholders shall be necessary to constitute a quorum for the transaction of business, a less number cannot act, but may adjourn. In the absence of express provision, no particular number is necessary to constitute a quorum.

(g) The major part of the legal votes actually cast at a meeting constitutes a "majority," and prevails.

[99] Underhill v. Santa Barbara Land, Bldg. & Imp. Co., supra.

[1] Mulrey v. Shawmut Mut. Fire Ins. Co., 4 Allen (Mass.) 116, 81 Am. Dec. 689; Hale v. Mechanics' Mut. Fire Ins. Co., 6 Gray (Mass.) 169, 66 Am. Dec. 410.

(h) A meeting and proceedings are not rendered illegal by the fact that one of the stockholders is non compos mentis, or otherwise under legal disability.

(i) Meetings are presumed to have been regular, and to have been legally conducted, unless the contrary appears.

183. An adjourned meeting is merely a continuation of the original meeting, without any loss or accumulation of powers.

184. A court of equity has jurisdiction to supervise and control an election, and appoint a master for that purpose, when necessary to procure a fair election, and when it appears that otherwise an honest election cannot be held.

In order that the acts of a majority of the stockholders may be binding on the corporation, they must be done at a meeting of the stockholders. It is only at a meeting duly held and regularly conducted that the stockholders represent the corporation.[2] Thus, the assent of a majority of the stockholders to the appointment of an agent to execute a mortgage on behalf of the corporation, if expressed elsewhere than at a meeting, as where the assent of each is given separately, and at different times, to a person who goes to them privately, is a nullity, and a mortgage given in pursuance thereof is void.[3]

Calling Meetings

It is generally expressly provided by the charter or by-laws who shall call stockholders' meetings, and no meeting can be legally called except in compliance therewith.[4] If the charter and by-laws are silent on the subject, a meeting may be called by the directors or the general agent to whom is intrusted the management and control of its affairs, whenever, in their opinion, the condition and affairs of the corporation are such as to render a meeting necessary.[5] If all the stockholders are present at a meeting, the fact that it was called by one not authorized will not render the proceedings invalid. If the proper officers refuse to perform their duty, positively imposed by law, to call a meeting of stockholders for an election of directors, a stockholder may compel such performance by mandamus.[6]

[2] Duke v. Markham, 105 N. C. 138, 10 S. E. 1003; Peirce v. New Orleans Bldg. Co., 9 La. 397, 29 Am. Dec. 448; Sayles v. Brown (C. C.) 40 Fed. 8. But see Woodbridge v. Pratt & Whitney Co., 69 Conn. 304, 37 Atl. 688.

[3] Duke v. Markham, supra.

[4] Matthews v. Columbia Nat. Bank (C. C.) 79 Fed. 558.

[5] Stebbins v. Merritt, 10 Cush. (Mass.) 27, 33.

[6] People v. Cummings, 72 N. Y. 433.

Notice of Meeting

It is essential to the validity of a stockholders' meeting, and of the acts and votes of the majority thereat, that due notice of the day, hour, and place of the meeting shall have been given personally to each stockholder, unless the stockholders were in fact all present, in person, or by proxy, or unless the time and place of the meeting were definitely fixed by statute, or by the charter or by-laws of the company, or by usage.[7] It is not enough to give notice of the day. The notice must also specify the hour.[8] If the meeting is a stated one—that is, if the time and place of holding the same are fixed by the charter or by-laws, or by the statute or usage—no notice is required of the time and place of holding it.[9] It is immaterial in what way the time and place of a general meeting are fixed. If they have been fixed by usage, a tacit understanding of the members, or in any other way, it is enough.[10] The fact that a by-law fixes the day and place for an annual meeting does not dispense with the necessity for notice, for the stockholders are entitled to notice of the hour.[11]

If the meeting is a special one, notice must be given to each stockholder, not only of the time and place of meeting, but also of the business which will be transacted, and there will be no power to transact any other business.[12] But if the meeting is a general one —that is, for the transaction of all business within the powers of the corporation—such notice is not necessary.[13] Stated meetings are to be regarded as general ones, unless restricted by statute or by the charter or by-laws.[14]

If all the stockholders have been notified, and are present at the meeting, in person or by lawful proxy, and no objection is then made to the regularity of the notification, all objections on that

[7] Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99, and note; Wiggin v. Elder, etc., of First Free Will Baptist Church, 8 Metc. (Mass.) 301; San Buenaventura Commercial Min. & Mfg. Co. v. Vassault, 50 Cal. 534. See State ex rel. Attorney General v. Bonnell, 35 Ohio St. 10.

[8] San Buenaventura Commercial Min. & Mfg. Co. v. Vassault, 50 Cal. 534.

[9] Warner v. Mower, 11 Vt. 385; Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252, 269. And see State ex rel. Attorney General v. Bonnell, 35 Ohio St. 10, 15.

[10] Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252, 269.

[11] San Buenaventura Commercial Min. & Mfg. Co. v. Vassault, 50 Cal. 534.

[12] Warner v. Mower, 11 Vt. 385; People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440; Atlantic De Laine Co. v. Mason, 5 R. I. 463; Evans v. Boston Heating Co., 157 Mass. 37, 31 N. E. 698; Mutual Fire Ins. Co. v. Furquhar, 86 Md. 668, 39 Atl. 527.

[13] Warner v. Mower, 11 Vt. 385. See People v. Batchelor, 22 N. Y. 128, 131.

[14] Warner v. Mower, 11 Vt. 385.

ground are waived.[15] Indeed, the presence of all the stockholders would obviate the objection that there was no notice.[16] Acts of the majority at a meeting that was irregular for want of notice may be ratified by the majority at a subsequent meeting that is regular.[17] Shareholders cannot, however, though they all consent, alter the form of notice prescribed by the law under which the corporation was organized.[18] In a recent Illinois case a corporation was organized under a statute which required the holding of the annual meeting of stockholders "at such time and place as the board of directors might designate" and also the giving of personal notice to each stockholder at least fifteen days prior to the meeting. A by-law was enacted providing for the holding of the meeting in the office of the corporation on December 18th of each year. During forty-two years, the stockholders without any personal notice to them, met on said date. At one meeting, plaintiff, who was present, objected to the holding of the meeting and refused to participate. Defendant was elected a director at this meeting. The Supreme Court held that defendant was usurping the office.[19] The decision, though technical, is sound in principle.

Time and Place of Meeting

Meetings cannot be held at an unreasonable or inconvenient time or place. If a particular time or place is fixed by the charter or by-laws, or by statute, the provisions must be observed. As a corporation has no legal existence beyond the limits of the state by which it was created,[20] at common law the stockholders cannot hold a meeting, and do strictly corporate acts, outside the state. This proposition has been laid down broadly and without qualification. The leading case on this point is Miller v. Ewer.[21] In this case, under a charter granted by the state of Maine, the corporators met in the state of New York, and there organized and accepted the charter, and elected officers and directors. The directors then met in the city of New York, and authorized the president and secretary

[15] Stebbins v. Merritt, 10 Cush. (Mass.) 27, 34; In re Griffing Iron Co., 63 N. J. Law, 168, 41 Atl. 931; Columbia Nat. Bank of Tacoma v. Mathews, 85 Fed. 934, 29 C. C. A. 491; Synnott v. Cumberland Bldg. Loan Ass'n, 117 Fed. 379, 54 C. C. A. 553; Tompkins v. Sperry, Jones & Co., 96 Md. 560, 54 Atl. 254.

[16] See People v. Peck, 11 Wend. (N. Y.) 604, 611, 27 Am. Dec. 104.

[17] Richardson v. Vermont & M. R. Co., 44 Vt. 613; Jones v. Milton & R. Turnpike Co., 7 Ind. 547.

[18] PEOPLE EX REL. CARUS v. MATTHIESSEN, 269 Ill. 499, 109 N. E. 1056, Wormser Cas. Corporations, 346.

[19] PEOPLE EX REL. CARUS v. MATTHIESSEN, supra.

[20] Ante, p. 34.

[21] Miller v. Ewer, 27 Me. 509, 46 Am. Dec. 619.

to execute a mortgage on the corporate property, which was done accordingly. It was held that the action of the corporators in meeting and electing directors was a corporate act, and could not be performed outside of the state of Maine, that the directors were not legally chosen, and that the mortgage, therefore, was void. The corporators, it was said, as natural persons, have no power to bring the corporation, the artificial being, into life and active operation. "The charter confers upon them a new faculty for this purpose—a faculty which they can have only by virtue of the law which confers it. That law is inoperative beyond the bounds of the legislative power by which it is enacted. As the corporate faculty cannot accompany the natural persons beyond the bounds of the sovereignty which confers it, and they cannot possess or exercise it there, [they] can have no more power there to make the artificial being act, than other persons not named or associated as corporators. Any attempt to exercise such a faculty there is merely a usurpation of authority by persons destitute of it, and acting without any legal capacity to act in that manner. It follows that all votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter, are wholly void." [22]

It will be noticed that in this case the corporators named in the charter met and organized outside the state granting the charter. They did not meet and organize in the state, and then hold a meeting outside the state for the election of the directors. The decision, therefore, might well have been based on the ground that the corporation had not been legally organized, leaving untouched the question whether the stockholders of a corporation which has been duly and legally organized within the state may hold meetings and transact corporate business in another state. And this view has been taken in Missouri. In Ohio & M. R. Co. v. McPherson,[23] the stockholders of an Illinois corporation, which had been duly organized in that state, held meetings and transacted corporate business in Missouri; and subscribers sought to defeat an action on their subscriptions on the ground that the calls for stock assessments were made in Missouri, and the votes and proceedings of the stockholders and directors in that state were void. It was held that the

[22] And see Bellows v. Todd, 39 Iowa, 209, 217; Ormsby v. Vermont Copper Min. Co., 56 N. Y. 623; Franco-Texan Land Co. v. Laigle, 59 Tex. 339; Craig Silver Co. v. Smith, 163 Mass. 262, 39 N. E. 1116; Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189; Duke v. Taylor, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232. See, also, book review of Beale, Foreign Corp., 5 Columbia Law Rev. 255, 256.

[23] 35 Mo. 13, 86 Am. Dec. 128.

defense could not be sustained. "After the corporation had become full-fledged," it was said, "I see nothing in reason or principle why the stockholders could not as well elect directors, as the directors elect a treasurer, on the Missouri side of the line. The most that could be said, under such circumstances, is that the election was irregular. The corporation having once been put into existence, if the members of the board of directors, whether charter members, or their appointees, or those elected by the stockholders in St. Louis, accepted their office, and acted under their appointment or election, as the evidence shows was the case, they became de facto directors, and their authority to act on behalf of the corporation could not be questioned by the appellants, in this collateral suit, without showing a judgment of ouster against them in a direct proceeding by the government for that purpose." [24]

It has also been held by the supreme court of the United States that where a stockholders' meeting is held in a state other than that by which the corporation was created, and all the stockholders are present and take part, they and the corporation are estopped to question the validity of the proceedings.[25] Mr. Morawetz says that "there is no objection to a meeting held in a foreign jurisdiction, provided all the shareholders give their consent. And, in the absence of an express statutory prohibition, there appears to be no reason why the shareholders in an ordinary business corporation should not provide in their articles of association that meetings may be called at convenient places outside of the state under whose laws the company is formed." [26] In some states it is provided by statute that meetings of the stockholders shall be held within the state; [27] while in other states it is provided that meetings may be held outside the state.[28] A meeting in one of several states of the stockholders of a corporation chartered in all of those states is valid,

[24] And see Wright v. Lee, 2 S. D. 596, 51 N. W. 706, 714. In a Florida case it has been held that the first or organization meeting must be held within the state creating the corporation, but as to subsequent meetings the court expressed no opinion. Duke v. Taylor, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232.

[25] Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Heath v. Silverthorn Lead Mining & Smelting Co., 39 Wis. 146.

[26] 1 Mor. Priv. Corp. § 488.

[27] In Hodgson v. Duluth, H. & D. R. Co., 46 Minn. 454, 49 N. W. 197, it was held that a general stockholders' meeting for the election of officers held out of the state, all of the stockholders not consenting, and the by-laws providing that it shall be held at a specified place in the state, is illegal; and, as against the officers thus elected, those previously in office have the right to retain control of the affairs of the corporation. And see Ormsby v. Vermont Copper Min. Co., 56 N. Y. 623.

[28] See Beale, Foreign Corp. § 323.

in respect to the property of the corporation in all of the states, without the necessity of a repetition of the meeting in the other states.[29]

Conduct of the Meeting

Of course, the meeting must be conducted regularly and fairly, and regulations contained in the charter or by-laws must be observed.[30] But it is not every slight and immaterial irregularity that will vitiate the proceedings. Thus, the fact that the inspectors at a stockholders' meeting are not sworn, or are not sworn in the proper manner, will not invalidate an election, if no objection is interposed at the time of the election. It is enough that they are duly appointed and enter on the discharge of their duties, and are therefore inspectors de facto.[31]

It is not necessary, in the absence of some express requirement, that the clerk, moderator, inspector, or chairman chosen to preside over a stockholders' meeting shall be a stockholder or member. He acts merely as an agent of the corporation, to preside and see that the proceedings are conducted in a legal and orderly manner; and there is nothing in the nature of the office which requires him to be a member, although, from convenience, the usage is to select one of the members to perform the duty.[32] Statutory or charter requirements, however, in this respect must be observed.[33]

"Quorum" and "Majority"

By the term "quorum" is meant the number of members of a corporation, board, committee, etc., who must be present in order to take action. Generally, by statute, or by particular charters or by-laws, persons owning a majority of the shares must be present or represented at a stockholders' meeting, to constitute a quorum, and, unless there is a quorum present, no action can be taken. Less than a quorum can do no more than adjourn. A majority of the legal votes actually cast, a quorum being present, will bind the corporation.

At common law no particular number of stockholders need be present, except that there must be at least two, for one person could not hold a meeting.[34] A recent English case, however, held that,

[29] Graham v. Boston, H. & E. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196.

[30] See Sayles v. Brown (C. C.) 40 Fed. 8.

[31] In re Mohawk & H. R. Co., 19 Wend. (N. Y.) 135; In re Chenango County Mut. Ins. Co., Id. 635.

[32] Stebbins v. Merritt, 10 Cush. (Mass.) 27, 34.

[33] See People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.

[34] Sharpe v. Dawes, 41 L. J. Q. B. 104. But see Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174.

where there was only one corporate shareholder, he could legally hold a "meeting." [35] If all the stockholders have been duly notified, or if the meeting is a stated one, those who assemble, though they represent less than a majority of the shares, constitute a quorum, and may act, unless there is express provision to the contrary, and a majority of these, however few, may bind the corporation. At common law, therefore, the "majority of the stockholders," as the term is used in reference to its power to bind the corporation, does not necessarily mean persons representing a majority of the shares, or a majority of persons owning shares. It means, in the absence of a provision to the contrary, the major part of those who are present at a regular corporate meeting. "There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case a majority of those who appear may act, but in the former a majority of the definite body must be present, and then a majority of the quorum may decide. This is the general rule on the subject, and, if any corporation has a different modification of the expression of the binding will of the corporation, it arises from the special provisions of the act or charter of incorporation." [36]

At a valid stockholders' meeting, the charter and by-laws being silent on the subject, a majority of the votes cast, though but a minority of the stock represented, prevails. Those having an opportunity to vote, and not voting, are held to acquiesce in the result of the votes actually cast. Therefore, if some of the members become dissatisfied, and fail or refuse to vote, a majority of the legal votes actually cast, though less than a majority of all the votes represented at the meeting, will elect.[37]

[35] EAST v. BENNETT BROS., LIMITED [1911], 1 Ch. 163, 168, Wormser Cas. Corporations, 342.

[36] 2 Kent, Comm. 293; 1 Kyd, Corp. 401; Ex parte Willcocks, 7 Cow. (N. Y.) 402, 410, 17 Am. Dec. 525; Field v. Field, 9 Wend. (N. Y.) 394, 403; Gilchrist v. Collopy, 119 Ky. 110, 82 S. W. 1018, 26 Ky. Law Rep. 1003. Cf. Haskell v. Read, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007. In counting a quorum, shares authorized, but not issued or subscribed for, are not to be included. Castner v. Twitchell-Champlin Co., 91 Me. 524, 40 Atl. 558.

[37] Inhabitants of First Parish in Sudbury v. Stearns, 21 Pick. (Mass.) 148; State v. Chute, 34 Minn. 135, 24 N. W. 353. And see Darrin v. Hoff, 99 Md. 491, 58 Atl. 196. See, contra, Com. ex rel. Swartz v. Wickersham, 66 Pa. 134. In this case, at a convention of school directors, 112 were present. Of these, 56 voted for one candidate for superintendent, while 55 voted for another, and one refused to vote at all. It was held that the former did not have a majority of the directors present, as the director not voting was entitled to be counted as present, and was not to be considered as absent, and the legal intendment was that he voted for neither or for the minority candidate.

Disability of Individual Stockholders

If all of the stockholders are present, or have been duly notified, the meetings and proceedings are not rendered illegal by the fact that one of them is non compos mentis, or otherwise under legal disability. The law does not look into the capacity of the stockholders to transact business, but only regards the capacity of the aggregate body when duly assembled. "If it were otherwise," said Bigelow, J., "the legal incapacity of a stockholder, such as coverture, infancy, or insanity, would operate as an effectual obstacle to a valid assembly of any aggregate corporation. The law confers the attribute of individuality on the entire body constituting a corporation, and in which the individuals composing it are merged. When duly assembled, the corporation itself becomes the individual or person whose acts and proceedings the law can alone regard. If, therefore, it is legally called together, the law presumes that the individual members are competent to the transaction of business." [38]

Record and Proof of Action

In the absence of express requirement to the contrary in the charter or by-laws, the resolutions adopted at a stockholders' meeting need not be recorded in the books of the corporation. In the absence of a record of the proceedings, they may be proved by parol evidence.[39] If the record is incorrect, the stockholder's remedy is by proceedings to correct it.[40]

Cure of Irregularity by Ratification

If a stockholders' meeting is irregularly called or conducted, the irregularity may generally be waived by the stockholders. They may ratify acts of the majority which are not binding because of irregularities, and thereby render them binding.[41]

Presumption of Regularity

Every reasonable intendment is to be made in favor of the regularity of stockholders' meetings, and the burden is upon one who claims that they were invalid to show the circumstances rendering them so. In the absence of evidence to the contrary, their legality will be presumed. "The maxim of law in such cases is, 'Omnia rite acta præsumuntur.'" [42] Thus, it has been held that, in the absence of evidence to the contrary, it will be presumed that due notice

[38] Stebbins v. Merritt, 10 Cush. (Mass.) 27, 33.

[39] Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227.

[40] Dennis v. Joslin Mfg. Co., 19 R. I. 666, 36 Atl. 129, 61 Am. St. Rep. 805.

[41] Richardson v. Vermont & M. R. Co., 44 Vt. 613; Jones v. Milton & R. Turnpike Co., 7 Ind. 547.

[42] Citizens' Mut. Fire Ins. Co. v. Sortwell, 8 Allen (Mass.) 217.

was given to all the stockholders.[43] So, where the by-laws of a corporation required the meetings to be held at the counting room of the company, and it appeared from the records that a meeting was held at the dwelling house of the general agent, without stating that it was at the counting room, it was presumed that the counting room was, for the time being, at such place.[44] So, it will be presumed that a quorum of members was present, unless the contrary clearly appears.[45]

Adjourned Meetings

A corporation may transact any business at an adjourned meeting that could have been transacted at the original meeting, for it is but a continuation of the same meeting. Whether the meeting is continued without interruption for many days, or by adjournment from day to day, or from time to time, many days intervening, it must be considered the same meeting, without any loss or accumulation of powers.[46] After a meeting has been regularly convened, it can be adjourned only by the act of the meeting itself, and the act of an officer serving as chairman in declaring it adjourned is a nullity.[47]

Equity Jurisdiction

A court of equity has jurisdiction to supervise and control an election of directors, and to appoint a master for that purpose, when it appears that through fraud, violence, or other unlawful conduct on the part of a portion of the corporators, a fair and honest election cannot be held without the court's interposition.[48]

It has been held that, if an election is held illegally, a court of equity has jurisdiction to set it aside at the suit of a dissenting stockholder.[49] But, by the better opinion, some other ground for equitable relief must exist, for otherwise the remedy at law by quo warranto would be adequate. A court of equity will not primarily take jurisdiction to determine the legality of an election of directors,

[43] Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

[44] McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274.

[45] Citizens' Mut. Fire Ins. Co. v. Sortwell, 8 Allen (Mass.) 217.

[46] Warner v. Mower, 11 Vt. 385; Smith v. Law, 21 N. Y. 296. And see Schoff v. Town of Bloomfield, 8 Vt. 472; State ex rel. Ryan v. Cronan, 23 Nev. 437, 49 Pac. 41.

[47] Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312, 67 N. E. 17. But see Haskell v. Read, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007.

[48] Tunis v. Hestonville, M. & F. Pass. R. Co., 149 Pa. 70, 24 Atl. 88, 15 L. R. A. 605; Deal v. Erie Coal & Coke Co., 248 Pa. 48, 93 Atl. 829; Bartlett v. Gates (C. C.) 118 Fed. 66. Cf. Yetter v. Delaware Valley R. Co., 206 Pa. 485, 56 Atl. 57.

[49] Wright v. Central California C. W. Co., 67 Cal. 532, 8 Pac. 70. And see Stratford v. Mallory, 70 N. J. Law, 294, 58 Atl. 347.

or to remove a director who is in possession of the office. It will inquire into the regularity of the election, or the right of the person to the office, only when the question arises incidentally and collaterally in a suit of which the court has rightful jurisdiction, and when the grant of the relief depends upon its decision.[60]

SAME—VOTING

185. Unless the right is taken away by express charter or statutory provision, or by the agreement under which shares were acquired, every stockholder is entitled to vote at corporate meetings; and he cannot be deprived of the right by by-laws enacted after his shares were acquired. The following rules may be particularly mentioned:

(a) Ordinarily the holder of the legal title on the books of the corporation is entitled to vote.

(b) The pledgor of shares, if he retains the title, is entitled to vote.

(c) A trustee who holds the legal title, and not the cestui que trust, is entitled to vote.

(d) Stock held by the corporation itself cannot be voted.

(e) Shares held by two or more jointly, either in their own right, or as executors, trustees, etc., cannot be voted unless all agree upon the vote.

(f) The right may be restricted by statute, and the statute cannot be evaded by transfer of the bare legal title.

(g) Personal interest in a measure does not disqualify a stockholder from voting.

186. NUMBER OF VOTES—At common law each shareholder had only one vote, without regard to the number of shares owned by him. But now, generally by charter or statutory provision, and perhaps by custom, there is a right to one vote for each share. Sometimes, by statute, a single stockholder is restricted as to the number of votes, and he cannot evade the statute by a colorable transfer.

187. CUMULATIVE VOTING—Cumulative voting is allowed in some states by constitutional provision or by statute, but the right does not exist at common law.

[60] Perry v. Tuskaloosa Cotton Seed Oil Mill Co., 93 Ala. 364, 9 South. 217; Nathan v. Tompkins, 82 Ala. 437, 2 South. 747; Haskell v. Read, 68 Neb. 107, 93 N. W. 907, 96 N. W. 1007; post, p. 670.

188. PROXY—At common law the right to vote can only be exercised in person; but the right to vote by proxy—that is, by another under a power of attorney—is generally given by statute, or by the charter or by-laws. In regard to proxies, the following points may be particularly mentioned:

(a) A proxy can only be given by the legal owner of stock at the time the vote is cast.

(b) A proxy, though in terms irrevocable, may nevertheless be revoked, if not coupled with an interest. Some courts hold such a proxy void as against public policy.

(c) Voting trusts are to-day generally regarded as valid and lawful, provided the propriety of their purpose affirmatively appears.

Who Entitled to Vote

Every stockholder has, as incident to his ownership of stock, a right to vote at stockholders' meetings, unless he is prohibited from doing so by some express charter or statutory provision, or by the agreement under which he holds his shares.[51] This is one of the stockholder's greatest privileges, since it affords a method of protecting his investment against feeble or incompetent administration.[52] He cannot be deprived of this right by a by-law, unless such a by-law is expressly authorized in advance, or where it was enacted before he acquired his shares.[53] But there is nothing to prevent a corporation, on issuing stock, common or preferred, after its organization, from stipulating that the holders shall not have or exercise the right to vote the same.[54] It is frequently provided that to entitle a stockholder to vote the transfer must have been entered on the books within a certain number of days before the meeting.[55]

The general rule is that the holder of the legal title to shares is entitled to vote them. And, in case of a dispute as to the right to vote at a stockholders' meeting, the books of the corporation are prima facie evidence as to who possesses that right.[56] The in-

[51] Talbot J. Taylor & Co. v. Southern Pac. Co. (C. C.) 122 Fed. 147; Lord v. Equitable Life Assur. Soc. of United States, 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420, note.

[52] Lord v. Equitable Life Assur. Soc. of United States, supra.

[53] Ante, p. 574, note 54.

[54] Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496; People ex rel. Browne v. Koenig, 133 App. Div. 756, 118 N. Y. Supp. 136 (preferred stock).

[55] In re Glen Salt Co., 17 App. Div. 234, 45 N. Y. Supp. 568, affirmed 153 N. Y. 688, 48 N. E. 1104.

[56] Hoppin v. Buffum, 9 R. I. 513, 518, 11 Am. Rep. 291; Com. v. Dalzell,

spectors of election are not to inquire beyond the transfer book. Any private agreement or understanding between the individual holding the legal title to the stock in due form and others is a matter between themselves, with which the corporation has no concern.[57]

Same—Pledgor and Pledgee

A person who pledges his stock is entitled to vote upon it until the title of the pledgee to the stock is perfected.[58] And it has been held that, if the stock stands on the books of the corporation in the name of the pledgee, the pledgor may, by suit in equity, compel a transfer to him, or oblige the pledgee to give him a proxy to vote.[59] But if the pledgor acquiesces in the control of the stock by the pledgee, who appears as the record owner, and makes no effort to inform the corporation of his ownership until a contested election occurs, and then not until the votes have been, or are being, counted, it will be too late to ask a court of equity to interfere with the declared result of the election.[60] So long as the stock stands on the books of the corporation in the name of the pledgee, without any reservation to the pledgor of the right to vote the same, the pledgee is entitled to vote,[61] since, if the pledgee is thus charged with the burdens of ownership, it would seem to follow that he is entitled to the corresponding privileges.[62]

Same—Trustees, etc.

One in whose name stock stands on the books of the corporation as trustee is entitled to vote upon it, unless the cestui que trust seasonably asserts his right to have it transferred to him.[63] An

152 Pa. 217, 25 Atl. 535, 34 Am. St. Rep. 640; Pender v. Lushington, 6 Ch. Div. 70; Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119. Where stock is transferable only on the books of the corporation, the books are conclusive as to who is entitled to vote stock legally issued. Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174.

[57] In re Long Island R. Co., 19 Wend. (N. Y.) 37, 44, 32 Am. Dec. 429.

[58] McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274; President, etc., of Merchants' Bank v. Cook, 4 Pick. (Mass.) 405; In re Barker, 6 Wend. (N. Y.) 509; Ex parte Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291; Haskell v. Read, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007.

[59] Vowell v. Thompson, 3 Cranch, C. C. 428, Fed. Cas. No. 17,023; Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291.

[60] Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291.

[61] See Com. v. Dalzell, 152 Pa. 217, 25 Atl. 535, 34 Am. St. Rep. 640; J. H. Wentworth Co. v. French, 176 Mass. 442, 57 N. E. 789.

[62] Aultman's Appeal, 98 Pa. 505, 516; Com. v. Dalzell, supra.

[63] Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291; In re Barker, 6 Wend.

administrator or executor may vote on the stock of the decedent, although the stock has not been transferred to him on the books.[64]

Same—Shares Held by the Corporation

A corporation cannot hold its own stock so as to entitle its directors or trustees to vote upon it.[65] Nor can persons who hold such stock in trust for the benefit of the corporation vote thereon. The right to vote the stock is suspended while it is so held.[66] It has been held that a corporation which has purchased shares in another corporation may not vote upon them,[67] but, on principle, when the laws of the state in which a corporation is organized authorize the holding by it of stock in other corporations, a corporation holding stock in another may vote this stock to the same extent as any other stockholder could do so.[68] In many states, this result is fortified by express statutory provisions conferring upon corporate

(N. Y.) 509; Com. v. Dalzell, 152 Pa. 217, 25 Atl. 535, 34 Am. St. Rep. 640. And see Wilson v. Proprietors of Central Bridge, 9 R. I. 590; National Bank of Commerce v. Allen, 90 Fed. 545, 33 C. C. A. 169. Under Civ. Code Cal. § 307, providing that every stockholder shall have the right to vote the number of shares standing in his name, "as provided in section 312," and section 312, providing that, to entitle a person to vote, he must be "a bona fide stockholder, having stock in his own name on the stock books at least ten days prior to the election," one is not entitled to vote stock in which he has never had any interest, but which is registered in his name for the purpose of enabling the real owner to avoid statutory liabilities; he not being a bona fide stockholder. Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119. Where a railroad company deposits with a trustee, under a written agreement, stock of another railroad company, reserving to itself all the rights, powers, and privileges appertaining to the ownership of the stock, including the right to vote it, the railroad company can exact from the trustee a proxy in order to vote the stock for a merger of the railroad company, whose stock is deposited with another company, as authorized by law, though the trustee will be compelled to receive back, instead of the stock of the original company, stock in the consolidated company. Pennsylvania R. Co. v. Pennsylvania Co. for Ins., on Lives & Granting Annuities, 205 Pa. 219, 54 Atl. 783.

[64] Schmidt v. Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. Law Rep. 763, 72 Am. St. Rep. 427.

[65] Ex parte Holmes, 5 Cow. (N. Y.) 426. And see Vail v. Hamilton, 85 N. Y. 453. See article by I. Maurice Wormser, 24 Yale Law Journal, 177, 184.

[66] American Railway Frog Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377. And see State ex rel. Page v. Smith, 48 Vt. 266.

[67] Parsons v. Tacoma Smelting & Refining Co., 25 Wash. 492, 65 Pac. 765. See, also, O'Connor v. International Silver Co., 68 N. J. Eq. 67, 59 Atl. 321, affirmed on distinct grounds on appeal 68 N. J. Eq. 680, 62 Atl. 408.

[68] Rogers v. Nashville, C. & St. L. Ry. Co., 91 Fed. 299, 33 C. C. A. 517; Oelberman v. New York & N. Ry. Co., 76 Hun, 613, 77 Hun, 332, 29 N. Y. Supp. 545. And see article by I. Maurice Wormser, 2 Fordham Law Review, 21, 27.

stockholders all the rights, powers and privileges of individual stockholders.[69]

Same—Shares Owned Jointly

Since the right of voting upon stock is in the legal owner, it follows that stock held jointly by two or more persons, either in their own right, or as executors, trustees, etc., cannot be voted at all, unless all agree upon the vote.[70]

Same—Restrictions in Charter or Statute

The right to vote may be restricted by the charter or by statute. Sometimes it is expressly provided, for instance, that nonresident stockholders of particular corporations shall not be allowed to vote at meetings of the corporation. The object of such a provision is to prevent corporations from being controlled by nonresidents.[71] And often the number of votes which a single stockholder shall be allowed to cast is limited. The object is to prevent the corporation from getting into the control of a single person.[72]

Same—Evasion of Statutory or Charter Prohibition

Where, by statute or by the charter, particular stockholders are prohibited from voting, the prohibition cannot be evaded by transferring the stock to others merely for the purpose of enabling them to vote upon it. Thus, where the charter of a corporation provided that no stockholder should be entitled to cast more than one-fourth of all the votes at an election of directors, it was held that a stockholder who owned more than one-fourth of the shares could not gratuitously transfer part of the stock for the purpose of enabling the transferees to vote it, and such transferees were enjoined from voting at the suit of another stockholder.[73] So, where nonresident stockholders in banking corporations were prohibited from voting, it was held that the prohibition could not be evaded by gratuitously transferring stock to residents for the purpose of enabling them to vote upon it. "The law," it was said, "is not to be outwitted by cunning devices."[74]

[69] See Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 52; In re Buffalo, N. Y. & E. R. Co. (Sup.) 37 N. Y. Supp. 1048.

[70] Tunis v. Hestonville, M. & F. Pass. R. Co., 149 Pa. 70, 24 Atl. 88, 15 L. R. A. 665. And see Villamil v. Hirsch (C. C.) 138 Fed. 690. Cf. Schmidt v. Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. Law Rep. 763, 72 Am. St. Rep. 427.

[71] State ex rel. Danforth v. Hunton, 28 Vt. 594.

[72] Mack v. De Bardeleben Coal & Iron Co., 90 Ala. 396, 8 South. 150, 9 L. R. A. 650.

[73] Mack v. De Bardeleben Coal & Iron Co., 90 Ala. 396, 8 South. 150, 9 L. R. A. 650; Campbell v. Poultney, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559; Webb v. Ridgely, 38 Md. 364. See, also, Bartlett v. Fourton, 115 La. 26, 38 South. 882. Contra, Pender v. Lushington, L. R. 6 Ch. Div. 70.

[74] State ex rel. Danforth v. Hunton, 28 Vt. 594. See, also, Smith v. San

Same—Personal Interest of Stockholder

The fact that a stockholder has a personal interest in a matter coming before a stockholders' meeting, different from that of the other stockholders, does not disqualify him from voting. "A shareholder has a legal right, at a meeting of the shareholders, to vote upon a measure, even though he has a personal interest therein separate from other shareholders. In such a meeting each shareholder represents himself and his own interests solely, and he in no sense acts as a trustee or representative of others." [75] In Beatty v. Northwestern Transp. Co.[76] one of the directors in a corporation contracted with his colleagues to sell to the company a vessel which he owned, at a certain price. The contract, though fair, was voidable, but it was subject to ratification by the stockholders; and it was held that the vendor director had a right, at a meeting of the stockholders, to vote in favor of ratifying the contract and concluding the purchase, and that his conduct was not to be regarded as oppressive towards the minority of shareholders because he individually owned a majority of the stock.

As we have seen in a preceding section, however, if a majority of the stockholders attempt to manage the affairs of the corporation, not only in their own interest, but in violation of the charter, or in fraud of the rights of the minority, a court of equity will interfere, in a proper case, at the suit of an injured stockholder.[77]

Francisco & N. P. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119.

[75] Gamble v. Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; Beatty v. Northwest Transp. Co., 12 App. Cas. 589; Bjorngaard v. Goodhue County Bank, 49 Minn. 483, 52 N. W. 48; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; Socorro Mountain Min. Co. v. Preston, 17 Misc. Rep. 220, 40 N. Y. Supp. 1040; Rogers v. Nashville, C. & St. L. Ry. Co., 91 Fed. 299, 33 C. C. A. 517; Windmuller v. Standard Distilling & Distributing Co. (C. C.) 114 Fed. 491; Burland v. Earle [1902] App. Cas. 83; Blinn v. Riggs, 110 Ill. App. 37, affirmed Blinn v. Gillett, 208 Ill. 473, 70 N. E. 704, 100 Am. St. Rep. 234; Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889. But see Memphis & C. R. Co. v. Woods, 88 Ala. 630, 7 South. 108, 7 L. R. A. 605, 16 Am. St. Rep. 81; Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111. Owners of shares are under no disability to vote because they are also directors. United States Steel Corp. v. Hodge, 64 N. J. Eq. 807, 54 Atl. 1, 60 L. R. A. 742.

[76] 12 App. Cas. 589. A person who, though not an agent or director, by his position as a large stockholder exercised a controlling influence on the company, must show that transactions between himself and it, by which he profited, are fair. Russell v. Rock Run Fuel Gas Co., 184 Pa. 102, 39 Atl. 21. And see Crichton v. Webb Press Co., 113 La. 167, 36 South. 926, 67 L. R. A. 76, 104 Am. St. Rep. 500.

[77] Ante, p. 482.

Number of Votes

In Taylor v. Griswold,[78] it was held that at common law each stockholder of a corporation has but one vote, without regard to the number of shares owned by him, and a by-law allowing one vote for each share was held void. It is generally provided, however, by the charter of joint-stock corporations, or by statute, that stockholders shall have a vote for each share; and this is clearly the just rule, for "stockholders are interested, not equally, but in proportion to the number of shares held by them." [79] Indeed, it has been said that the custom of giving the shareholders in joint-stock corporations a vote for each share has become so well established that an intention to follow the custom may be implied, in the absence of any indication to the contrary.[80] And it has been held, contrary to the decision in Taylor v. Griswold, that a by-law giving a vote for each share is valid and binding on all the stockholders.[81] As we have seen, to prevent the corporation from getting into the control of a single person the number of votes which a single stockholder shall be allowed to cast is sometimes limited by statute, and the limitation cannot be evaded by transferring the shares to enable the transferees to vote upon them.[82]

Cumulative Voting

In some states, in order to allow the minority of the stockholders to secure representation on the board of directors, there are statutory or constitutional provisions allowing cumulative voting. Thus, it is provided in West Virginia that, in all elections for directors or managers of corporations, every stockholder shall have the right to vote for the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit.[83] The right to cumulative voting does not exist unless expressly given by statute.[84]

[78] 14 N. J. Law, 222, 27 Am. Dec. 33.

[79] 1 Cook, Stock, Stockh. & Corp. Law, § 609.

[80] 1 Mor. Priv. Corp. § 476.

[81] Com. v. Hemmingway, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

[82] Ante, p. 596.

[83] See Cross v. West Virginia Cent. & P. Ry. Co., 35 W. Va. 174, 12 S. E. 1071. And see Wright v. Central California C. W. Co., 67 Cal. 532, 8 Pac. 70; Horton v. Wilder, 48 Kan. 222, 29 Pac. 566; Weinburgh v. Union Street-Railway Advertising Co., 55 N. J. Eq. 640, 37 Atl. 1026; Boggiano v. Chicago Macaroni Mfg. Co., 99 Ill. App. 509; Pierce v. Com., 104 Pa. 150; Com. v.

[84] See Note 84 on following page.

It has been held that, where the Legislature has reserved the right to amend or repeal the charter of a corporation, it may pass an act allowing cumulative voting.[85] If no such power has been reserved, such a statute, as applied to existing corporations, would be unconstitutional, as impairing the contractual rights of the stockholders.[86]

Votes by Proxy

The right to vote by proxy must be expressly given, either by a statute or by the charter or by-laws of the corporation, or it does not exist. The common law requires all votes to be given in person.[87] It has been held that, since the common law requires this, a by-law giving the right to vote by proxy is repugnant to law, and therefore void, unless such a by-law is authorized by the charter.[88] By the weight of authority, however, a corporation has the implied power to enact such a by-law.[89] To authorize a vote by proxy, the case must be brought within the terms of the statute, charter, or by-law. Thus, where an act of incorporation provided that each stockholder personally present should be allowed to vote on the stock standing in his name, and that each stockholder, "being a citizen of the United States," might vote by proxy, it was held that an alien stockholder could not vote by proxy.[90]

Flannery, 203 Pa. 28, 52 Atl. 129. Where the right is given, it is no objection to the validity of an election that the stockholders did not vote cumulatively; it not appearing that any stockholder claimed the right. Schmidt v. Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. Law Rep. 763, 72 Am. St. Rep. 427.

[84] State v. Stockley, 45 Ohio St. 304, 13 N. E. 279. In this case it was held that a statute providing that the directors of corporations "shall be chosen by ballot, by the stockholders who attend for that purpose, either in person, or by lawful proxies; each share shall entitle the owner to as many votes as there are directors to be elected, and a plurality of votes shall be necessary for a choice"—did not give the right of cumulative voting. Cf. Schwartz v. State ex rel. Schwartz, 61 Ohio St. 497, 56 N. E. 201.

[85] Cross v. West Virginia Cent. & P. Ry. Co., 35 W. Va. 174, 12 S. E. 1071; Attorney General ex rel. Dusenbury v. Looker, 111 Mich. 498, 69 N. W. 929, 56 L. R. A. 947; Looker v. Maynard ex rel. Dusenbury, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79; ante, p. 276.

[86] Ante, pp. 259, 565; State ex rel. Haeussler v. Greer, 78 Mo. 188.

[87] Taylor v. Griswold, 14 N. J. Law, 222, 27 Am. Dec. 33; Com. ex rel. Verree v. Bringhurst, 103 Pa. 134, 49 Am. Rep. 119; Philips v. Wickham, 1 Paige (N. Y.) 590; People v. Twaddell, 18 Hun (N. Y.) 427; McKee v. Home Savings & Trust Co., 122 Iowa, 731, 98 N. W. 609. See article by S. Williston, 2 Harv. Law Rev. at page 158.

[88] Taylor v. Griswold, supra.

[89] Com. v. Detwiller, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360; State ex rel. Kilbourn v. Tudor, 5 Day (Conn.) 329, 5 Am. Dec. 162; People ex rel. Chritzman v. Crossley, 69 Ill. 195; Walker v. Johnson, 17 App. D. C. 144.

[90] In re Barker, 6 Wend. (N. Y.) 509.

A proxy to vote stock can only be given by the legal owner of the stock at the time the vote is to be cast. "The right of voting stock is inseparable from the right of ownership. The one follows as a sequence from the other, and the right to vote cannot be separated from the ownership without the consent of the legal owner." [91] It follows that a proxy is revoked by a sale of the stock,[92] and where the owner of stock dies a proxy to vote thereon can only be given by his executors. It cannot be given by the will; nor can a provision in the will that the executors shall give a proxy to a certain person entitle such person to vote the stock, if the executors refuse to give the proxy, for on the death of the owner of stock his ownership ceases, and the executors become the owners.[93] It may even be doubted whether one who holds stock in a representative capacity—e. g., as trustee—may give a proxy at all.

A power of attorney or proxy to vote stock, though in terms irrevocable, may nevertheless be revoked at any time before the vote, if it is not coupled with an interest.[94]

A proxy or power of attorney to vote stock must, of course, be sufficient to show the inspectors that the agent is acting by the authority of the principal, but no peculiar formality is required. It is sufficient if it appears on its face to confer the requisite authority, and is free from all reasonable grounds of suspicion of its genuineness and authenticity.[95]

Voting Trusts and Pooling Agreements

How far it is possible to tie up a majority of the stock of a corporation by a surrender on the part of stockholders of the voting power, so that the control may be secured for the support of a continuous policy of management, is a question on which the authorities are not in agreement. Such a result has been sought to be attained in various ways, sometimes by an agreement between stockholders to vote together, sometimes by an agreement by which proxies are given to trustees with power to vote as they may be directed or may determine, sometimes by an agreement by which the stock is transferred to trustees with power to vote.[96] A voting

[91] Tunis v. Hestonville, M. & F. Pass. R. Co., 149 Pa. 70, 24 Atl. 88, 15 L. R. A. 665.

[92] Ryan v. Seaboard & R. R. Co. (C. C.) 89 Fed. 397.

[93] Id.

[94] Woodruff v. Dubuque & S. C. R. Co. (C. C.) 30 Fed. 91; Schmidt v. Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. Law Rep. 763, 72 Am. St. Rep. 427; Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

[95] In re Election of Directors of St. Lawrence Steamboat Co., 44 N. J. Law, 529.

[96] For a full discussion, see Cook, Corp. § 622 et seq.; 10 Cyc. 341 et seq.; Cushing, Voting Trusts.

trust might be defined as an arrangement whereby the stockholders, or a portion of them, transfer their shares of stock to trustees, who thereby acquire the right to vote said stock, and in return trust certificates are given to the shareholders, these certificates being transferable, like stock certificates are, subject, however, to the trust agreement.[97] Some courts have held or declared broadly that the power to vote is inseparable from the beneficial ownership of the stock, and that all such agreements or devices by which the stockholders combine to place the voting power of their shares in others are illegal, upon the ground that each stockholder is entitled to the free exercise of the judgment of the other stockholders and that each must be free to cast his vote for what he deems the best interest of the corporation.[98] Other courts have sustained such agreements in one form or another.[99]

On sound principle, the voting trust should be upheld, provided the propriety and legality of its object plainly and affirmatively appear. Where the trust is created, however, to consummate an illegal, monopolistic, or unfair purpose it should be condemned. Many apparently conflicting decisions are reconcilable when the

[97] See Cushing, Voting Trusts, pp. 20, 36, et seq.; note, 29 Harv. Law Rev. 433, 434.

[98] Harvey v. Linville Imp. Co., 118 N. C. 693, 24 S. E. 489, 32 L. R. A. 265, 54 Am. St. Rep. 749; Bridgers v. First Nat. Bank, 152 N. C. 293, 67 S. E. 770, 31 L. R. A. (N. S.) 1199; White v. Thomas Inflatable Tire Co., 52 N. J. Eq. 178, 28 Atl. 75; LUTHY v. REAM, 270 Ill. 170, 110 N. E. 373, Wormser Cas. Corporations, 350. See, also, Griffith v. Jewett, 15 Wkly. Law Bul. (Ohio) 419; Moses v. Scott, 84 Ala. 608, 4 South. 742; Gage v. Fisher, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557; Kreissl v. Distilling Co. of North America, 61 N. J. Eq. 5, 47 Atl. 471; Warren v. Pim, 66 N. J. Eq. 353, 59 Atl. 773; Bostwick v. Chapman (Shepaug Voting Trust Cases), 60 Conn. 553, 24 Atl. 32. In Shepaug Voting Trust Cases, supra, a syndicate owning a majority of the stock of a railroad company had the title put in a trust company to vote for five years according to the direction of a committee, who had no title to the stock. The agreement secured a secret personal advantage to the members of the syndicate, and was illegal on that ground. In Fisher v. Bush, 35 Hun (N. Y.) 641, it was held that an agreement among stockholders not to give proxies was contrary to public policy. And see notes, 1 Columbia Law Rev. 56, 3 Columbia Law Rev. 482; article, 10 Harv. Law Rev. 428; note, 29 Harv. Law Rev. 433, 434.

[99] Mobile & O. R. Co. v. Nicholas, 98 Ala. 92, 12 South. 723; Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119; BRIGHTMAN v. BATES, 175 Mass. 105, 55 N. E. 809, Wormser Cas. Corporations, 355; Greene v. Nash, 85 Me. 148, 26 Atl. 1114; Boyer v. Nesbitt, 227 Pa. 398, 76 Atl. 103, 136 Am. St. Rep. 890; Thompson-Starrett Co. v. E. B. Ellis Granite Co., 86 Vt. 282, 84 Atl. 1017. And see Chapman v. Bates, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459; Cf. Warren v. Pim, supra. In New York the subject of voting trust agreements is governed by statute. General Corporation Law N. Y. (Consol. Laws, c. 23) § 25. So, also, in Maryland. Laws Md. 1908, c. 240.

purposes of the trust in each case are scrutinized. The voting trust is frequently of much service, especially in the reorganization of corporations, and to lay down as a general rule that, irrespective of their purpose, voting trusts are void per se as opposed to sound public policy, is to adopt an unprogressive point of view. As has been seen, several jurisdictions, however, do so hold, including Illinois.

It is to-day generally held that stockholders may lawfully combine to control for proper purposes the management of the corporation, and that an agreement to vote as a unit for such policy as the majority of them may determine is not illegal, but that such agreement is revocable.[1] Thus where several purchasers of stock agreed that they would for five years retain the power to vote in one body, the vote to be determined by ballot between them, the agreement was sustained, and it was further held to be binding and irrevocable.[2] But a contract in regard to elections, which provides that a lucrative position shall be given to a party to the contract, is illegal,[3] for the purpose is an improper one.[4]

A contract between stockholders, whereby they give proxies to trustees with power to vote as they shall determine, without transfer of the shares, is not illegal; but the proxies, although irrevocable in terms, are nevertheless sometimes held to be revocable.[5] In Illinois it has thus recently been decided that the holder of a voting trust certificate must be allowed to revoke the agreement at any time.[6] It has been held, however, in Alabama, that where, in

[1] Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24. And see Havemeyer v. Havemeyer, 43 N. Y. Super. Ct. 506, 45 N. Y. Super. Ct. 464, affirmed 86 N. Y. 618; Beitman v. Steiner, 98 Ala. 241, 13 South. 87; Sullivan v. Parkes, 69 App. Div. 221, 74 N. Y. Supp. 787.

[2] Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119. And see BRIGHTMAN v. BATES, 175 Mass. 105, 55 N. E. 809, Wormser Cas. Corporations, 355; Boyer v. Nesbitt, 227 Pa. 398, 76 Atl. 103, 136 Am. St. Rep. 890. In these cases, also, the agreement was regarded as irrevocable.

[3] Guernsey v. Cook, 120 Mass. 501; West v. Camden, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254; Gage v. Fisher, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557; Snow v. Church, 13 App. Div. 108, 42 N. Y. Supp. 1072; Withers v. Edmonds, 26 Tex. Civ. App. 189, 62 S. W. 795.

[4] And see, Moses v. Scott, 84 Ala. 608, 4 South. 742; Venner v. Chicago City R. Co., 258 Ill. 523, 101 N. E. 949.

[5] Brown v. Pacific Mail S. S. Co., 5 Blatchf. 525, Fed. Cas. No. 2,025. And see Vanderbilt v. Bennett, 6 Pa. Co. Ct. R. 193; Woodruff v. Dubuque & S. C. R. Co. (C. C.) 30 Fed. 91; Clowes v. Miller, 60 N. J. Eq. 179, 47 Atl. 345. Such an agreement was held unlawful in Bostwick v. Chapman (Shepaug Voting Trust Cases), supra.

[6] LUTHY v. REAM, 270 Ill. 170, 110 N. E. 373, Wormser Cas. Corporations, 350. Cf. Venner v. Chicago City R. Co., 258 Ill. 523, 101 N. E. 949.

order to prevent foreclosure of a railroad, the creditors and stockholders entered into an agreement by which the claims of the creditors were transferred to trustees, in whom, by irrevocable power of attorney, the right to vote the stock was vested until the debts should be paid, the power was not subject to revocation.[7]

On principle, the trust, if for proper purposes, should not be regarded as revocable, since it is not a mere "dry trust," but is an active one, because of the duty of the trustees to vote and the interest of the stockholders in the agreement.

In Massachusetts, accordingly, a contract between stockholders whereby they transfer their stock to trustees and invest them with power to vote upon it on such terms as they may determine has been declared to be legal, and it was said that if the trust was an active one it could not be terminated at will, and it was held that the trustees' duty of voting incident to the legal title made the trust an active one.[8] In view of the necessity of a consistent policy

[7] Mobile & O. R. Co. v. Nicholas, 98 Ala. 92, 12 South. 723. The court said: "We have examined case after case, and find generally that the agreements declared void by the courts, where the power to vote was separated from the stockholder and vested in third persons, were under circumstances which showed that the purpose to be accomplished was unlawful, such as the courts would not sanction if the principal had voted, and not a proxy; and, in case of a mere dry trust, it is held that the stockholder might revoke a power of attorney in form irrevocable. The doctrine as to dry trust does not arise in this case. * * * If there were no precedents, upon principle, we would hold that, in determining the validity of an agreement which provides for the vesting of the voting power in a person other than the stockholder, regard should be had to the condition of the parties, the purpose to be accomplished, the consideration of the undertaking, interests which have been surrendered, rights acquired, and the consequences to result. The law does not make contracts for parties. Neither will it annul them, except to preserve its own majesty, and to conserve the greater interest of the public." See, also, Warren v. Pim, 66 N. J. Eq. 353, 410, 59 Atl. 773, 794, dissenting opinion by Swayze, J.

[8] BRIGHTMAN v. BATES, 175 Mass. 105, 55 N. E. 809, Wormser Cas. Corporations, 355. In this case it was held that an agreement to form a syndicate to gain control of a company and advantage to the members, the members subscribing for a certain number of shares of stock at a stated price, and agreeing, after the purchase of the stock, to enter into a pooling contract, whereby all syndicate stock shall be voted by a committee of five of the subscribers "at each annual meeting for a period of not less than three years for such board of directors as shall be named," with power reserved to fill vacancies on the committee, is not illegal as an attempt on the part of the stockholders to deprive themselves of their deliberate powers and duties as stockholders; it being possible that the committee contemplated should act as trustees for the stockholders, and it not appearing that the "gain and advantage" mentioned was to be at the expense of the corporation, or intended to work a wrong to the other stockholders. Holmes, C. J., said: "Supposing that the committee had been trustees, what would the syndicate agreement have amounted to then? Merely an agreement by each of the trustees to vote as

and a stable management for large corporations, especially where money must be provided for a reorganization, it is difficult to see why a voting trust, if formed in good faith and for the promotion of the interests of the corporation, should be regarded as opposed to public policy, and in some jurisdictions they now have positive statutory sanction.[9] In several decisions, however, they have been condemned upon this ground.[10]

they should jointly agree to vote, and an agreement by the subscribers not to demand back their shares for three years. The latter term certainly is not illegal, whether valid or not. A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one, he cannot terminate it at will; and the attempt to cut himself off by contract, instead of by the imposition of duties, from ending it, certainly is not enough to poison the covenant with the plaintiff. * * * It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases. As to the arrangement for the trustees uniting to elect their candidates, the decisions of other states show that such arrangements have been upheld, and we do not think that it needs argument to prove that they are lawful. If stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together." See, also, Chapman v. Bates, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459; Boyer v. Nesbitt, 227 Pa. 398, 404, 76 Atl. 103, 105. But see Warren v. Pim, 66 N. J. Eq. 353, 59 Atl. 773; LUTHY v. REAM, 270 Ill. 170, 110 N. E. 373, Wormser Cas. Corporations, 350.

[9] In New York voting trusts are authorized, subject to restrictions by statute. General Corporation Law (Consol. Laws, c. 23) § 25. And see Laws Md. 1908, c. 240.

[10] Harvey v. Linville Imp. Co., supra; Bostwick v. Chapman (Shepaug Voting Trust Cases), supra; LUTHY v. REAM, 270 Ill. 170, 110 N. E. 373, Wormser Cas. Corporations, 350. And see Warren v. Pim, supra, in which seven members of the court held the voting trust to be contrary to public policy, and six dissented. Swayze, J., dissenting, however, said: "If the only object to the voting trust is to secure permanency of management, with a view to what the stockholders honestly consider to be the best interests of the corporation, I see no objection to the adoption of any necessary means authorized by the statute to secure that end. When it is said that the stockholder of a corporation is entitled to the benefit of the judgment of every other stockholder in the management of the affairs of the corporation, it cannot be meant that he is entitled to hamper in any way the free and honest exercise of his fellow stockholders' judgment. He may on each occasion act as he chooses, and, as Chief Justice Holmes intimated in BRIGHTMAN v. BATES, 175 Mass. 105, 55 N. E. 810, Wormser Cas. Corporations, 355, the question is whether it is unlawful to contract to do what it is perfectly lawful to do. The legality of the purpose must depend upon the good faith of the stockholder, and upon whether his purpose is the general welfare of the corporation. If it is, I cannot believe that purpose is made illegal merely because he may think that the general welfare of the corporation will be promoted by securing permanency of management for a long series of years. The fact that the voting power is surrendered for a long series of years may be an important, or even a controlling, fact in determining the question of good faith of the stockholder. A case may readily be conceived where such action would indicate bad faith,

Effect of Illegal Reception or Rejection of Votes

When illegal votes are offered, objection must be raised at the time. If they are not challenged, their receipt will afford no ground for setting the election aside.[11]

Before a stockholder can complain that his vote was not taken at a stockholders' meeting, he must show that he offered to vote, or that he properly presented his claim of right to vote, and that it was excluded.[12] If the charter and by-laws prescribe no different rule, and the meeting appoints no tellers or inspectors for the purpose, it is for the meeting to determine, in the first instance, the right to vote. The president of the corporation or chairman of the meeting has no right to pass upon it. And one who, upon an adverse opinion expressed by that officer, refrains from offering his vote, and does not present his claim of right to the meeting for it to pass upon, cannot be heard afterwards to complain.[13]

It is not a valid objection to an election that illegal votes were received, or legal votes rejected, unless the majority is thereby changed.[14] And, to set aside an election on such a ground, it must be made to appear affirmatively that the majority is changed. Such a result will not be presumed.[15]

Where votes rejected by inspectors at an election of directors, which, if received, would have elected certain candidates, are adjudged to have been erroneously rejected, the only remedy is to set

and a desire to secure an advantage of a fellow stockholder, rather than the good of the corporation. But can it be contended that, if a corporation finds it necessary to borrow money upon bonds issued for a long term of years, the stockholders cannot, consistently with public policy, in order to secure the loan, vest the management of the corporation in hands satisfactory to the lenders and for a term commensurate with the loan? Nor do I think that it can be said to be contrary to public policy for stockholders to combine for a long term of years, because such a combination may enable a minority to control the corporation. Practically the only way in which holders of small amounts of stock can protect themselves at all is by means of a combination by which they act together. If this is not permitted to them, large stockholders, even though they may not hold a majority of the stock, will possess a great advantage in the management of the corporate affairs, and I cannot see how public policy is violated by allowing small stockholders to make their union effective by making it endure for more than three years."

[11] In re Chenango County Mut. Ins. Co., 19 Wend. (N. Y.) 635.

[12] State v. Chute, 34 Minn. 135, 24 N. W. 353.

[13] Id.

[14] See Trustees of School Dist. No. 3 v. Gibbs, 2 Cush. (Mass.) 39, 45; Inhabitants of First Parish in Sudbury v. Stearns, 21 Pick. (Mass.) 148; Wardens of Christ Church v. Pope, 8 Gray (Mass.) 140; Ex parte Murphy, 7 Cow. (N. Y.) 153; In re Chenango County Mut. Ins. Co., 19 Wend. (N. Y.) 635; In re Argus Co., 138 N. Y. 557, 34 N. E. 388, 391.

[15] Ex parte Murphy, 7 Cow. (N. Y.) 153.

aside the election. The court has no power to declare those candidates elected for whom the votes would have been cast if they had been received.[16] But the court may vacate the seats of directors elected by illegal votes, and declare those elected who received a majority of the legal votes.[17]

ELECTION AND APPOINTMENT OF OFFICERS AND AGENTS

189. Every private corporation has the inherent power to appoint officers and agents to supervise and manage its affairs. Ordinarily corporate affairs are conducted by a board of directors elected by the stockholders. The board of directors in turn ordinarily elects the corporate officers.

190. No particular formalities are necessary in the appointment of officers and agents, except such as may be prescribed by the charter or by-laws.

A corporation, being impersonal, can only transact its business and make contracts through the intervention of agents. Generally, the charter of a modern corporation provides what officers and agents shall manage the affairs of the company. Usually, the management is vested in a board of directors, trustees, or managers, who are to be elected periodically by the stockholders. If the charter is silent on the subject, the stockholders may nevertheless elect directors, and invest them with the supervision and management of the corporate affairs, for the power to appoint agents is inherent in all private corporations.[18] A person, in becoming a member of a private corporation, impliedly consents that it shall be represented by such officers and agents as are reasonably necessary for the transaction of its business, and that they shall possess such powers and perform such duties as are ordinarily possessed and performed by such officers and agents.[19]

In the appointment of officers and agents of a corporation, no particular formalities are necessary, except in so far as they may be

[16] In re Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; People v. Phillips, 1 Denio (N. Y.) 388, 396; Grommes v. Sullivan, 81 Fed. 45, 26 C. C. A. 320, 43 L. R. A. 419.

[17] Ex parte Desdoity, 1 Wend. (N. Y.) 98. A stockholder may obtain an injunction to restrain persons illegally elected directors from acting. Reynolds v. Bridenthal, 57 Neb. 280, 77 N. W. 658.

[18] Ang. & A. Corp. § 231; Hurlbut v. Marshall, 62 Wis. 590, 22 N. W. 852, 855.

[19] Protection Life Ins. Co. of Chicago v. Foote, 79 Ill. 361.

prescribed by the charter or by-laws. A seal is not necessary unless it is so required.[20] Nor is a formal vote necessary. "Where one has the actual charge and management of the general business of a corporation, with the knowledge of the members and directors, this is evidence of his authority, without showing any vote or other corporate act constituting him the agent of the corporation."[21] Usually a board of directors is elected by the stockholders, and the directors appoint other officers and agents.[22] Like a natural person, as we shall see, a corporation may become liable for the acts of a person as its agent by allowing him to appear as having authority to act for it.[23] And it may ratify and render binding acts done without previous authority.[24]

QUALIFICATIONS OF DIRECTORS OR OTHER OFFICERS

191. No particular qualification is necessary for directors or other officers, unless required by statute, or by the charter or by-laws; but they are generally so expressly required to be stockholders.

Unless required by statute, or by the charter or by-laws of the corporation, a person, to be a director or other officer, need have no particular qualifications. He is generally required to be a stockholder, and, even in the absence of any such requirement, directors are usually chosen by the stockholders from their own number; but there is no rule of law that makes the ownership of stock an indispensable qualification of a director, where there is no such express requirement.[25] Where a director is required to be a stock-

[20] Bank of Columbia v. Patterson's Adm'r, 7 Cranch, 299, 3 L. Ed. 351; 1 Mor. Priv. Corp. § 504; ante, p. 195.

[21] Goodwin v. Union Screw Co., 34 N. H. 378. And see Sherman Center Town Co. v. Swigart, 43 Kan. 292, 23 Pac. 569, 19 Am. St. Rep. 137; Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669, 110 Am. St. Rep. 207; Cunningham v. German Ins. Bank, 101 Fed. 977, 41 C. C. A. 609.

[22] Post, p. 611.

[23] Post, p. 624.

[24] Post, p. 626.

[25] Wight v. Springfield & N. L. R. Co., 117 Mass. 226, 19 Am. Rep. 412; Bristol Bank & Trust Co. v. Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228. Contra, dictum in Penobscot R. Co. v. Dummer, 40 Me. 172, 63 Am. Dec. 654. And see People ex rel. v. Lihme, 269 Ill. 351, 109 N. E. 1051. Where statute so requires, on sale of his stock a director ceases to be director. Ondin & Bergman Fire Clay Min. & Mfg. Co. v. Conlan, 34 Wash. 216, 75 Pac. 798. As the law now stands in New York, directors need not be stock-

holder, it has been held sufficient if he holds stock and appears as owner on the books of the corporation, though the share may have been transferred to him merely for the purpose of qualifying him;[26] but this is doubtful, for such a requirement seems clearly to contemplate beneficial ownership of stock by directors.[27] The legislative policy, where there is this requirement, would seem to be to commit the management of corporations to those only who have a personal pecuniary interest in the conduct of the corporate business.[28] Thus, where the by-laws of a corporation require a director to be "the holder or owner of at least one share" of its stock, and it appeared that stock had been transferred prior to an election for the sole purpose of qualifying the transferees as directors, but that these shares had been immediately assigned back to the true owner in blank, their election to the office of director is invalid.[29]

In the absence of express prohibition, a nonresident may be a director; and where directors are required to be stockholders, and nonresidents are not prohibited from owning stock, a nonresident stockholder may be a director.[30] But in some states the directors, or at least a certain number of them, are expressly required to be residents of the state.[31]

In the absence of express provision to the contrary, a director may at the same time hold some other office, as cashier, treasurer, president, etc.[32]

Persons dealing with a corporation are not bound to inquire into the qualifications of those whom the corporation holds out as its

holders if the organizers or stockholders of a stock corporation so provide, either in its certificate of incorporation or its by-laws. Matter of Ringler & Co., 204 N. Y. 30, 36, 97 N. E. 593, Ann. Cas. 1913C, 1036.

[26] State ex rel. Rankin v. Leete, 16 Nev. 242; In re Argus Printing Co., 1 N. D. 435, 48 N. W. 347, 12 L. R. A. 781, 26 Am. St. Rep. 639. One who holds stock as executor may be a director. Schmidt v. Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. Law Rep. 763, 72 Am. St. Rep. 427.

[27] In Re Elias, 17 Misc. Rep. 718, 40 N. Y. Supp. 910, it was held that the New York law providing that "the directors of every stock corporation shall be chosen from the stockholders," and that, "if a director shall cease to be a stockholder, his office shall become vacant," requires the beneficial ownership of stock, as well as the legal title, and that a mere trustee of stock is not eligible for the office of director. And see Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644.

[28] Matter of Ringler & Co., 204 N. Y. 30, 97 N. E. 593, Ann. Cas. 1913C, 1036: Sinclair v. Fuller, 158 N. Y. 607, 53 N. E. 510; Matter of Hassam Paving Co. of New York, 152 App. Div. 610, 137 N. Y. Supp. 453.

[29] Matter of Ringler & Co., supra.

[30] Com. v. Detwiller, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

[31] See Horton v. Wilder, 48 Kan. 222, 29 Pac. 566.

[32] Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

directors. If a corporation elects a person or director who is ineligible to the office, under the by-laws, and permits him to act as such, it will be bound by his acts as director.[33]

POWERS OF DIRECTORS

192. Where the general management of a corporation is intrusted to a board of directors or other officers, they have the power to bind the corporation by any act or contract within the powers conferred upon it, except that they cannot effect any great and radical change in the organization of the body, without the assent of the stockholders, unless the power is expressly conferred. The corporate powers conferred upon the board of directors usually refer to the ordinary business transactions of the corporation. The board of directors may delegate an authority to an executive committee, or to one of their own number, or to third persons, to do acts for the company. And they may ratify acts done without such previous authority. They cannot, however, delegate the exercise of a discretion vested in them.

Where the directors are given the management and control of the corporation, and there are no express limitations on their power, they are competent to make any contract which may be necessary or fit and proper to enable the corporation to accomplish the purposes of its creation. The expediency of making such a contract is committed absolutely to their judgment, and so long as they keep within the power conferred upon the corporation, and act in good faith, with honest motives and for honest ends, their contracts are valid, and conclude the corporation and the stockholders.[34] Being invested with the general management of the business of the company, the management and transaction of all ordinary business within the powers of the corporation, and the general affairs of the corporation, devolve upon them.[35] Thus, they may make or authorize a valid assignment of the corporate prop-

[33] Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

[34] Park v. Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162; Automatic Syndicate Co., Limited, v. Cunninghame, L. R. [1906] 2 Ch. Div. 34.

[35] See Eastern R. Co. v. Boston & M. R., 111 Mass. 125, 15 Am. Rep. 13; Commercial Nat. Bank v. Weinhard, 192 U. S. 243, 24 Sup. Ct. 253, 48 L. Ed. 425.

erty for the benefit of creditors, where it is in failing circumstances,[36] even against the expressed will of the stockholders.[37] And they may borrow money, when necessary, and mortgage or convey real estate or personal property of the corporation to pay or secure its debts.[38] And they may assign over securities belonging to the company,[39] or compromise a claim or action pending against it.[40] And they may accept an amendment of the charter authorizing the corporation to take property under the power of eminent domain.[41]

As we have seen in a previous section, when the charter of a corporation invests a board of directors or trustees with the power to manage its concerns the power is exclusive, and they alone can act. The stockholders cannot act, nor can they interfere with the directors in their management, or control them otherwise than by electing new directors.[42]

It must not be supposed that the powers of the directors are unlimited. They are only invested with the power to manage the usual and ordinary business affairs of the corporation, and here their authority ends. They have no power to effect any radical change in the organization of the corporate body without the consent of the stockholders. Thus, where the charter of a corporation empowers it to increase its capital stock, but does not provide by whom the power is to be exercised, it cannot be exercised by the board of directors without the assent of the stockhold-

[36] Wright v. Lee, 2 S. D. 596, 51 N. W. 706, 714; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Tripp v. Northwestern Nat. Bank, 41 Minn. 400, 43 N. W. 60; Chamberlain v. Bromberg, 83 Ala. 576, 3 South. 434; Chase v. Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64; Vanderpoel v. Gorman, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. Rep. 601; Rogers v. Pell, 154 N. Y. 518, 49 N. E. 75; Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; Hutchinson v. Green, 91 Mo. 367, 1 S. W. 853; Calumet Paper Co. v. Haskell Show Printing Co., 144 Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425; Boynton v. Roe, 114 Mich. 401, 72 N. W. 257; Goetz v. Knie, 103 Wis. 366, 79 N. W. 401.

[37] Hutchinson v. Green, supra.

[38] Burrill v. President, etc., of Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316. They may not pledge the future earnings. Brown v. Bradford, 103 Iowa, 378, 72 N. W. 648. In New York the statute requires the consent of two-thirds of the stockholders to any mortgage, except a purchase-money mortgage. Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 6.

[39] President, etc., of Northampton Bank v. Pepoon, 11 Mass. 288.

[40] Donohoe v. Mariposa Land & Min. Co., 66 Cal. 317, 5 Pac. 495; Chambers v. Chambers & McKee Glass Co., 185 Pa. 105, 39 Atl. 822; Stoehlke v. Hahn, 158 Ill. 79, 42 N. E. 150.

[41] Eastern R. Co. v. Boston & M. R., 111 Mass. 125, 15 Am. Rep. 13; ante, p. 55.

[42] Ante, p. 564.

ers.[43] Nor, on the same principle, can the board of directors wind up the affairs of the company, and dispose of all its property,[44] unless it is insolvent, in which case, as we have seen, they may make an assignment for the benefit of creditors.[45]

The directors can lawfully do no act that is not within the powers conferred upon the corporation by its charter. If they attempt to do so, and, for any reason relief cannot be obtained through the corporation, a stockholder may maintain a suit to enjoin them.[46]

Unauthorized acts or contracts done or entered into by the directors may be ratified by the stockholders, if within the powers of the corporation, and ratification will be implied if they delay for an unreasonable time to take steps to set the transaction aside.[47]

Directors de Facto

Directors de facto, holding office under color of an election, and having charge of the affairs of a corporation, are capable of binding the corporation in all matters legitimately devolving upon directors; and the fact that their election was void and is set aside, and they are removed from office, cannot affect the validity and binding effect of their acts while in office.[48]

Appointment of Agents—Ratification

The board of directors, having general superintendence and active management of the affairs of a corporation, constitute the corporation, to all purposes of dealing with others on its behalf, and do not exercise a delegated authority, in the sense of the maxim, "Delegatus non potest delegare," like agents and attorneys who exercise the powers especially conferred upon them, and no others. Therefore a board of directors may delegate an authority to a com-

[43] Com. ex rel. Claghorn v. Cullen, 13 Pa. 133, 53 Am. Dec. 450; Chicago City R. Co. v. Allerton, 18 Wall. 233, 21 L. Ed. 902; Clark v. Brown (Tex. Civ. App.) 108 S. W. 421, 437; Macon Gas Co. v. Richter, 143 Ga. 397, 85 S. E. 112; ante, p. 443.

[44] 1 Mor. Priv. Corp. § 513; Consolidated Water Power Co. v. Nash, 109 Wis. 490, 85 N. W. 485; Forrester v. Butte & M. Consol. Copper & Silver Min. Co., 21 Mont. 544, 55 Pac. 229, 353.

[45] Ante, p. 609.

[46] Ante, p. 482.

[47] State ex rel. Page v. Smith, 48 Vt. 266; Steger v. Davis, 8 Tex. Civ. App. 23, 27 S. W. 1068; Aurora Agricultural & Horticultural Soc. v. Paddock, 80 Ill. 263; Reichwald v. Commercial Hotel Co., 106 Ill. 439; post, p. 626.

[48] Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. Ed. 707. And see Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594; Collier v. Consolidated Ry., Lighting & Refrigerating Co., 70 N. J. Law, 313, 57 Atl. 417; In re Ringler & Co., 204 N. Y. 30, 97 N. E. 593, Ann. Cas. 1913C, 1036. But see Schwab v. Frisco Min. & Mill. Co., 21 Utah, 258, 60 Pac. 940.

mittee, or to one of their own number, or to some other officer, or to outsiders, if they choose, to do acts for the company.[49] Thus, they may authorize a committee of their own number to alienate or mortgage real estate; and such authority necessarily implies an authority to execute suitable and proper instruments for that purpose, and to affix the corporate seal to an instrument requiring it.[50] So they may invest an executive committee of their number to conduct the corporate business during the intervals between board meetings.[51] And the board may authorize one of their number, or some other officer, to assign over any securities belonging to the company which it has the power to assign,[52] or to execute notes for money loaned to the company.[53]

But the board cannot delegate to an agent the power to exercise the discretion conferred upon them by the charter. Thus, the power, at discretion, to sell or purchase real property, cannot be delegated, but the board themselves must determine whether to purchase or sell. They can delegate to an agent the power to purchase or sell, after they have determined to do so, but they cannot delegate the power to determine whether the purchase or sale shall be made.[54]

The board may ratify and render valid an act done without previous authority, in any case where they could have authorized it; and they may do so impliedly as well as expressly, as by recognizing the act as binding and acting upon it.[55]

[49] Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135; Sheridan Electric Light Co. v. Chatham Nat. Bank, 127 N. Y. 517, 28 N. E. 467.

[50] Burrill v. President, etc., of Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395.

[51] Sheridan Electric Light Co. v. Chatham Nat. Bank, supra.

[52] President, etc., of Northampton Bank v. Pepoon, 11 Mass. 288. See, also, Sheridan Electric Light Co. v. Chatham Nat. Bank, 127 N. Y. 517, 28 N. E. 467.

[53] Leavitt v. Oxford & Geneva S. M. Co., 3 Utah, 265, 1 Pac. 356.

[54] Bliss v. Kaweah, C. & I. Co., 65 Cal. 502, 4 Pac. 507. See, also, Weidenfeld v. Sugar Run R. Co. (C. C.) 48 Fed. 615; Canada-Atlantic & Plant S. S. Co. v. Flanders, 145 Fed. 875, 76 C. C. A. 1; Tempel v. Dodge, 89 Tex. 69, 32 S. W. 514, 33 S. W. 222; Caldwell v. Mutual Reserve Fund Life Ass'n, 53 App. Div. 245, 65 N. Y. Supp. 826. Where by the charter the powers of the corporation are vested in the stockholders, they may authorize the board to delegate its powers to an executive committee. Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265.

[55] Burrill v. President, etc., of Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Calumet Paper Co. v. Haskell-Show Printing Co., 144 Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425.

DIRECTORS' MEETINGS AND RESOLUTIONS

193. Where the management of a corporation is vested in a board of directors or trustees, they are the agents of the corporation only when legally acting as a board. They cannot bind the corporation by individual action, but only when regularly assembled at a board meeting.

194. The principal rules relating to directors' meetings are these:

(a) In the absence of express prohibition, directors may meet, and act as agents of the corporation, in another state.

(b) Notice of the purpose of the meeting is generally deemed unnecessary, unless perhaps the directors are to be called upon to take action upon an extraordinary emergency involving the exercise of unusual power. Notice of the time and place of the meeting, however, must generally be given each director, unless the meeting is a stated one. But,

(1) If all the directors are present, want of notice is immaterial.

(2) If the charter makes less than all the directors a quorum, with power to transact business, and does not require notice, a quorum may meet and transact business without the presence of, or notice to, the other directors.

(c) In the absence of express provision otherwise, a majority of the directors constitute a quorum, and a majority of the quorum may decide any question upon which they may act.

(d) A director is disqualified to vote upon any resolution in which he is personally interested.

(e) Unless the charter or by-laws so require, the votes and decisions of the directors need not be recorded.

Directors must Act as a Board

Where the government of a corporation and management of its affairs are vested in a board of directors (or, as in some states, in a board of trustees), the legal effect is to invest the directors with such government and management as a board, and not otherwise. The general rule is that the governing body, as such, of a corporation, are agents of the corporation only as a board, and not individually. They have authority to act for the corporation only when regularly assembled at a board meeting. The separate action of one or of all of the directors individually is not the action of the

body clothed with the corporate powers, and does not bind the corporation;[56] nor are they acting as a board where voting as stockholders at a stockholders' meeting.[57] While directors must act as a board, it has been held that it is not essential that their action be formal or their votes recorded, and that it is enough, at least as to third parties, if they establish a mutual understanding.[58]

Special Meetings

Although, by the rules of the corporation, the directors are to have stated meetings, it does not follow that they can have none other. On the contrary, it is a necessary power, incident to the

[56] Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261, 276. In this case a conveyance of land belonging to a corporation was executed in the name of the corporation by all the directors acting separately, and not as a board, and without any authority from the board. It was held void as a conveyance, and equally ineffectual as a contract to convey. See, also, In re Marseilles Extension R. Co., 7 Ch. App. 161; D'Arcy v. Railway Co., L. R. 2 Exch. 158; Filon v. Miller Brewing Co., 60 Hun, 582, 15 N. Y. Supp. 57; Schumm v. Seymour, 24 N. J. Eq. 143; First Nat. Bank of Highstown v. Christopher, 40 N. J. Law, 435, 29 Am. Rep. 262; Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186; Stoystown & Greensburg Turnpike Road Co. v. Craver, 45 Pa. 386; Buttrick v. Nashua & L. R. R., 62 N. H. 413, 13 Am. St. Rep. 578; Hillyer v. Overman Silver Min. Co., 6 Nev. 51; Calumet Paper Co. v. Haskell-Show Printing Co., 144 Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425; Morrison v. Wilder Gas Co., 91 Me. 492, 40 Atl. 542, 64 Am. St. Rep. 257; Peirce v. Morse Oliver Bldg. Co., 94 Me. 406, 47 Atl. 914; Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. 176; Broughton v. Jones, 120 Mich. 462, 79 N. W. 691; Chavelle v. Washington Trust Co., 226 Fed. 400, 141 C. C. A. 230; Pink v. Metropolitan Milk Co., 129 Minn. 353, 152 N. W. 725; U. S. Fire Apparatus Co. v. G. W. Baker Mach. Co. (Del. Ch.) 95 Atl. 294. In Vermont the rule seems otherwise. In Bank of Middlebury v. Rutland & W. R. Co., 30 Vt. 159, it was held that directors could bind their corporation by acting separately, if this was their usual practice in transacting the corporate business. See, also, Longmont Supply Ditch Co. v. Coffman, 11 Colo. 551, 19 Pac. 508. And see National State Bank of Terre Haute v. Sandford Fork & Tool Co., 157 Ind. 10, 60 N. E. 699. A provision in a certificate of incorporation that any resolution signed by all the members of the board of directors shall constitute action by the board, with the same force and effect as if it had been duly passed by the same vote at a duly called meeting of the board, is not authorized by the general corporation act, permitting any provision which incorporators may choose to insert in their certificate for the conduct of the affairs of the corporation, and any provision creating, defining, limiting, and regulating the powers of the directors, provided such provision be not inconsistent with the act. Audenried v. East Coast Milling Co., 68 N. J. Eq. 450, 59 Atl. 577.

[57] Gashwiler v. Willis, supra; Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27. But see, contra, Spencer v. Lowe, 198 Fed. 961, 117 C. C. A. 497.

[58] Hyams v. Old Dominion Co., 113 Me. 294, 93 Atl. 747, L. R. A. 1915D, 1128.

faithful discharge of their trust, that they shall have special or informal meetings when the interests of the corporation require it.[59]

Place of Meeting

There is nothing to prevent a corporation from acting by its agents outside of the state by which it was created, if the state in which the acts are done raises no objection. A corporation cannot itself act outside of the state, for it can have no legal existence save in the state to whose laws it owes its existence. They can have no extraterritorial effect.[60] It can, however, appoint agents, and they may act for it beyond the limits of the state.[61] For most purposes the directors are merely the agents of the corporation, and act as such in the management of its affairs. Therefore, as a general rule, in the absence of express provision to the contrary,[62] they may hold their meetings, and act for the corporation, in another state than that by which it was created.[63] Thus, it has been held that they may meet outside the state, and confer authority upon an agent to execute a deed, mortgage, or other instrument for the corporation,[64] or appoint a secretary,[65] or transact any other ordinary corporate business.[66]

Notice of Meeting

To constitute a valid directors' meeting, all the directors must have notice of the time and place of meeting, unless the meeting is a stated one, so that each one of them is chargeable with notice. It is immaterial in what way the day of the regular meetings of directors is fixed. If it has been fixed by usage, a tacit understanding of the members, or in any other way, it is enough.[67] The purpose of the meeting need not be specified, unless required by the charter or by-laws. When a meeting of directors is notified with-

[59] Read v. Memphis Gayoso Gas Co., 9 Heisk. (Tenn.) 545.

[60] Ante, p. 87. As to stockholders' meetings, see ante, p. 585.

[61] Bank of Augusta v. Earle, 13 Pet. (U. S.) 521, 10 L. Ed. 274.

[62] See State Nat. Bank of St. Joseph v. Union Nat. Bank, 168 Ill. 519, 48 N. E. 82; Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74.

[63] Post, p. 758. Wright v. Lee, 2 S. D. 596, 51 N. W. 706, 713; Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74. But in Ormsby v. Vermont Copper Min. Co., 56 N. Y. 623, it was held that neither the stockholders nor the directors of a corporation can do a corporate act out of the jurisdiction creating the corporation, which will bind those who do not participate in it.

[64] Arms v. Conant, 36 Vt. 744; Bellows v. Todd, 39 Iowa, 209, 217; Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316.

[65] McCall v. Byram Mfg. Co., 6 Conn. 428.

[66] Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74, semble.

[67] Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252, 269; American Exch. Nat. Bank v. First Nat. Bank, 82 Fed. 961, 27 C. C. A. 274; Western Imp. Co. v. Des Moines Nat. Bank, 103 Iowa, 455, 72 N. W. 657.

out specification of the particular purpose, it is to be understood that it is called to consider any matters pertaining to the conduct of the affairs of the corporation that may come before it.[68] No general principle in the law of corporations requires the object of a directors' meeting to be specified in the notice in order to validate corporate action.[69] It is not necessary that the records of a corporation shall show that all the directors of the corporation had notice of a directors' meeting, or the terms of the notice. In the absence of evidence to the contrary, a sufficient notice will be presumed.[70] It has been held that if, by the charter of a corporation, a certain number of directors are made a quorum, and given power to transact business, the corporation is bound by the unanimous concurrence of that number at a casual meeting, and without notice to the others, unless notice is expressly required by the charter or by-laws.[71] But in the absence of such a provision a majority of the directors cannot bind the corporation where one of the directors is not present at the consultation, and has not been given notice of the proposed action, and the act is not done at a regular meeting, of which he should know, and at which he might be present.[72] And, according to the prevailing rule, business may not be transacted at a special meeting, where all the directors are not present, unless notice has been given to each director, and the acts of the directors at such a meeting are not binding upon the corporation.[73]

[68] In re Argus Co., 138 N. Y. 557, 34 N. E. 388, 394; Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 45 N. W. 410, 56 Am. St. Rep. 187; Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17. If the business is of exceptional character and importance, it seems that the notice should state the purpose. Mercantile Library Hall Co. v. Pittsburg Library Ass'n, 173 Pa. 30, 33 Atl. 744.

[69] In re Argus Co., supra. But in this case the court intimated that there might be a departure from the general rule where the meeting is called "to take action upon an extraordinary emergency involving the exercise of unusual power. 138 N. Y. 579, 34 N. E. 395.

[70] Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Leavitt v. Oxford & Geneva S. M. Co., 3 Utah, 265, 1 Pac. 356; Chase v. Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64; Fletcher v. Chicago, St. P., M. & O. Ry. Co., 67 Minn. 339, 69 N. W. 1085; Balfour-Guthrie Co. v. Woodworth, 124 Cal. 169, 56 Pac. 891.

[71] Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; State ex rel. Page v. Smith, 48 Vt. 266; Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285. But see Hamlin v. Union Brass Co., 68 N. H. 292, 44 Atl. 385. Cf. Chase v. Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64.

[72] Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

[73] Farwell v. Houghton Copper Works (C. C.) 8 Fed. 66; Doyle v. Mizner, 42 Mich. 332, 3 N. W. 968; Doernbecher v. Columbia City Lumber Co., 21 Or. 573, 28 Pac. 899, 28 Am. St. Rep. 766; Whitehead v. Hamilton Rubber

The fact that notice of a special meeting was not given, even where it was required by the charter or by-laws, is immaterial, if all the directors were present and participated in the proceedings.[74]

"Quorum" and "Majority"

In the case of a stockholders' meeting, as we have seen, no particular number are required to constitute a quorum, unless there is some charter or statutory provision.[75] With directors it is otherwise. In the absence of provision to the contrary in a statute, or in the charter or by-laws, a majority of the directors are necessary to constitute a quorum.[76] A less number cannot act so as to bind the corporation, but can only adjourn.[77] A majority is always enough to constitute a quorum, unless more are expressly required. It is not necessary that the president of a corporation should be present at a meeting of the directors, in order to authorize them to transact business, unless this is expressly required.[78]

A majority of the quorum have authority to decide any question upon which the board may act.[79] Where the by-laws of a corporation confer upon the directors power to act in behalf of the corporation, without special limitation as to the manner, a majority may act, within the scope of the authority given to the board, and bind the corporation, either where there is a consultation of all together, and a concurrence of a majority, or where there is a regular meeting at which all might be present, and a majority actually attend

Co., 52 N. J. Eq. 78, 27 Atl. 897; First Nat. Bank of Springfield v. Asheville Furniture & Lumber Co., 116 N. C. 827, 21 S. E. 948; Vaught v. Ohio County Fair Co., 49 S. W. 426, 20 Ky. Law Rep. 1471; Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383; Hatch v. Lucky Bill Min. Co., 25 Utah, 405, 71 Pac. 865. Where notice is impracticable, as where a director is beyond reach of notice, it seems that it may be dispensed with if the emergency requires prompt action. In re Argus Co., 138 N. Y. 557, 34 N. E. 388; Chase v. Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64; Bank of Little Rock v. McCarthy, 55 Ark. 473, 18 S. W. 759, 29 Am. St. Rep. 60; National Bank of Commerce v. Shumway, 49 Kan. 224, 30 Pac. 411.

[74] Minneapolis Times Co. v. Nimocks, 53 Minn. 381, 55 N. W. 546; Troy Min. Co. v. White, 10 S. D. 475, 74 N. W. 236, 42 L. R. A. 549.

[75] Ante, p. 588.

[76] Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Calumet Paper Co. v. Haskell-Show Printing Co., 144 Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425. A by-law authorizing a quorum of five directors to transact ordinary business is valid. Hoyt v. Thompson's Ex'r, 19 N. Y. 207.

[77] Sargent v. Webster, supra; Leavitt v. Oxford & Geneva S. M. Co., 3 Utah, 265, 1 Pac. 356.

[78] Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

[79] Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516; Leavitt v. Oxford & Geneva S. M. Co., 3 Utah, 265, 1 Pac. 356.

and act by a major vote.[80] And, where the act done at a meeting purports to be the act of the board, it will be presumed that it was the act of the majority, until the contrary is shown.[81]

As we have just seen, a majority of the directors cannot bind the corporation where one of the directors is not present at the consultation, and has not been given notice of the proposed action, and the act is not done at a regular meeting of which he should know, and at which he might be present.[82]

A director, unlike a stockholder at a stockholders' meeting, is disqualified to vote upon any resolution in which he is personally interested. "All the authorities agree that it is essential that the majority of the quorum of a board of directors shall be disinterested in respect to the matters voted upon." [83] Thus, where directors met and unanimously voted themselves a monthly salary, it was held that the directors could not recover.[84]

Record of Proceedings

It is not necessary that the votes or decisions of the directors shall be recorded, unless recording is required by the charter or by-laws. If not recorded, they may be proved by parol. If they are recorded, they must be proved by the record, unless, for some reason, secondary evidence may be admissible.[85]

[80] Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

[81] Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Heintzelman v. Druids' Relief Ass'n, 38 Minn. 138, 36 N. W. 100.

[82] Ante, p. 616.

[83] Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; Smith v. Los Angeles Immigration & Land Co-Operative Ass'n, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53; Copeland v. Johnson Mfg. Co., 47 Hun (N. Y.) 235; Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co., 130 Cal. 345, 62 Pac. 552, 80 Am. St. Rep. 132; Leary v. Interstate Nat. Bank (Tex. Civ. App.) 63 S. W. 149; Hartley v. Pioneer Iron Works, 87 App. Div. 107, 84 N. Y. Supp. 79; Adams v. Burke, 201 Ill. 395, 66 N. E. 235.

[84] Haas v. Universal Phonograph & Record Co., 75 Misc. Rep. 119, 132 N. Y. Supp. 767.

[85] Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 633; Zalesky v. Iowa State Ins. Co., 102 Iowa, 512, 70 N. W. 187, 71 N. W. 433; Tobin v. Roaring Creek & C. R. Co. (C. C.) 86 Fed. 1020; Hurd v. Hotchkiss, 72 Conn. 472, 45 Atl. 11.

AUTHORITY OF OTHER OFFICERS AND AGENTS

195. The particular officers and agents of a corporation have such authority only as is expressly conferred upon them by the charter, by-laws, or resolution of the board of directors or of the stockholders, and such as is implied because necessary or proper to enable them to perform the duties of their office.

196. If a corporation holds an officer out, or allows him to appear, as having authority not usual to such an office, it will be bound by acts done by him within the scope of his apparent authority, and will be estopped to deny his ostensible right to bind the corporation.

197. A corporation may ratify any act done without previous authority which it could have authorized. And ratification will be implied from acquiescence, or acceptance of the benefits, with knowledge of the facts.

The powers of the officers of a corporation over its business and property are strictly the powers of agents—powers either conferred by the charter, or delegated to them by the directors or managers, in whom, as the representatives of the corporation, the control of its business and property is vested. Like the agents of natural persons, they can bind their principal, the corporation, only within the scope of their authority, and he who deals with them is bound to know their powers and the extent thereof. Their authority, like the authority of agents of natural persons, may be either express or implied. The rules relating to agency generally apply here.[86]

If the general management of the business of a corporation is intrusted to a particular officer by the directors or by the corporation, whatever may be the name given the office—whether it be "president" or "general manager" or "secretary" or "superintendent"—such officer has the implied power, in the absence of express limitations, to do all acts on behalf of the corporation that may be necessary or proper in performing his duties; that is, in managing the company's affairs and conducting its business.[87] Such a gen-

[86] See Tif. Ag. 180 et seq.

[87] Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; Hastings v. Brooklyn Life Ins. Co., 138 N. Y. 473, 34 N. E. 289; Oakes v. Cattaraugus Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544; Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669, 110 Am. St. Rep. 207. As to powers of managing agent generally, see 10 Cyc. 923 et seq.

eral managing officer or agent of a trading corporation, for instance, has the implied authority to borrow money on behalf of the corporation, when needed in its business, and to execute its note therefor, and to accept bills or indorse paper in the usual course of the company's business.[88] And, in payment of a debt of the corporation, he may transfer to the creditor part of the business and assets of the corporation by executing a bill of sale to the creditor.[89] So, a person appointed superintendent and manager of a corporation at a particular place, where the corporation is prosecuting some work, has, in the absence of express limitation, implied authority to purchase supplies and implements, and engage services, necessary or proper for carrying on the work, and may bind the corporation by contracts therefor. His authority extends to all such usual dealings as are necessary to carry on the business from day to day.[90]

No officer of a corporation can bind it by any act or contract that is not within the line of his ordinary duties, unless authority is expressly conferred by the charter, or by the stockholders or board of directors. Thus, it has been held that the president and cashier of a bank have no authority, in discounting commercial paper, to agree that the indorser shall not be liable on his indorsement, and such an agreement is not binding on the bank. All discounts being made under the authority of the directors, it is for them to fix any conditions which may be proper in lending money.[91] So the treasurer, secretary, president, or other officer of a corporation has no implied authority to release a debtor of the corporation from his liability, or to give up securities belonging to the company, without payment. Such power must be expressly given, or it must be implied from a course of dealing known to and sanctioned by the corporation.[92] An officer cannot release a subscriber from liability on his subscription.[93]

Nor can the officers bind the corporation by statements not made in the course of their duty. Mere desultory observations or casual

[88] See Matson v. Alley, 141 Ill. 284, 31 N. E. 419; Rosemond v. Northwestern Autographic Register Co., 62 Minn. 374, 64 N. W. 925; Africa v. Duluth News Tribune Co., 82 Minn. 283, 84 N. W. 1019, 83 Am. St. Rep. 424. Otherwise of the general manager of a nontrading corporation. Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628.

[89] Quee Drug Co. v. Plaut, 55 App. Div. 87, 67 N. Y. Supp. 10.

[90] Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355. See, also, Thayer v. Nehalem Mill Co., 31 Or. 437, 51 Pac. 202. He has not implied authority to grant an easement. Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co., 21 Mont. 539, 55 Pac. 112.

[91] Bank of United States v. Dunn, 6 Pet. (U. S.) 51, 8 L. Ed. 316.

[92] Moshannon Land & Lumber Co. v. Sloan, 109 Pa. 532, 7 Atl. 102.

[93] Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135.

remarks, not uttered as matter of business, are not admissible against the corporation.[94]

The powers of the president of a corporation are such only as he derives from the board of directors or other authority to which he owes his appointment.[95] If there is nothing in the charter bestowing special power upon him, he has, from his office merely, no more power over the corporate property and business than any other director.[96] His powers depend upon the authority conferred upon him by the board, and the duties with which he is charged.[97] Thus, in the absence of special authority, he cannot dispose of or mortgage the property of the corporation.[98] But the rule in New York, followed in several other jurisdictions, is that the president of a corporation, by virtue of his office, may prima facie lawfully perform any act which the board of directors could authorize or ratify.[99]

The treasurer of a corporation is an agent of a fiscal nature with special powers merely, and cannot bind the corporation by the performance of acts without the scope and ordinary course of the duties of his office. Thus the treasurer cannot make contracts of purchase on behalf of the corporation,[1] nor can he bind it by contracts of employment made on its behalf,[2] since he has no power, simply

[94] Hay v. Platt, 66 Hun, 488, 21 N. Y. Supp. 362; Cobb v. United Engineering & Contracting Co., 191 N. Y. 475, 84 N. E. 395.

[95] As to powers of president generally, see 10 Cyc. 903 et seq. As to powers of vice president, see 10 Cyc. 922 et seq.

[96] Titus v. Cairo & F. R. Co., 37 N. J. Law, 98; Brush Electric Light & Power Co. of Montgomery v. City Council of Montgomery, 114 Ala. 433, 21 South. 960; St. Clair v. Rutledge, 115 Wis. 583, 92 N. W. 236, 95 Am. St. Rep. 964; 1 Mor. Priv. Corp. § 537.

[97] Id.; Walworth County Bank v. Farmers' Loan & Trust Co., 14 Wis. 325; Templin v. Chicago, B. & P. Ry. Co., 73 Iowa, 548, 35 N. W. 634; Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135; Grant v. Duluth, M. & N. Ry. Co., 66 Minn. 349, 69 N. W. 23; Pacific Bank v. Stone, 121 Cal. 202, 53 Pac. 634. Some cases declare that, in the absence of any showing to the contrary, the president will be presumed to have authority to act for the corporation in all matters within the ordinary scope of its business. White v. Elgin Creamery Co., 108 Iowa, 522, 79 N. W. 283.

[98] See cases above cited; and see 2 Cook, Stock, Stockh. & Corp. Law, § 716, and notes, where the cases are collected. See Leggett v. New Jersey Mfg. & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

[99] Oakes v. Cattaraugus Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544; White v. Elgin Creamery Co., supra.

[1] Alexander v. Cauldwell, 83 N. Y. 480. And see, Board of Education of Detroit v. Union Trust Co., 136 Mich. 454, 99 N. W. 373.

[2] Connell v. Ernst-Marx-Nathan Co., 35 Misc. Rep. 133, 71 N. Y. Supp. 813; Parmelee v. Associated Physicians & Surgeons, 9 Misc. Rep. 458, 30 N. Y. Supp. 250.

because of his office as treasurer, to bind the corporation. It is very generally held that the treasurer of a corporation has no implied authority, merely by virtue of his office, to borrow money and execute notes on behalf of the company, or to indorse or transfer securities belonging to the company.[3] Such power must have been expressly conferred by the charter or by-laws, or by resolution of the board of directors, or the directors or managers must have clothed the treasurer with apparent authority.[4] But in Massachusetts it is held that, in the case of a trading or manufacturing corporation, the treasurer is clothed, by virtue of his office alone, with the power to execute notes on behalf of the company;[5] and this rule has in a late case been held to apply to gaslight companies, the business of which requires credit at certain seasons of the year.[6] Even in Massachusetts, however, the rule is held not to extend to a college,[7] nor to a monument association,[8] nor to a savings bank,[9] nor to a horse railroad company.[10] And two of the judges dissented from the decision applying the rule to gaslight companies.[11] The treasurer of a corporation has no implied authority to consent to judgment against the company without suit.[12]

The secretary of a corporation keeps the minutes of meetings, is custodian of the corporate seal and records, and generally acts as transfer agent for shares. He has no implied authority to bind the corporation by contracts, or by representations.[13] Nor can the

[3] In re Millward-Cliff Cracker Co.'s Estate, 161 Pa. 157, 28 Atl. 1072; Craft v. South Boston R. Co., 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641; Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. Law, 513, 7 Atl. 318; Wahlig v. Standard Pump Mfg. Co. (City Ct. N. Y.) 9 N. Y. Supp. 739; First Nat. Bank v. Council Bluffs City Waterworks Co., 56 Hun, 412, 9 N. Y. Supp. 859; Jacobus v. Jamestown Mantel Co., 211 N. Y. 154, 105 N. E. 210; Blake v. Domestic Mfg. Co., 64 N. J. Eq. 480, 38 Atl. 241. And see Chemical Nat. Bank of New York v. Wagner, 93 Ky. 525, 20 S. W. 535, 40 Am. St. Rep. 206.

[4] As to apparent authority, see post, p. 625.

[5] Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 282; Fay v. Noble, 12 Cush. (Mass.) 1; Merchants' Nat. Bank of Gardiner v. Citizens' Gaslight Co., 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453.

[6] Merchants' Nat. Bank of Gardiner v. Citizens' Gaslight Co., supra.

[7] Webber v. President, etc., of Williams College, 23 Pick. (Mass.) 302.

[8] Torrey v. Dustin Monument Ass'n, 5 Allen (Mass.) 327.

[9] Tappan v. Warren Five Cents Sav. Bank, 127 Mass. 107, 34 Am. Rep. 351. And see Jewett v. West Somerville Co-op. Bank, 173 Mass. 54, 52 N. E. 1085, 73 Am. St. Rep. 259; Slattery v. North End. Sav. Bank, 175 Mass. 380, 56 N. E. 606.

[10] Craft v. South Boston R. Co., 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641.

[11] Field, C. J., and Allen, J., dissented.

[12] Stevens v. Carp River Iron Co., 57 Mich. 427, 24 N. W. 160.

[13] Parmelee v. Associated Physicians & Surgeons, 9 Misc. Rep. 458, 30 N. Y. Supp. 250; City of Chicago v. Stein, 252 Ill. 409, 96 N. E. 886, Ann.

secretary be deemed as possessing authority to execute and deliver a lease on behalf of his corporation.[14] The secretary, however, has been regarded in at least one case, as an executive officer of the corporation and one of its general managing agents, and when in the discharge of his duties as representing the corporation itself.[15]

The cashier of a bank, by custom, is its executive officer, through whom the whole financial operations of the bank are conducted.[16] He has implied authority, from his office, without special authority, to transact the ordinary business of the bank, as to receive deposits, and packages of money consigned to the bank; to draw and indorse bills of exchange, checks, and drafts;[17] and to certify checks.[18] So he has the implied authority to transfer and indorse negotiable notes or bills belonging to the bank,[19] or to release a debt secured by mortgage, if he acts in conformity to the rules and practice of the bank.[20] But he has no authority, unless it is expressly conferred upon him, to bind the bank by acts and contracts which do not relate to the ordinary business of the bank, or to his ordinary duties as cashier.[21] Where discounts, for instance, are made under the authority of the board of directors, and not of the cashier, the cashier can make no special agreement in lending money.[22] Nor can a cashier contract with the government, on behalf of the bank, for the transfer of money.[23] The ordinary duties of cashiers of banks do not comprehend a contract which involves the payment of money, unless it has been loaned in the usual way, nor can a cashier create an agency for the bank, unless he has been expressly authorized to do so.[24] Nor can the cashier of a bank execute a mort-

Cas. 1912D, 294; Stone v. United States Title Guaranty & Indemnity Co., 159 App. Div. 679, 144 N. Y. Supp. 849, affirmed short, 217 N. Y. 656, 112 N. E. 1077.

[14] Fischer v. Motor Boat Club of America, 61 Misc. Rep. 66, 68, 69, 113 N. Y. Supp. 56; Karsch v. Pottier & Stymus Mfg. & Imp. Co., 82 App. Div. 232, 81 N. Y. Supp. 782.

[15] Hastings v. Brooklyn Life Ins. Co., 138 N. Y. 473, 479, 34 N. E. 289.

[16] See Fleckner v. Bank of United States, 8 Wheat. (U. S.) 338, 5 L. Ed. 631; West St. Louis Savings Bank v. Parmalee, 95 U. S. 557, 24 L. Ed. 490. As to his authority generally, see Morse, Banks & B. §§ 152, 160.

[17] Merchants' Bank of Macon v. Central Bank of Georgia, 1 Ga. 418, 44 Am. Dec. 665.

[18] Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008.

[19] Wild v. Bank of Passamaquoddy, 3 Mason, 505, Fed. Cas. No. 17,646.

[20] Ryan v. Dunlap, 17 Ill. 40, 63 Am. Dec. 334.

[21] Bank of United States v. Dunn, 6 Pet. (U. S.) 51, 8 L. Ed. 316; U. S. v. City Bank of Columbus, 21 How. (U. S.) 356, 16 L. Ed. 130.

[22] Bank of United States v. Dunn, supra.

[23] U. S. v. City Bank of Columbus, supra. [24] Id.

gage on its property.[25] Nor can the cashier be regarded as having authority by virtue of his office to bind the bank by representations as to the solvency of one of the customers of the bank.[26]

Persons dealing with a corporation are bound at their peril, to ascertain whether the person assuming to contract for the corporation has authority to bind it.[27] This principle is qualified by another, which we shall consider in the following paragraph, namely that, where a corporation allows another to appear as having authority to bind it in a particular transaction, it will be estopped to deny the apparent authority with which it has clothed him, to the prejudice of persons dealing with him, and cannot set up a by-law to limit such apparent authority.[28]

Holding Out—Agency by Estoppel

It is a well-settled principle of the law of agency that third persons may act upon the apparent authority conferred by the principal upon the agent, and are not bound by secret limitations or instructions qualifying the terms of the written or verbal appointment, and this applies with full force to a corporation which clothes a person with apparent authority to act as its agent.[29] An officer of a corporation may, by the acts of its directors or managers, be invested with the authority to bind the company by his acts beyond those powers which are inherent in and implied from his office. If, in the general course of the company's business, the directors or managers have permitted an officer to assume the direction and control of its affairs, and have held him out to the public as its general agent, his authority to act for the company in a particular

[25] Leggett v. New Jersey Mfg. & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

[26] Taylor v. Commercial Bank, 174 N. Y. 181, 66 N. E. 726, 62 L. R. A. 783, 95 Am. St. Rep. 564. This was a four to three decision. But see Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259.

[27] Bocock's Ex'r v. Alleghany Coal & Iron Co., 82 Va. 913, 1 S. E. 325, 3 Am. St. Rep. 128; Slattery v. North End Sav. Bank, 175 Mass. 380, 56 N. E. 606; Alexander v. Cauldwell, 83 N. Y. 480; Jacobus v. Jamestown Mantel Co., 211 N. Y. 154, 105 N. E. 210.

[28] Post, pp. 625, 626. Ante, p. 580.

[29] Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355; Lowenstein v. Lombard Ayres & Co., 164 N. Y. 324, 58 N. E. 44; Hanover Nat. Bank of City of New York v. American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721; Marshall v. American Exp. Co., 7 Wis. 1, 73 Am. Dec. 381; Carson City Sav. Bank v. Carson City Elevator Co., 90 Mich. 550, 51 N. W. 641, 30 Am. St. Rep. 454; Sherman Center Town Co. v. Swigart, 43 Kan. 292, 23 Pac. 569, 19 Am. St. Rep. 137; St. Clair v. Rutledge, 115 Wis. 583, 92 N. W. 234, 95 Am. St. Rep. 964; G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 23, 36 C. C. A. 633; Colorado Springs Co. v. American Pub. Co., 97 Fed. 848, 38 C. C. A. 433.

transaction may be implied from the manner in which he has been permitted by the directors or managers to transact its business.[30] This is in accord with the general rule that "direct proof of agency may be dispensed with by estoppel." [31] Thus, though the treasurer of a corporation may have no implied authority, by virtue of his office alone, to borrow money and issue negotiable paper therefor on behalf of the corporation, nor to draw or accept bills of exchange or indorse notes, yet, if the directors or other managers allow him to do so, authority will be implied.[32]

As we have seen in the preceding paragraph, persons dealing with a person as agent of a corporation are bound to know whether or not he has authority to represent it. This does not mean that they cannot assume that his apparent authority is real, nor that, if a person contracts with an agent acting within the apparent scope of his authority, he is bound, at his peril, to ascertain whether there are any extrinsic facts limiting his authority in the particular transaction. If an officer of a corporation acts within the apparent scope of his authority, persons dealing with him are not bound to have knowledge of extrinsic facts making it improper to act in the particular case.[33]

[30] Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. Law, 513, 7 Atl. 318; McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559; Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. Ed. 707; Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, 53 N. W. 1061; Blake v. Domestic Mfg. Co., 64 N. J. Eq. 480, 38 Atl. 241; Chicago Tip & Tire Co. v. Chicago Nat. Bank, 176 Ill. 224, 52 N. E. 52; Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707; G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 23, 36 C. C. A. 633; National State Bank of Terre Haute v. Sandford Fork & Tool Co., 157 Ind. 10, 60 N. E. 699; Carrington v. Turner, 101 Md. 437, 61 Atl. 324; Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997; Sturtevant Co. v. Fireproofing Film Co., 216 N. Y. 199, 110 N. E. 440.

[31] Ralli v. White, 21 Misc. Rep. 285, 47 N. Y. Supp. 197, affirming 20 Misc. Rep. 635, 46 N. Y. Supp. 376, per McAdam, J.

[32] Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. Law, 513, 7 Atl. 318; Page v. Fall River, W. & P. R. Co. (C. C.) 31 Fed. 257; Credit Co. v. Howe Machine Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123. "The rule is well settled that if a corporation permit the treasurer to act as their general fiscal agent, and hold him out to the public as having the general authority implied from his general name and character, and by their silence and acquiescence suffer him to draw and accept drafts, and to indorse notes payable to the corporation, they are bound by his acts done within the scope of such implied authority." Lester v. Webb, 1 Allen (Mass.) 34. See, also, Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707; Jacobus v. Jamestown Mantel Co., 211 N. Y. 154, 105 N. E. 210. The issue is ordinarily one of fact for the jury. Sturtevant Co. v. Fireproofing Film Co., 216 N. Y. 199, 202, 110 N. E. 440.

[33] Credit Co. v. Howe Machine Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep.

By-laws of business corporations are, as to third persons, private regulations, binding as between the corporation and its members, or third persons having knowledge of them; but they are of no force as limitations, per se, as to third persons, of an authority which, except for the by-laws, would be construed as within the apparent scope of the agency. Therefore, where a corporation, for the purpose of mining, among other things, appointed a person "superintendent and manager" at a particular place, it was held that he had apparent authority to purchase, on the credit of the corporation, supplies and implements for carrying on the work, and that the rights of persons contracting with him within such apparent authority could not be affected by a by-law of the corporation, of which they had no notice, providing that no debt should be contracted by any officer or agent of the corporation, nor any obligation created imposing liability upon it, unless expressly authorized by a majority of the board of trustees.[34]

Where a person has been appointed superintendent of a corporation's business in a foreign country, though by a resolution expressed by words in præsenti, with the understanding both on the part of the corporation and of the appointee that his duties and authority are not to commence until certain preliminary stages of its business shall be completed, he cannot bind the corporation before that time by holding himself out as its active agent to one who relies merely upon his representations, without any knowledge of the resolution.[35]

Agency by Ratification

A corporation, like a natural person, may become bound by the act of a person assuming to act for it without authority, if it ratifies the act.[36] It may ratify, and thereby render binding, any act done without authority which it could have authorized; and an act may be ratified by any officer or board who or which could have

123; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Hess v. W. & J. Sloane, 66 App. Div. 522, 73 N. Y. Supp. 313, affirmed 173 N. Y. 616, 66 N. E. 1110; Ring v. Long Island Real Estate Exchange & Investment Co., 93 App. Div. 442, 87 N. Y. Supp. 682, affirmed 184 N. Y. 553, 76 N. E. 1107. Allison v. Tennessee Coal, Iron & Railroad Co. (Tenn. Ch. App.) 46 S. W. 348; post, p. 656.

[34] Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355. See, also, Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 44 N. E. 410, 56 Am. St. Rep. 187; Marine Bank of Buffalo v. Butler Colliery Co., 52 Hun, 612, 5 N. Y. Supp. 291, affirmed 125 N. Y. 695, 26 N. E. 751. Powers v. Schlicht Heat, Light & Power Co., 23 App. Div. 380, 48 N. Y. Supp. 237, affirmed 165 N. Y. 662, 59 N. E. 1129. Cf. In re Millward-Cliff Cracker Co.'s Estate, 161 Pa. 157, 28 Atl. 1072.

[35] Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355.

[36] As to ratification by corporations generally, see 10 Cyc. 1069 et seq.

authorized it.[37] And ratification may be implied from the conduct of the corporation or its authorized agents, as where it accepts the benefits with notice of the circumstances.[38] Thus, if a person, professing to be authorized, mortgages the personal property of a corporation in order to procure a loan, and the money obtained thereby comes into the possession of the corporation, and is retained by it, this will be evidence of a ratification of the mortgage.[39] It is generally deemed a question of fact for the jury whether a contract has been ratified.[40]

Ratification of an act done by one assuming to act as agent relates back, and is equivalent to a prior authority. When, therefore, the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification, except in the same manner. Thus, if a person executes a contract or conveyance under seal for a corporation, without authority, his act can be ratified only by an instrument under seal, where, as at common law, authority to execute a sealed instrument must be under seal. But parol ratification may render the contract binding as a parol contract, if a seal is not necessary.[41]

Negotiable Instruments

Where an officer of a corporation executes and issues negotiable paper, purchasers thereof buy at their peril, as to his authority to

[37] Burrill v. President, etc., of Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; McLaughlin v. Detroit & M. Ry. Co., 8 Mich. 100; Leggett v. New Jersey Mfg. & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Aurora Agricultural & Horticultural Soc. v. Paddock, 80 Ill. 263; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Grape Sugar & Vinegar Mfg. Co. of Baltimore v. Small, 40 Md. 395; Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; American Exch. Nat. Bank v. First Nat. Bank, 82 Fed. 961, 27 C. C. A. 274; Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 23, 36 C. C. A. 633; Beacon Trust Co. v. Souther, 183 Mass. 413, 67 N. E. 345; Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997.

[38] Cases above cited.

[39] Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

[40] Matteson v. United States & Canada Land Co., supra.

[41] Despatch Line of Packets v. Bellamy Mfg. Co., supra. Where the execution of a note and mortgage could have been authorized only by a resolution of the board, equivalent to an authority in writing, within Civ. Code Cal. § 2309, a corporation can ratify an unauthorized execution by its president and secretary only in the manner that would have been necessary to confer original authority for the act ratified, as provided by section 2310, and not by an exercise of ownership over the property for the price of which the note and mortgage were executed. Blood v. La Serena Land & Water Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

execute it; but there is this exception, namely, that if the officer, in issuing the paper, acted within the apparent scope of his authority, but in the particular instance acted wrongfully, and the purchaser had no notice of the wrongful character of the act, or of facts sufficient to put him on inquiry, the purchaser will be protected, as against the corporation.[42] But if the purchaser has notice that the officer executed the paper for his own debt, or otherwise for his personal benefit, he is bound to inquire as to the officer's authority.[43]

Ultra Vires Contracts by Agents

According to the strict rule of ultra vires, if a corporation has no power to enter into a particular contract, it cannot, by appointing an agent, become bound by such a contract entered into by him, nor can it become bound by ratification. This is too clear to require argument. "The powers of agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make. * * * The same want of power to give authority to an agent to contract, and thereby bind the corporation, in matters beyond the scope of their corporate objects, must be equally conclusive against any attempt to ratify such contract. What they cannot do directly they cannot do indirectly. They cannot bind themselves by the ratification of a contract which they had no authority to make. The power of the agent must be restricted to the business which the company was authorized to do. Within the scope of the business which they had power to transact, he, as its agent, may be authorized to act for it, but beyond that he could not be authorized, for its powers extend no further." [44] As we have seen, however, the contract of a corporation is not always unenforceable because it is ultra vires,[45] and a corporation may be liable for a tort committed by its agent in the course of an ultra vires transaction.[46] But it must be borne in mind that every person

[42] Chemical Nat. Bank of New York v. Wagner, 93 Ky. 525, 20 S. W. 535, 40 Am. St. Rep. 206; Page v. Fall River, W. & P. R. Co. (C. C.) 31 Fed. 257; Wahlig v. Standard Pump Mfg. Co. (City Ct. N. Y.) 9 N. Y. Supp. 739; Merchants' Nat. Bank of Gardiner v. Citizens' Gaslight Co., 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453; Credit Co. v. Howe Machine Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123; Matson v. Alley, 141 Ill. 284, 31 N. E. 419; Dexter Sav. Bank v. Friend (C. C.) 90 Fed. 703.

[43] Randall v. Rhode Island Lumber Co., 20 R. I. 625, 40 Atl. 763; Rochester & C. Turnpike Road Co. v. Paviour, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790.

[44] DOWNING v. MT. WASHINGTON ROAD CO., 40 N. H. 230, Wormser Cas. Corporations, 96. And see Weckler v. First Nat. Bank of Hagerstown, 42 Md. 581, 20 Am. Rep. 95.

[45] Ante, p. 205.

[46] Post, p. 661.

dealing with a corporation is charged with notice of the limitations of its powers, and consequently to that extent with notice of the limitations of the authority of its agents, which cannot be broader than the powers of the corporation.[47]

NOTICE TO OFFICER AS NOTICE TO CORPORATION

198. Knowledge of facts acquired by an officer or agent of a corporation is notice to the corporation, if acquired by him while acting within the scope of his duties, but not otherwise.

It is a well-settled principle of the law of agency that knowledge of facts acquired by an agent is notice to the principal of such facts, if the knowledge is acquired by the agent in the course of his employment, but not otherwise. This principle is applicable to agents of corporations.[48] We have seen that the directors of a corporation represent and have power to bind the corporation only when acting as a board, at a board meeting. It follows that notice to a director, or knowledge derived by him, individually, and not while acting officially, as a member of the board, in the business of the corporation, is not to be regarded, in law, as notice to the corporation.[49] In a Connecticut case, after a defective deed had been recorded, purporting to convey certain land, one of the directors of a corporation, not acting as agent of the corporation, and having no manage-

[47] Ante, p. 217.

[48] Bank of United States v. Davis, 2 Hill (N. Y.) 451; National Security Bank v. Cushman, 121 Mass. 490; Innerarity v. Merchants' National Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; Love v. Anchor Raisin Vineyard Co. (Cal.) 45 Pac. 1044; City of Denver v. Sherret, 88 Fed. 226, 31 C. C. A. 499; Zeis v. Potter, 105 Fed. 671, 44 C. C. A. 665. As to notice to corporations generally, see 10 Cyc. 1053 et seq.

[49] Bank of United States v. Davis, 2 Hill (N. Y.) 451; Buttrick v. Nashua & L. R. R., 62 N. H. 413, 13 Am. St. Rep. 578; New Haven, M. & W. R. Co. v. Town of Chatham, 42 Conn. 465; Farrel Foundry v. Dart, 26 Conn. 376; Farmers' & Citizens' Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Fidelity & D. Co. v. Courtney, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193. Compare United States Ins. Co. v. Shriver, 3 Md. Ch. 381. Knowledge possessed by a director while acting with the board with reference to a matter acted upon is notice to the corporation. National Security Bank v. Cushman, 121 Mass. 490. In this case, Morton, J., said (page 491): "If the note is discounted by a bank the mere fact that one of the directors knew the fraud or illegality will not prevent the bank from recovering. But if the director who has such knowledge acts for the bank in discounting the note, his act is the act of the bank, and the bank is affected with his knowledge." The court held that it was a question of fact whether or not the director did act for the bank.

ment of its business otherwise than as director, went to the town records for the purpose of ascertaining the situation of the land, and there saw the record of the deed; but he did not inform the corporation, or any of its agents, thereof. It was held that the corporation was not, by reason of these facts, chargeable with any knowledge of the deed.[50] The same principle has often been applied where it was sought to charge a corporation with notice in order to defeat its claim as a bona fide holder of negotiable paper.[51]

This doctrine is by no means limited to directors. It applies to all officers and agents, the only qualification being that the knowledge must be acquired in the course of their employment.[52] As was said by the Alabama court: "Notice to one agent of a corporation with respect to a matter covered by his agency must be as efficacious as to its directors or to its president, since these also are only agents, with larger powers and duties, it is true, but not more fully charged with respect to the particular thing than he whose authority is confined to that one thing." [53] If the officer does not represent the corporation in the transaction by which he acquires knowledge of facts, or where he is acting in his own interest, and against the interest of the corporation—as where an officer of a corporation procures the corporation to discount a note, of the illegal consideration of which he has knowledge, or where he sells

[50] Farrel Foundry v. Dart, 26 Conn. 376.

[51] Farmers' & Citizens' Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362, Holm v. Atlas Nat. Bank, 84 Fed. 119, 28 C. C. A. 297, and other cases in note 49, supra. In this case it appeared that a director of a bank had knowledge of the object for which certain bills of exchange were delivered to a party applying to the bank for a discount thereof, but this director was not present at the meeting of the directors at which such application was made, and the bills discounted; and he did not communicate his knowledge to any other director or officer of the bank. It was held that such knowledge on the part of the director was not notice to the bank. And see Casco Nat. Bank of Portland v. Clark, 139 N. Y. 307, 313, 34 N. E. 908, 36 Am. St. Rep. 705.

[52] Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210. Thus, where a defaulting treasurer of a corporation, whose defalcation was as yet unknown, stole money from a third person, and placed it with the funds of the corporation, in order to conceal and make good his defalcation, without the knowledge of any other officer, it was held that the corporation, having used the money as its own, did not thereby acquire a good title to it, as against the true owner, since it was charged with the knowledge of its treasurer, who was its representative in the transaction. Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698; Huron Printing & Bindery Co. v. Kittleson, 4 S. D. 520, 57 N. W. 233; Brennan v. Emery-Bird-Thayer Dry Goods Co. (C. C.) 99 Fed. 971.

[53] Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362, 10 South. 539, 544, 36 Am. St. Rep. 210.

and conveys land to the corporation with knowledge of outstanding equities—in which case he could not be supposed to give notice to the corporation, his knowledge cannot be imputed to the corporation.[54]

CONTRACTS BETWEEN STOCKHOLDER AND CORPORATION

199. Stockholders or members in a corporation have as much right to contract with it as if they were strangers, and have the same rights under such contracts as a stranger would have, since the corporation is a legal entity and artificial person distinct and separate from its shareholders.

The members or stockholders, as we have heretofore pointed out, compose the corporation, but they are not the corporation, which, in legal contemplation, is a distinct unit. They have as much right to deal with the corporation as a stranger would have, and may sue it on its contracts. Thus, they may advance money to it in excess of the capital contributed, and the result will be a debt due them by the corporation, which will stand upon exactly the same footing as such a debt due to a stranger.[55] And a stockholder who is a creditor of the corporation may be preferred in an assignment made by it in any case where a creditor not connected with the corporation could be preferred.[56] A majority stockholder of a railroad

[54] Merchants' Nat. Bank of Kansas City v. Lovitt, 114 Mo. 519, 21 S. W. 825, 35 Am. St. Rep. 770; Johnston v. Shortridge, 93 Mo. 227, 6 S. W. 64; Frenkel v. Hudson, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736; Wickersham v. Chicago Zinc Co., 18 Kan. 481, 26 Am. Rep. 784; Innerarity v. Merchants' National Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; Casco Nat. Bank of Portland v. Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705; Seaverns v. Presbyterian Hospital, 173 Ill. 414, 50 N. E. 1079, 64 Am. St. Rep. 125; Ft. Dearborn Nat. Bank of Chicago v. Seymour, 71 Minn. 81, 73 N. W. 724; American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; Hadden v. Dooley, 92 Fed. 274, 34 C. C. A. 338.

[55] See Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; Langston v. Greenville Land & Improvement Co., 120 N. C. 132, 26 S. E. 644; Hitt v. Sterling-Gould Mfg. Co., 111 Iowa, 458, 82 N. W. 919. Stockholders of a corporation, who do not control its directors, owe no duty to it not to conceal from the directors that they are interested in another corporation with which the directors are about to make a contract, and such contract is valid notwithstanding such concealment. Fox v. Mackay, 125 Cal. 57, 57 Pac. 670; ante, p. 9. And a stockholder who is a creditor may take a mortgage to secure the debt. Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76.

[56] Lexington Life, Fire & Marine Ins. Co. v. Page, supra.

corporation, if he is not in control of the property and does not mismanage the affairs of the company for his own benefit, may purchase the property of the corporation at a judicial sale.[57] But where the holder of the majority of the stock of a corporation made a sale to himself of all the property of the corporation for its fair value, when he knew that the value was only five-sevenths of the amount which the corporation could obtain for it, the United States Circuit Court of Appeals decided that the transaction was voidable, being "violative of the duty of a fiduciary." [58]

RELATION BETWEEN OFFICERS AND CORPORATION

200. The directors and officers of a corporation, being its agents, and intrusted with the management of its affairs, though not strictly trustees, occupy a fiduciary relation towards it, and cannot, directly or indirectly, derive any personal advantage or profit from their position which is not enjoyed in common by all the stockholders. Any secret profits made by them in the transaction of the company's business belong to the company.

The cases do not agree in the terms used to designate the relation existing between the directors and other officers of a corporation and the corporation. In most of the cases they are spoken of as "trustees." [59] In others they are spoken of as "agents." [60] And in others they are termed "mandatories." [61] By the better opinion, they are not strictly trustees, since the title to the corporate prop-

[57] Rothchild v. Memphis & C. R. Co., 113 Fed. 476, 51 C. C. A. 310. And see Windmuller v. Standard Distilling & Distributing Co. (C. C.) 114 Fed. 491.

[58] Wheeler v. Abilene Nat. Bank Bldg. Co., 159 Fed. 391, 89 C. C. A. 477, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917; Crichton v. Webb Press Co., 113 La. 167, 36 South. 926, 67 L. R. A. 76, 104 Am. St. Rep. 500.

[59] In re Cameron's Coalbrook, etc., Ry. Co., 18 Beav. 339; Liquidators of The Imperial Mercantile Credit Ass'n v. Coleman, L. R. 6 H. L. 189; Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 721, 17 L. Ed. 339; Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 216; Shea v. Mabry, 1 Lea (Tenn.) 319; Cumberland Coal & Iron Co. v. Sherman, 30 Barb. (N. Y.) 553; Bosworth v. Allen, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667; Schnittger v. Old Home Consol. Min. Co., 144 Cal. 603, 78 Pac. 9. See note, 53 Am. Dec. 637.

[60] Ferguson v. Wilson, 2 Ch. App. 77; Allen v. Curtis, 26 Conn. 456; Overend & Gurney Co. v. Gibb, L. R. 5 H. L. 480. But see Hoyt v. Thompson's Ex'r, 19 N. Y. 207, 216; Beveridge v. New York El. R. Co., 112 N. Y. 1, 23, 19 N. E. 489, 2 L. R. A. 648; People ex rel. Manice v. Powell, 201 N. Y. 194, 94 N. E. 634.

[61] Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684.

erty is not in them but in the corporation.[62] Indeed, they are little more than the agents of the corporation, governed by the rules of law applicable to other agents.[63] Some courts dispute this, and insist that the powers of directors are original and undelegated.[64] However much the authorities may disagree in the use of terms to describe the relation, they all agree that the relation is a fiduciary one, and it is generally to express this idea that the relation is spoken of as a "trust relation." It would seem correct to say that as to third persons the directors are, in substance, the agents of their corporation; but as to the corporation itself, though they are not technically trustees, the courts hold them responsible essentially as such, and particularly in the duty exacted of strictest good faith.

Since the relation between the directors and the corporation is fiduciary, it follows that a director cannot, directly or indirectly, derive any personal profit or advantage by reason of his position that is not enjoyed in common by all the stockholders.[65] A director is a trustee for the entire body of stockholders, and both good morals and good law imperatively demand that he shall manage all the business affairs of the company with a view to promote the common interests, and not his own interests; and he cannot, directly or indirectly, derive any personal profit or advantage, by reason of his

[62] People ex rel. Manice v. Powell, 201 N. Y. 194, 94 N. E. 634.

[63] See 1 Mor. Corp. § 516; note, 53 Am. Dec. 637; Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487. "The liability of officers to the corporation for damages caused by negligent or unauthorized acts rests upon the common-law rule, which renders every agent liable who violates his authority or neglects his duty to the damage of his principal." North Hudson Mut. Bldg. & Loan Ass'n v. Childs, 82 Wis. 460, 52 N. W. 600, 605, 33 Am. St. Rep. 57. "Bank directors are often styled 'trustees,' but not in any technical sense. The relation between the corporation and them is rather that of principal and agent." Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 929, 35 L. Ed. 662. "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees; but that, as I apprehend, is only in a general sense, as we term an agent or any other bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties and who are therefore bound to apply ordinary care and diligence, and no more." Per Sharswood, J., in Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684.

[64] Hoyt v. Thompson's Ex'r, 19 N. Y. 207; Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; People ex rel. Manice v. Powell, 201 N. Y. 194, 94 N. E. 634.

[65] Arkansas Val. Agr. Soc. v. Eichholtz, 45 Kan. 164, 25 Pac. 613; Landes v. Hart, 131 App. Div. 6, 115 N. Y. Supp. 337.

position, distinct from the other stockholders. "By assuming the office, he undertakes to give his best judgment, in the interests of the corporation, in all matters in which he acts for it, untrammeled by any hostile interest in himself or others. There is an inherent obligation on his part that he will in no manner use his position to advance his own interest as an individual, as distinguished from that of the corporation. And all secret profits derived by him in any dealings in regard to the corporate enterprise must be accounted for to the corporation, even though the transaction in which they were made also advantaged the corporation of which he was director." [66] Thus, where the directors of a corporation secured their own debts by a mortgage of the corporate property, it was held that the mortgage should be set aside.[67] So, where the president of a bank, who was also a director, loaned the moneys of the bank, on a note running to the bank, at a stipulated rate of interest, but on a secret agreement with the borrowers that he should participate in the profits of lands to be purchased with the money, it was held that he was guilty of a breach of trust, and that the profits so acquired by him belonged to the bank.[68] Where a director was promised a bonus by a contractor if the director secured a contract with his corporation for the contractor, and the director did secure the contract as agreed, it was held that the bonus could not be recovered, since the arrangement tended to the betrayal of the fiduciary relationship, and was, therefore, illegal and void as against public policy.[69] It is immaterial that the unfaithful director may have informed his codirectors of the corrupt bargain.[70] So, it has been

[66] Bird Coal & Iron Co. v. Humes, 157 Pa. 278, 27 Atl. 750, 37 Am. St. Rep. 727. See, also, Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715, 17 L. Ed. 339; Farmers' & Merchants' Bank of Los Angeles v. Downey, 53 Cal. 466, 31 Am. Rep. 62; Parker v. Nickerson, 112 Mass. 195; Wardell v. Union P. R. Co., 103 U. S. 651, 26 L. Ed. 509; Cook v. Sherman (C. C.) 20 Fed. 167; Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co., 93 Ala. 364, 9 South. 217; Flint & P. M. Ry. Co. v. Dewey, 14 Mich. 477; Rutland Electric Light Co. v. Bates, 68 Vt. 579, 35 Atl. 480, 54 Am. St. Rep. 904; Klein v. Independent Brewing Ass'n, 231 Ill. 594, 83 N. E. 434; Landes v. Hart, supra. Compare Keeney v. Converse, 99 Mich. 316, 58 N. W. 325, where stockholders were held barred of relief by reason of laches.

[67] Koehler v. Black River Falls Iron Co., supra.

[68] Farmers' & Merchants' Bank of Los Angeles v. Downey, 53 Cal. 466, 31 Am. Rep. 62. The president of a corporation which is insolvent cannot, in view of his fiduciary duty to the corporation, sell its properties to himself. Bowden Lime Works v. Moss (Ala. App.) 70 South. 292.

[69] Landes v. Hart, 131 App. Div. 6, 115 N. Y. Supp. 337.

[70] Munson v. Syracuse, G. & C. R. Co., 103 N. Y. 58, 8 N. E. 355; Landes v. Hart, supra.

decided, a stockholder, acting as a member of a corporate purchasing committee, cannot make a secret profit for his own firm.[71]

This doctrine does not apply where an officer of a corporation enters into a transaction in which he owes no duty to the corporation. A director or other agent of a corporation may purchase property, and afterwards sell it to the corporation at an advance, provided it was not his duty at the time of the purchase to purchase for the corporation, and he may purchase claims against the corporation at a discount, and enforce them in full, if he is under no obligation to purchase them for the corporation.[72] Thus, a director may buy up bonds of his corporation at their market value from holders of the bonds, and enforce them subsequently against the corporation at their full par value, since there exists no present duty.[73] If he was under any duty to the company, however, at the time of the purchase, it may claim the benefit of any profit or advantage realized by him. As we shall presently see, at some length, the fiduciary relation in which an officer stands towards the corporation disqualifies him to represent it in making contracts in which he is personally interested. There is much confusion as to the effect of contracts and transactions between a corporation and its officers. Therefore we shall reserve the subject for a separate section.

The doctrine of these cases has been applied to a purchase by a director, at an execution sale, of the corporate property, on the

[71] Redhead v. Parkway Driving Club, 148 N. Y. 471, 42 N. E. 1047.

[72] 1 Mor. Corp. § 521, and cases there cited. In St. Louis, Ft. S. & W. R. Co. v. Chenault, 36 Kan. 51, 12 Pac. 303, where the treasurer of a railroad corporation, who, with his own money, and for himself individually, had purchased notes of the company at a discount, he was allowed to collect their full face value from the company, on the ground that, at the time of the purchase, he was under no obligation to purchase or to pay them on behalf of the company. See, also, Glenwood Mfg. Co. v. Syme, 109 Wis. 355, 85 N. W. 432; Burland v. Earle, [1902] App. Cas. 83; Seymour v. Spring Forest Cemetery Ass'n, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; McIntyre v. Ajax Min. Co., 28 Utah, 162, 77 Pac. 613. A corporation, in possession of certain premises, near the end of its lease, sought a renewal from the landlord and was refused. Subsequently, a director of the corporation secured a lease for himself and covenanted neither to assign nor sublet. Held, the director's action was not such a breach of trust as would entitle the corporation to interfere in any way with his enjoyment of the full benefit of the lease. CRITTENDEN & COWLER CO. v. COWLER, 66 App. Div. 95, 72 N. Y. Supp. 702, Wormser Cas. Corporations, 358. The decision seems sound, since there was an extinction of any expectancy of renewal on the part of the corporation and therefore the director received no benefit which the corporation could legally claim.

[73] Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co., 69 N. J. Eq. 718, 61 Atl. 529, affirmed 71 N. J. Eq. 221, 65 Atl. 980.

ground that it is the duty of a director to prevent such a sale, if possible, and, if not, then to endeavor to have the property produce the highest price, and, in order to the attainment of these objects, to use the knowledge he has derived from the confidence reposed in him as director, while, as purchaser, on the other hand, it is to his interest to pay as little as possible, and to use his special knowledge for his own advantage. And it is held in some states that in such cases actual fraud or actual advantage need not be shown; that the corporation has an absolute right to disaffirm the sale and demand a resale.[74] Other courts, however, hold that such a purchase is valid, if in good faith.[75] Thus, where a director who was also the general manager of a corporation did his best to prevent foreclosure of a mortgage on corporate property, it was held he might bid in the property at the sale.[76]

CONTRACTS OR OTHER TRANSACTIONS BETWEEN DIRECTORS OR OFFICERS AND THE CORPORATION

201. An officer cannot, as such, on behalf of the corporation, contract with or convey to himself in his individual capacity, unless he acts under the immediate direction of a superior agent.

202. The directors or other officers of a corporation have no right to represent it in contracts or transactions with themselves, or in which they are personally interested. If they do so, the corporation not being represented by other agents who are disinterested, the contract or transaction is voidable at the option of the corporation. But,

(a) By the weight of authority, a contract or transaction with an officer, or in which he is personally interested, will be binding upon the corporation if it is shown to be fair and free

[74] Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314, 13 Am. Rep. 595. But see Preston v. Loughran, 58 Hun, 210, 12 N. Y. Supp. 313. Cf. Marr v. Marr, 72 N. J. Eq. 797, 66 Atl. 182.

[75] Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316; Watt's Appeal, 78 Pa. 370; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Lucas v. Friant, 111 Mich. 426, 69 N. W. 735; Coombs v. Barber, 31 Mont. 526, 79 Pac. 1; Snediker v. Ayers, 146 Cal. 407, 80 Pac. 511; Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362; In re New Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 880. The director has the burden of establishing good faith and payment of value. Horbach v. Marsh, 37 Neb. 22, 55 N. W. 286.

[76] Buchler v. Black, 226 Fed. 703, 141 C. C. A. 459. In this case, as in many others of the same kind, the complaining stockholders were chargeable with laches. See, also, Twin-Lick Oil Co. v. Marbury, supra.

from fraud, and if the corporation was represented by other agents. In New York and some other jurisdictions it is held, even in these cases, that the contract or transaction may be avoided by the corporation, and that the question of fraud is immaterial.

(b) Such a contract or transaction may be ratified by the stockholders, either expressly or impliedly, by acquiescence or acceptance of the benefits with knowledge of the facts.

(c) The corporation is liable, on avoiding the contract or transaction, for the benefits actually received and retained.

(d) Contracts between corporations with interlocking directors are not void, but only voidable upon affirmative proof of misconduct by the directors or of fraud in fact.

Contract or Transaction by Officer with Himself

From the nature of things, the directors or other officers or agents of a corporation cannot contract in their representative capacity with themselves in their capacity as individuals; nor can they convey to themselves. Such a transaction would be void for want of two parties. "The idea," said Orton, J., in a Wisconsin case, "that the same persons constitute different identities of themselves by being called directors or officers of a corporation, so that, as directors or officers, they can convey or mortgage to or contract with themselves as private persons, is in violation of common sense." [77] But it has been held that an agent may represent the corporation in making a contract with himself personally, if he acts under immediate instructions from a superior agent, or from the board of directors.[78]

[77] Haywood v. Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184, 187, per Campbell, J., in People ex rel. Plugger v. Township Board of Overyssel, 11 Mich. 222; Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; Hill v. Marston, 178 Mass. 285, 59 N. E. 766; Janney v. Minneapolis Industrial Exposition, 79 Minn. 488, 82 N. W. 984, 50 L. R. A. 273. "If it be conceded that the contract by which the defendant became the creditor of the company was valid, we see no principle on which the subsequent purchase under the deed of trust is not equally so. The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted, and who in this respect was the trustee of the corporation, and must be supposed to have been selected by it for the exercise of this power. Defendant was at liberty to bid, subject to those rules of fairness which we have already conceded to belong to his peculiar position; for, if he could not bid, he would have been deprived of the only means which his contract gave him of making his debt out of the security on which he had loaned his money." Per Miller, J., in Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328.

[78] 1 Mor. Priv. Corp. § 527; Louisville, N. A. & C. Ry. Co. v. Carson, 151

Personal Interest of Officer in Contract or Transaction

It is an elementary principle that the same person cannot be allowed to act for himself, and at the same time, with respect to the same matter, as the agent for another, whose interests are conflicting. Thus, a person cannot be a purchaser of property and at the same time the agent of the vendor. "The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle." [79] Or, as the Pennsylvania court has said: "We have the authority of Holy Writ for saying that 'no man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.'" [80] The law therefore will always condemn the transactions of a party on his own behalf, directly or indirectly, when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted.[81] This doctrine applies with full force to transactions by directors or other officers of a corporation, on behalf of the corporation, in which they are personally interested. They will not be permitted to occupy a position in which their own interests will conflict with the interests of the corporation which they represent, and which they are bound to protect. It is well settled, therefore, that, where the directors or other officers or agents of a corporation are personally interested in any contract or transaction into which they enter on behalf of the corporation, the latter may repudiate it. "They cannot, as agents or trustees, enter into nor authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits." [82] If any profits are made out of such a transaction,

Ill. 444, 38 N. E. 140. In this case a lease to a corporation by a lessor, who also executed the lease on behalf of the company as its vice president and manager, was held good, where it was executed in good faith, under the direction of the president, and ratified by the corporation by taking possession, and paying rent according to its terms.

[79] Wardell v. Union P. R. Co., 103 U. S. 651, 26 L. Ed. 509; Metropolitan Elevated R. Co. v. Manhattan Elevated R. Co., 11 Daly (N. Y.) 373; Id., 14 Abb. N. C. (N. Y.) 103; Attalla Iron Ore Co. v. Virginia Iron, Coal & Coke Co., 111 Tenn. 527, 77 S. W. 774.

[80] Everhart v. Searle, 71 Pa. 256.

[81] Id. And see cases cited in note 77, ante.

[82] Id. See, also, Goodin v. Cincinnati & W. Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95; United States Rolling Stock Co. v. Atlantic & G. W. R. Co., 34 Ohio St. 450, 32 Am. Rep. 380; Flint & P. M. Ry. Co. v. Dewey, 14 Mich. 477; Gilman, C. & S. R. Co. v. Kelly, 77 Ill. 426; Gallery v. National Exch. Bank, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149; Hook v. Ayers, 80 Fed. 978, 26 C. C. A. 287; Morgan v. King, 27 Colo. 539, 63 Pac. 416; Barnes v. Lynch,

they will inure to the benefit of the corporation.[83] Thus, where the directors of a corporation bought a steamboat in their individual capacity, and then, as directors, caused it to be purchased on behalf of the corporation at a large advance upon its cost and value, it was held that the transaction was fraudulent, and that the profits inured to the benefit of the company, and could be recovered by it, with interest.[84] So, where the general manager of a corporation entered into a contract for the purchase of asphalt at $13.20 a ton,

9 Okl. 156, 59 Pac. 995; Kroegher v. Calivada Colonization Co., 119 Fed. 641, 56 C. C. A. 257; Scott v. Farmers' & Merchants' Nat. Bank, 97 Tex. 31, 75 S. W. 7, 104 Am. St. Rep. 835; Smith v. Pacific Vinegar & Pickle Works, 145 Cal. 352, 78 Pac. 550; Booth v. Land Filling & Improvement Co., 68 N. J. Eq. 536, 59 Atl. 767; Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152, 76 N. E. 1075; In re McCarthy Portable Elevator Co. (D. C.) 196 Fed. 247. Where defendant and his associate purchased real estate through a syndicate for the purpose of selling it at a profit to plaintiff corporation to be formed, and after such formation, while acting as directors of plaintiff, authorized a sale of the property to it, in exchange for stock, at a price largely in excess of the value of the property, without making a full disclosure of all facts known to them material to the property and as to their purchase, including the price paid by them, or requiring that the corporation should have independent, adequate advice, the corporation was entitled to rescind the transaction for fraud. Old Dominion Copper Mining & Smelting Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479. Cf., however, Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025.

[83] Bent v. Priest, 10 Mo. App. 543; McClure v. Law, 161 N. Y. 78, 55 N. E. 388, 76 Am. St. Rep. 262; Redhead v. Parkway Driving Club, 148 N. Y. 471, 42 N. E. 1047; Billings v. Shaw, 209 N. Y. 265, 103 N. E. 142; Asphalt Const. Co. v. Bouker, 150 App. Div. 691, 135 N. Y. Supp. 714, affirmed 210 N. Y. 643, 105 N. E. 1080. Spaulding v. North Milwaukee Town-Site Co., 106 Wis. 481, 81 N. W. 1064; Goodhue Farmers' Warehouse Co. v. Davis, 81 Minn. 210, 83 N. W. 531; Gluckstein v. Barnes [1900] App. Cas. 240; The Telegraph v. Lee, 125 Iowa, 17, 98 N. W. 364; The Telegraph v. Loetscher, 127 Iowa, 383, 101 N. W. 773, 4 Ann. Cas. 667; De Bardeleben v. Bessemer Land & Imp. Co., 140 Ala. 621, 37 South. 511; Klein v. Independent Brewing Ass'n, 231 Ill. 594, 83 N. E. 434. Cf. Campbell's Case, L. R. 4 Ch. D. 470. The president and general manager invented a gas tip, which the corporation manufactured under his orders as manager, without any contract with him. He directed an employé of the corporation to ascertain the exact cost of the manufacture, to which he added 150 per cent. profit, for which amount he sold the tips to himself under another name; and he placed the tips on the market at a price double that paid the corporation. The directors of the corporation had no knowledge of, and did not consent to, this arrangement. Held that, the president and manager being bound to devote his energies to the benefit of the corporation, the profits made by him on the resale of the tips belonged to the corporation, and that it was entitled to compel him to account therefor. D. M. Steward Mfg. Co. v. Steward, 109 Tenn. 288, 70 S. W. 808.

[84] Parker v. Nickerson, 112 Mass. 195. Contra, Burland v. Earle, [1902] App. Cas. 83.

and thereafter agreed with the corporation to deliver to it the same asphalt at $33 a ton, and the contract was carried out, the court held that an action could be successfully maintained by the corporation to compel the manager to account for the profits that he had realized out of the transaction.[85] This principle has been applied in a variety of cases. There is no limit to the circumstances under which the question may arise. A director of a corporation is disqualified to vote or act, at a meeting of the board, upon any resolution in which he is personally interested.[86] Thus he cannot vote on a resolution authorizing the renewal of notes of the corporation in his favor.[87] Where the directors fix the compensation for their own services, either as directors or other officers, the transaction will be jealously scrutinized by the courts, and will be set aside, at the election of the corporation, unless it is shown to be fair and free from fraud.[88] An officer or director, however, who has interests to protect, may in good faith purchase the property of a corporation at a public sale.[89] An officer may purchase from third persons at a discount securities issued by the corporation unless he owes it a duty to discharge or buy them.[90]

Extent of Personal Interest—Interlocking Directors

It can make no difference in the application of this principle that there are other parties to a contract or transaction with a corpora-

[85] Asphalt Const. Co. v. Bouker, 150 App. Div. 691, 135 N. Y. Supp. 714, affirmed 210 N. Y. 643, 105 N. E. 1080. See, also, Tooker v. National Sugar Refining Co. of New Jersey, 80 N. J. Eq. 305, 84 Atl. 10.

[86] He cannot be included in counting a quorum. Bassett v. Fairchild, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611; Parsons v. Tacoma Smelting & Refining Co., 25 Wash. 492, 65 Pac. 765; In re McCarthy Portable Elevator Co. (D. C.) 196 Fed. 247. But see Stewart v. Lehigh Valley R. Co., 38 N. J. Law, 505; Tooker v. National Sugar Refining Co. of New Jersey, 80 N. J. Eq. 305, 84 Atl. 10.

[87] Smith v. Los Angeles Immigration & Land Co-operative Ass'n, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53.

[88] Jones v. Morrison, 31 Minn. 140, 16 N. W. 854. See Copeland v. Johnson Mfg. Co., 47 Hun (N. Y.) 235; Haas v. Universal Phonograph & Record Co., 75 Misc. Rep. 119, 132 N. Y. Supp. 767; Davis v. Memphis City R. Co. (C. C.) 22 Fed. 883; Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412. Post, p. 666.

[89] Greenwood Ice & Coal Co. v. Georgia Home Ins. Co., 72 Miss. 46, 17 South. 83; Snedliker v. Ayers, 146 Cal. 407, 80 Pac. 511; In re New Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 880. Contra, Aldine Mfg. Co. v. Phillips, 129 Mich. 240, 88 N. W. 632; McAllen v. Woodcock, 60 Mo. 174. In the last cited case a purchase of corporate property by its treasurer at a sheriff's sale was condemned.

[90] Seymour v. Spring Forest Cemetery Ass'n, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; McIntyre v. Ajax Min. Co., 28 Utah, 162, 77 Pac. 613; Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co., 69 N. J. Eq.

tion in which an officer is personally interested, who occupy no fiduciary relation to the corporation.[91] The doctrine applies, for instance, where a contract is made with a firm of which one of the directors is a member,[92] or where it is with another corporation of which he is also a stockholder,[93] or an officer.[94] The rule has frequently been applied, for instance, where the directors of a railroad company enter into a contract for the construction of its road with a construction firm or corporation of which one or more of the directors are members.[95]

So the directors of one corporation cannot act for it, at least when their action is an essential factor in contracting with another corporation, of which they are also directors.[96] It has been held that a contract between two corporations by their respective boards of directors is not invalid, or voidable at the election of one of the parties thereto, from the mere circumstance that a minority of its board are also directors of the other company.[97] But a stricter rule

718, 61 Atl. 529, affirmed 71 N. J. Eq. 221, 65 Atl. 980. Contrary intimations are sometimes found in unofficial authorities: thus see 10 Cyc. 798.

[91] Munson v. Syracuse, G. & C. R. Co., 103 N. Y. 58, 8 N. E. 355.

[92] Aberdeen Ry. Co. v. Blakie, 1 Macq. 461; Sims v. Petaluma Gaslight Co., 131 Cal. 656, 63 Pac. 1011; Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 352, 78 Pac. 550, 104 Am. St. Rep. 42. Cf. Costa Rica Ry. v. Forwood, [1900] 1 Ch. 756.

[93] Parker v. Nickerson, 112 Mass. 195; Gilman, C. & S. R. Co. v. Kelly, 77 Ill. 426. And see Wardell v. Union P. R. Co., 103 U. S. 651, 26 L. Ed. 509; Attalla Iron Ore Co. v. Virginia Iron, Coal & Coke Co., 111 Tenn. 527, 77 S. W. 774.

[94] Bear River Valley Orchard Co. v. Hanley, 15 Utah, 506, 50 Pac. 611.

[95] See Thomas v. Brownville, Ft. K. & P. R. Co. (C. C.) 2 Fed. 877; Id., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018; Barr v. New York, L. E. & W. R. Co., 125 N. Y. 263, 26 N. E. 145; Gilman, C. & S. R. Co. v. Kelly, 77 Ill. 426.

[96] Metropolitan Telephone & Telegraph Co. v. Domestic Telegraph & Telephone Co., 44 N. J. Eq. 568, 14 Atl. 907; Pearson v. Concord R. Corp., 62 N. H. 537, 13 Am. St. Rep. 590; Davis Provision Co. v. Fowler Bros., 20 App. Div. 626, 47 N. Y. Supp. 205, affirmed 163 N. Y. 580, 57 N. E. 1108; McLeod v. Lincoln Medical College of Cotner University, 69 Neb. 550, 96 N. W. 265, 98 N. W. 672. But see Evansville Public Hall Co. v. Bank of Commerce, 144 Ind. 34, 42 N. E. 1097; Salina Nat. Bank v. Prescott, 60 Kan. 490, 57 Pac. 121; McComb v. Barcelona Apartment Ass'n, 134 N. Y. 598, 31 N. E. 613; Booth v. Robinson, 55 Md. 419.

[97] United States Rolling-Stock Co. v. Atlantic & G. W. R. Co., 34 Ohio St. 450, 32 Am. Rep. 380. See, also, Jesup v. Illinois Cent. R. Co. (C. C.) 43 Fed. 483; Hagerstown Mfg. Min. & Land. Imp. Co. v. Keedy, 91 Md. 430, 46 Atl. 985; Porter v. Lassen County Land & Cattle Co., 127 Cal. 261, 59 Pac. 563; Schnittger v. Old Home Consol. Min. Co., 144 Cal. 603, 78 Pac. 9; Gould Copper Min. Co. v. Walker (Ariz.) 152 Pac. 853. It has even been held that the transaction will be upheld in the absence of a disinterested majority, provided it is fair and just. Evansville Public Hall Co. v. Bank of Commerce, 144 Ind. 34, 42 N. E. 1097.

prevails in some jurisdictions.[98] The weight of modern authority regards transactions between corporations with interlocking directors as not void, but merely voidable upon affirmative proof of misconduct going to establish fraud in fact. This rule seems open to serious criticism, in that it places the burden of proof upon plaintiff to prove fraud, rather than upon the directors or officers to establish the fairness of their dealings. On the other hand, the extreme rule which prohibits all such transactions as against public policy, and therefore void, is too drastic and raises an unnecessary presumption of illegality and unfairness.

Where the Corporation is Represented by Other Agents

Most courts hold that a director or other officer may legally contract with the corporation, if, in entering into the contract, the corporation is represented by other agents; that, for instance, a director, either alone or jointly with strangers, may sell property or lend money to the corporation, or make any other contract with it, if the contract is sanctioned by a majority of the board of directors, not including himself; and that the corporation will be bound if the transaction is fair, open, and free from fraud.[99] "It

[98] Post, p. 643. And see Fitzgerald v. Fitzgerald & Mallory Construction Co., 44 Neb. 463, 62 N. W. 899, writ of error dismissed Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536.

[99] 1 Mor. Priv. Corp. § 527; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Barr v. Pittsburgh Plate Glass Co., 6 C. C. A. 260, 57 Fed. 86; Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; Roseboom v. Whittaker, 132 Ill. 81, 23 N. E. 339; Louisville, N. A. & C. Ry. Co. v. Carson, 151 Ill. 444, 38 N. E. 140; Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362; Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 633; Garrett v. Burlington Plow Co., 70 Iowa, 697, 29 N. W. 395, 59 Am. Rep. 461; Gorder v. Plattsmouth Canning Co., 36 Neb. 548, 54 N. W. 830; Parker v. Nickerson, 137 Mass. 487; Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316; Ft. Payne Rolling Mill v. Hill, 174 Mass. 224, 54 N. E. 532; Troy Min. Co. v. White, 10 S. D. 475, 74 N. W. 236, 42 L. R. A. 549; Singer v. Salt Lake City Copper Mfg. Co., 17 Utah, 143, 53 Pac. 1024, 70 Am. St. Rep. 773; Porter v. Lassen County Land & Cattle Co., 127 Cal. 261, 59 Pac. 563; Rawlings v. New Memphis Gaslight Co., 105 Tenn. 268, 60 S. W. 206; Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189. See, also, Junkins v. Doughty Union School Dist., 39 Me. 220. The fact that boards of directors of two mining corporations are appointed by a third corporation as a holding company of the majority of the stock of the mining corporations does not subject the government of the mining companies to a common control, so as to make directors of one of the mining companies, who are also directors of the holding company, common to each of the mining companies, where it is established that the directors of the two original companies, appointed by the holding company, are not mere "dummies," subject to the will of the directors of the holding company. Pierce v. Old Dominion Copper Mining & Smelting Co., 67 N. J. Eq. 399, 58 Atl. 319. Where a proposition to borrow money from certain directors of a corporation was carried by sufficient votes of other members of

cannot be maintained," said Mr. Justice Miller in Twin Lick Oil Co. v. Marbury,[1] "that any rule forbids one director among several from lending money to the corporation when the money is needed, and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given." The transaction is voidable on proof of misconduct or bad faith, but is not void. Even in such cases as these, however, it is well settled that the transaction will be jealously scrutinized by the courts, and set aside at the instance of the corporation, if the slightest fraud or unfairness appears.[2] And by the better opinion the burden is on the directors or other officers to show the good faith and fairness of the transaction.[3]

Some of the courts—the New York court among them—have adopted a more rigid rule, and hold that a contract entered into with a corporation, acting through its directors, by one or more of the directors, either alone or jointly with third persons, is voidable at the option of the corporation, though a majority of the directors who assent to the contract are not personally interested, and without regard to whether or not the transaction is fair and free from fraud.[4] In these jurisdictions the law does not inquire whether the

the board of directors to render the same valid without the votes of the lending directors, the fact that such lending directors were present at the meeting and voted for the transaction did not invalidate the same. Schnittger v. Old Home Consol. Min. Co., 144 Cal. 603, 78 Pac. 9. And see Jesup v. Illinois Cent. R. Co. (C. C.) 43 Fed. 483.

[1] 91 U. S. 587, 23 L. Ed. 328. See, also, Jones v. Hale, 32 Or. 465, 52 Pac. 311; Rylander v. Sheffield, 108 Ga. 111, 34 S. E. 348; Blake v. Ray, 110 Ky. 705, 62 S. W. 531.

[2] Thomas v. Brownsville, Ft. K. & P. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Hallam v. Indianola Hotel Co., 56 Iowa, 178, 9 N. W. 111; Hubbard v. New York, N. E. & W. Investment Co. (C. C.) 14 Fed. 675; Meeker v. Winthrop Iron Co. (C. C.) 17 Fed. 48; Patterson v. Portland Smelting Works, 35 Or. 96, 56 Pac. 407; Horbach v. Marsh, 37 Neb. 22, 55 N. W. 286.

[3] Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Ryan v. Williams (C. C.) 100 Fed. 172; Tenison v. Patton, 95 Tex. 284, 67 S. W. 92; Horbach v. Marsh, 37 Neb. 22, 55 N. W. 286. Cf. Marr v. Marr, 72 N. J. Eq. 797, 66 Atl. 182.

[4] Aberdeen Ry. Co. v. Blakie, 1 Macq. 461; Munson v. Syracuse, G. & C. R. Co., 103 N. Y. 58, 8 N. E. 355; Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Gamble v. Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; Continental Securities Co. v. Belmont, 206 N. Y. 7, 99 N. E. 138, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914A, 777. Pearson v. Concord R.

transaction was fair or unfair, but stops their inquiry as soon as the relation is disclosed, and sets aside the transaction, or refuses to enforce it, at the instance of the corporation, without asking whether there was fraud or not. As was said in a New York case,[5] it prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry; and it leaves neither to judge nor jury the right to determine, upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. It makes no difference in these jurisdictions that only one director is a party to the contract, and that there were a number of other directors who voted for the contract, and who were not personally interested.

Consent—Acquiescence and Laches of Corporation or Stockholders

A contract between directors or other officers or agents of a corporation and the corporation, or a transaction with the corporation in which they are interested directly or indirectly, is not absolutely void, even where there is fraud, if it is within the powers of the corporation. It is simply voidable at the election of the corporation or its stockholders.[6] To be binding on the corporation, it does not need ratification. It is binding until avoided. It follows that if the stockholders of the corporation, or a majority of them, where the transaction is one which they could have authorized, but not otherwise,[7] assent to the contract, expressly or impliedly, by taking the

Corp., 62 N. H. 537, 13 Am. St. Rep. 590; Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., 16 Md. 456, 77 Am. Dec. 311; Cumberland Coal & Iron Co. v. Sherman, 30 Barb. (N. Y.) 553; Stewart v. Lehigh Valley R. Co., 38 N. J. Law, 505; United States Steel Corp. v. Hodge, 64 N. J. Eq. 807, 54 Atl. 1, 60 L. R. A. 742. Cf. Robotham v. Prudential Ins. Co. of America, 64 N. J. Eq. 673, 53 Atl. 842.

[5] Munson v. Syracuse, G. & C. R. Co., 103 N. Y. 58, 8 N. E. 355.

[6] Barr v. New York, L. E. & W. R. Co., 125 N. Y. 263, 26 N. E. 145; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Urner v. Sollenberger, 89 Md. 316, 43 Atl. 810; Nye v. Storer, 168 Mass. 53, 46 N. E. 402; Salem Iron Co. v. Lake Superior Consol. Iron Mines, 112 Fed. 239, 50 C. C. A. 213; Stanley v. Luse, 36 Or. 25, 58 Pac. 75; United States Steel Corp. v. Hodge, 64 N. J. Eq. 807, 54 Atl. 1, 60 L. R. A. 742; Schnittger v. Old Home Consol. Min. Co., 144 Cal. 603, 78 Pac. 9; Godley v. Crandall & Godley Co., 212 N. Y. 121, 105 N. E. 818, L. R. A. 1915D, 632.

[7] For instance, the holders of a majority of the stock of a corporation could not, by their votes at a stockholders' meeting, lawfully authorize its officers to lease its property to themselves, or to another corporation formed for the purpose, and whose stock is exclusively owned by them, unless such lease is made in good faith, and is supported by an adequate consideration; otherwise, a fraud would thereby be committed on the minority stockholders. See Meeker v. Winthrop Iron Co. (C. C.) 17 Fed. 48; Continental Securities Co.

benefit of it with knowledge of the facts, it becomes binding upon the corporation, and cannot afterwards be avoided.[8] And such consent will be implied if the stockholders are guilty of laches in moving to avoid it. They must take steps to avoid it within a reasonable time after they have knowledge of the circumstances.[9]

The rule that a contract between a director of a corporation and the corporation is voidable at the instance of the latter, or of its stockholders, clearly does not apply where all who are interested in the corporation, its officers, directors, and stockholders, not only know of but consent to it, and where the property acquired by the corporation under the contract is kept and used by it without dissent by any one.[10] But it must be clear that there was full and fair disclosure of the transaction, and that all the stockholders, in the light of such disclosure, had consented, or at least acquiesced.

Liability to Extent of Benefit

Even where the contract is voidable, and is avoided by the corporation, it will be liable for the actual value of the benefits it has received. Thus, where two of the board of directors of a railroad company, who took part in making a contract for the construction of the road, were interested with the other parties in the contract, and the other contractors entered into an agreement with the other directors at the time the construction contract was made that, in effect, relieved them from liability on their unpaid stock, it was held that the contract was voidable at the election of the corporation or its stockholders, but that, to the extent of the benefit conferred upon the corporation in the construction of the road, the

v. Belmont, 206 N. Y. 7, 99 N. E. 138, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914A, 777; Godley v. Crandall & Godley Co., 212 N. Y. 121, 105 N. E. 818, L. R. A. 1915D, 632. As to the powers of the majority, see ante, p. 560.

[8] Barr v. New York, L. E. & W. R. Co., 125 N. Y. 263, 26 N. E. 145; Louisville, N. A. & C. Ry. Co. v. Carson, 151 Ill. 444, 38 N. E. 140; Welch v. Importers' & Traders' Nat. Bank, 122 N. Y. 177, 25 N. E. 269; Omaha Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917; Battelle v. Northwestern Cement & C. P. Co., 37 Minn. 89, 33 N. W. 327.

[9] Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; United States Rolling-Stock Co. v. Atlantic & G. W. R. Co., 34 Ohio St. 450, 32 Am. Rep. 380; Stetson v. Northern Inv. Co., 104 Iowa, 393, 73 N. W. 869; Cullen v. Coal Creek Min. & Mfg. Co. (Tenn. Ch. App.) 42 S. W. 693. And see Keeney v. Converse, 99 Mich. 316, 58 N. W. 325; Morgan v. King, 27 Colo. 539, 63 Pac. 416; Rabe v. Dunlap, 51 N. J. Eq. 40, 25 Atl. 959.

[10] Battelle v. Northwestern Cement & C. P. Co., 37 Minn. 89, 33 N. W. 327. And see Barr v. Pittsburgh Plate-Glass Co., 6 C. C. A. 260, 57 Fed. 86, and Sanford Fork & Tool Co. v. Howe, B. & Co., 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713.

bonds issued in payment thereof were not void, and in a suit to foreclose a mortgage by which they were secured a decree for that amount should be allowed.[11]

LIABILITY OF DIRECTORS AND OFFICERS TO THE CORPORATION

203. The directors and other officers of a corporation are liable to it for losses sustained:

(a) By reason of a willful abuse of their trust, as by exceeding their authority or the powers of the corporation, or by misapplication of the corporate funds.

(b) By reason of negligence and inattention to the duties of their trust, though there may be no actual bad faith. By the weight of authority, they are bound to exercise ordinary care and prudence,—that is, the same degree of care and prudence that reasonable men ordinarily exercise under similar circumstances.

(c) But they are not liable for accidents, thefts, etc., where they have not been negligent, nor for mere mistakes or errors of judgment, where they have acted in good faith and with ordinary care and diligence.

(d) Nor are they liable for the acts or omissions of other directors or agents, where they have not themselves been guilty of neglect in supervising or appointing them. It is otherwise, however, if they participated in such acts, or negligently failed to take measures to prevent them. What is required is a reasonable degree of business knowledge, care and diligence, under the circumstances of the particular case.

It is well settled that the directors, trustees, or other officers of a corporation, if they act in good faith within the limits of the powers conferred upon the corporation by the charter, and within their authority, and use reasonable intelligence, prudence, and diligence, are not responsible for losses resulting to the corporation from mere mistakes or errors of judgment.[12] Thus, they are not liable

[11] Thomas v. Brownsville, Ft. K. & P. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018. See, also, Wardell v. Union Pacific R. Co., Fed. Cas. No. 17,164; Griffith v. Blackwater Boom & Lumber Co., 46 W. Va. 56, 33 S. E. 125.

[12] Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684; Watts' Appeal, 78 Pa. 370; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Booth v. Dexter Steam Fire Engine Co., 118 Ala.

for declaring and paying a dividend which diminishes the capital, in violation of a statute or of the common law, where they are not guilty of bad faith or negligence.[13] Nor are they liable for losses from accident, theft, innocent mistake, etc., where they have not been negligent.[14]

On the other hand, all the authorities agree that the directors or other officers of a corporation who willfully abuse their trust, or misapply the funds of the corporation, by which a loss is sustained, are personally liable, as trustees, to make good the loss.[15] They are bound to observe the limits placed upon their powers in the charter and by-laws, and if they intentionally or negligently transcend those powers, and do ultra vires or unauthorized acts, they are liable for the damages.[16] But they are not liable, according to some authorities, for violation of the charter through mistake, unless the mistake arose from the want of due care.[17] On the other hand, some decisions hold that when directors overstep their authority, and authorize, or do, an act which is beyond their powers or ultra vires of the corporation, they are absolutely liable, whether they act negligently or with due care, in bad faith or in good faith,

369, 24 South. 405; Carrington v. Thomas C. Basshor Co., 118 Md. 419, 84 Atl. 746; CHILDS v. WHITE, 158 App. Div. 1, 142 N. Y. Supp. 732, Wormser Cas. Corporations, 366; GENERAL RUBBER CO. v. BENEDICT, 215 N. Y. 18, 109 N. E. 96, L. R. A. 1915F, 617, Wormser Cas. Corporations, 318.

[13] Excelsior Petroleum Co. v. Lacey, 63 N. Y. 422; Van Dyck v. McQuade, 86 N. Y. 38; Lexington & O. R. Co. v. Bridges, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528; Dovey v. Cory, [1901] A. C. 477, 17 Times L. R. 732; Prefontaine v. Grenier, [1907] App. Cas. 101. Cf. Leeds Investment Co. v. Shepherd, L. R. 36 Ch. Div. 787.

[14] Mowbray v. Antrim, 123 Ind. 24, 23 N. E. 858; London Financial Ass'n v. Kelk, L. R. 26 Ch. Div. 107, 144; Yates v. Jones Nat. Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002.

[15] Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Heath v. Erie Ry. Co., Fed. Cas. No. 6,306; Perry v. Tuskaloosa Cotton-Seed Oil Mill Co., 93 Ala. 364, 9 South. 217; Ellis v. Ward, 137 Ill. 509, 25 N. E. 530; Horn Silver Min. Co. v. Ryan, 42 Minn. 196, 44 N. W. 56; Gratz v. Redd, 4 B. Mon. (Ky.) 178, 195; Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; GENERAL RUBBER CO. v. BENEDICT, 215 N. Y. 18, 109 N. E. 96, L. R. A. 1915F, 617, Wormser Cas. Corporations, 318; Hill v. Murphy, 212 Mass. 1, 98 N. E. 781, 40 L. R. A. (N. S.) 1102, Ann. Cas. 1913C, 374.

[16] Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624. And see People ex rel. Perkins v. Moss, 187 N. Y. 410, 80 N. E. 383, 11 L. R. A. (N. S.) 528, 10 Ann. Cas. 309; Greenfield Sav. Bank v. Abercrombie, 211 Mass. 252, 97 N. E. 897, 39 L. R. A. (N. S.) 173, Ann. Cas. 1913B, 420.

[17] Hodges v. New England Screw Co., supra; Williams v. McDonald, 37 N. J. Eq. 409; Yates v. Jones Nat. Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002, and cases hereafter cited.

honestly or fraudulently.[18] The latter rule seems harsh, in view of the recognized difficulty oftentimes of determining what is ultra vires.

Directors are liable if they suffer the corporate funds or property to be lost or wasted by gross negligence, and inattention to the duties of their trust, though there is no bad faith.[19] In a Virginia case it appeared that the president of a savings bank misappropriated its funds and overdrew his accounts, and a brother of the president, and corporations of which the officers and directors were also officers, largely overdrew their accounts, and were loaned large sums by the bank, with little or no security, though such borrowers were irresponsible, and another borrower was permitted to withdraw his security. The directors, though required to meet weekly, met but once, twice, or three times a year, and never caused the books to be examined, nor called for statements of accounts with other banks. The capital of the bank was small, and much of it was not paid up, and the paid-up portion was treated as a loan. The bank, on suspension, was able to pay but 10 per cent. on the deposits. Under these circumstances, it was held that, though the directors were ignorant of the affairs of the bank, and were not guilty of bad faith, they were guilty of such negligence as rendered them liable to the depositors.[20] A federal judge has said, speaking

[18] Holmes, Booth & Haydens v. Willard, 125 N. Y. 75, 25 N. E. 1083, 11 L. R. A. 170; Cullerne v. London, etc., Society, L. R. 25 Q. B. D. 485, 490, per Lindley, J.; In re National Funds Assur. Co., L. R. 10 Ch. Div. 118, per Jessel, M. R.; Hill v. Murphy, 212 Mass. 1, 98 N. E. 781, 40 L. R. A. (N. S.) 1102, Ann. Cas. 1913C, 374.

[19] Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Brinckerhoff v. Bostwick, 88 N. Y. 52; Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Delano v. Case, 17 Ill. App. 531; Id., 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; United Society of Shakers v. Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731; President, etc., of Bank of Mutual Redemption v. Hill, 56 Me. 385, 96 Am. Dec. 470; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; Horn Silver Min. Co. v. Ryan, 42 Minn. 196, 44 N. W. 56; Gratz v. Redd, 4 B. Mon. (Ky.) 178, 195; Doe v. Northwestern Coal & Transportation Co. (C. C.) 78 Fed. 62; Loan Society of Philadelphia v. Eavenson, 248 Pa. 407, 94 Atl. 121; and cases in the following notes.

[20] Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84. Compare Savings Bank of Louisville's Assignee v. Caperton, 87 Ky. 306, 8 S. W. 885, 12 Am. St. Rep. 488; Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662. In the case last cited, it was held (Harlan, Gray, Brewer and Brown, JJ., dissenting) that where the affairs of a bank are managed by its president, who has the reputation of being trustworthy and efficient, and owns the greater part of the stock, and the bank is generally considered to be in a prosperous condition, directors cannot be held liable for losses through mismanagement on the ground of negligence, in that they did not, within 90 days after they

of the duties of directors: "The idea is not to be tolerated that they serve as merely gilded ornaments of the institution, to enhance its attractiveness, or that their reputations should be used as a lure to customers." [21]

An officer of a corporation is not liable to it for doing ultra vires acts, and thereby causing a loss, if the acts were authorized by the corporation; and such authority is shown if it appears that the directors and stockholders knowingly acquiesced therein.[22] But the board of directors alone cannot authorize violation of his duty by an officer. Thus, it has been held by the Supreme Court of the United States that no act or vote of the board of directors of a bank, in violation of their own duties, and in fraud of the interests and rights of the stockholders, will justify the cashier in acts which are in violation of the stipulation in his official bond, well and truly to execute the duties of his office, or exempt him and his sureties from liability thereon.[23]

Directors of a corporation are not bound to exercise the highest degree of care and diligence—such as a very vigilant or extremely careful person would exercise.[24] If this were required, it would be difficult to find responsible persons to assume the duties of directors. "None of the decisions exact more than a reasonable business knowledge and skill, strict good faith, and a reasonable measure of care and diligence under the circumstances of the particular case." [25] It is sometimes declared that they are bound to exercise the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. "When," said the

became directors, compel the board of directors to make a thorough investigation of the books and condition of the bank. The duty of the board of directors is not discharged by merely selecting officers of good reputation for ability and integrity, and then leaving the affairs of the bank in their hands, without any other supervision or examination than mere inquiry of such officers, and relying upon their statements until some cause for suspicion attracts their attention. The board is bound to maintain a supervision of the bank's affairs, to have a general knowledge of the character of the business and the manner in which it is conducted, and to know at least on what security its large lines of credit are given. GIBBONS v. ANDERSON (C. C.) 80 Fed. 345, Wormser Cas. Corporations, 360. See, also, Rankin v. Cooper (C. C.) 149 Fed. 1010.

[21] GIBBONS v. ANDERSON (C. C.) 80 Fed. 345, Wormser Cas. Corporations, 360. And see, Warner v. Penoyer, 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761.

[22] Holmes, Booth & Haydens v. Willard, 125 N. Y. 75, 25 N. E. 1083, 11 L. R. A. 170.

[23] Minor v. Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. Ed. 47.

[24] Briggs v. Spaulding, supra. Cf. Campbell v. Watson, 62 N. J. Eq. 396 50 Atl. 120.

[25] Carrington v. Thomas C. Basshor Co., 118 Md. 419, 84 Atl. 746.

New York court, "one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty—'crassa negligentia'—not to bestow them. It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied. What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank." [26] And it was recently held: "What is due diligence and care varies with the circumstances of each case, and it is impossible to formulate precisely general rules which will cover all states of fact." [27] It is often said that directors and trustees are liable only for gross negligence—"crassa negligentia"—but, by the weight of opinion, that phrase means the absence of ordinary care and diligence under the circumstances of the particular case.[28] Cardozo, J., recently declared that "the defendant, as a

[26] Hun v. Cary, 82 N. Y. 65, 71, 37 Am. Rep. 546. See, also, GENERAL RUBBER CO. v. BENEDICT, 215 N. Y. 18, 109 N. E. 96, L. R. A. 1915F, 617, Wormser Cas. Corporations, 318. Warren v. Robison, 19 Utah, 289, 57 Pac. 287, 75 Am. St. Rep. 734; New Haven Trust Co. v. Doherty, 75 Conn. 555, 54 Atl. 209, 96 Am. St. Rep. 239. In Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513, it was said: "I think the question in all such cases should and must necessarily be whether they [directors] have omitted that care which men of common prudence take of their own concerns. To require more would be adopting too rigid a rule, and rendering them liable for slight neglect; while to require less would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care, and expose them to liability for gross neglect only, which is very little short of fraud itself."

[27] CHILDS v. WHITE, 158 App. Div. 1, 142 N. Y. Supp. 732, Wormser Cas. Corporations, 366, per Hotchkiss, J.

[28] Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684; Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; North Hudson Mut. Bldg. & Loan Ass'n v. Childs, 82 Wis. 460, 52 N. W. 600, 605, 33 Am. St. Rep. 57; Horn Silver Min. Co. v. Ryan, 42 Minn. 196, 44 N. W. 56; Swentzel v. Penn Bank, 147 Pa. 140, 23 Atl. 405, 415, 15 L. R. A. 305, 30 Am. St. Rep. 718; Warner v. Penoyer, 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761; Killen v. Barnes, 106 Wis. 546, 82 N. W. 536; Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate, [1899] 2 Ch. 292; Dovey v. Cory, [1901] App. Cas. 477; Prefontaine v. Grenier, [1907] App. Cas. 101; Johnson v. Stoughton Wagon Co., 118 Wis. 438, 95 N. W. 394; David Reus Permanent Loan & Savings Co. v. Conrad, 101 Md. 224, 60 Atl. 737. In Spering's Appeal, supra, Judge Sharswood said: "They [directors] can only be regarded as manda-

director of a corporation, should have taken the same care of its property that men of average prudence take of their own property." [29] There are some cases against this view of the law—cases in which it seems to be held that directors will not be liable for losses resulting from their inattention to the duties confided to them unless their inattention was willful or fraudulent.[30] This latter rule seems too lenient. The cases agree that directors cannot be held responsible for the acts or omissions of other directors or agents, unless they have been guilty of neglect in supervising or appointing them.[31] "The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management." [32]

taries—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more." In Swentzel v. Penn Bank, supra, Paxson, J., said: "In Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684, the subject is very fully discussed by the late Justice Sharswood, and the rule of ordinary care is laid down. Not, however, the ordinary care which a man takes of his own business, but the ordinary care of a bank director in the business of a bank. Negligence is the want of care according to the circumstances, and the circumstances are everything in considering this question. The ordinary care of a business man in his own affairs means one thing; the ordinary care of a gratuitous mandatory is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give in a short space of time to the business of other persons, from whom he receives no compensation."

[29] GENERAL RUBBER CO. v. BENEDICT, 215 N. Y. 18, 23, 109 N. E. 96, L. R. A. 1915F, 617, Wormser Cas. Corporations, 318. And see Shea v. Mabry, 1 Lea (Tenn.) 319; Vance v. Phœnix Ins. Co., 4 Lea (Tenn.) 385; CHILDS v. WHITE, supra.

[30] See Savings Bank of Louisville's Assignee v. Caperton, 87 Ky. 306, 8 S. W. 885, 12 Am. St. Rep. 488; Godbold v. Branch Bank at Mobile, 11 Ala. 191, 46 Am. Dec. 211; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; Ebelhar v. German American Security Co.'s Assignee (Ky.) 91 S. W. 262. "Where they [directors] have not profited personally by their bad management, or appropriated any of the property of the corporation to their own use, courts of equity treat them with indulgence." Per Pinney, J., in North Hudson Mut. Bldg. & Loan Ass'n v. Childs, 82 Wis. 460, 52 N. W. 600, 605, 33 Am. St. Rep. 57.

[31] Directors "are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention, or in neglecting to use proper care in the appointment of agents." Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 929, 35 L. Ed. 662. See, also, Warner v. Penoyer, 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761. A receiver

[32] Dovey v. Cory, [1901] App. Cas. 477, per Earl of Halsbury, L. C.; Prefontaine v. Grenier, [1907] App. Cas. 101, 109, 110.

SAME—REMEDIES AGAINST OFFFICERS

204. Where a loss results to a corporation by reason of the fraud, wrong, or negligence of its directors or other agents,
   (a) The corporation may maintain
      (1) An action on the case at law to recover damages.
      (2) A suit in equity to compel them to account.
   (b) An individual stockholder in such a case
      (1) Cannot maintain an action at law, as the injury is to the corporation.
      (2) But he may sue in equity when, and only when, the directors cannot or will not institute the suit on the corporate behalf, and relief cannot be obtained by applying to a stockholders' meeting.
   (c) Creditors of the corporation, in case of insolvency, may enforce the liability to the corporation; and by statute, in a number of states, officers who are guilty of fraud or neglect are expressly made liable to creditors.

205. The statute of limitations does not run against the claim of a corporation against its officers for misappropriation of corporate funds, since their relation is a fiduciary one. But some cases declare that, since directors are not technical trustees, the statute may operate in their favor.

An action on the case by the corporation will lie against the directors or other officers of a corporation for wrongful acts or negligence affecting the interests of the company.[88] A court of equity,

of a national bank may sue the directors to hold them responsible for the malfeasance of the managing officer, when it appears that they were so negligent as to make practically no examination of its books or affairs, and to hold meetings only at rare intervals, and then to limit their business almost wholly to the election of directors and the declaration of dividends. In such case their liability for losses should begin at a time when they ceased to discharge the duty of giving proper supervision to the conduct of the bank's affairs. In the circumstances of the case, they were liable from the time when, by reason of the failure to earn dividends for more than a year, their attention should have been drawn to the necessity of making a thorough examination. GIBBONS v. ANDERSON (C. C.) 80 Fed. 345, Wormser Cas. Corporations, 360. Where the by-laws provided that the general manager should have charge of all the company's property, and control of all persons in its employ, with power to discharge them at will, and that he should cause regular and accurate accounts to be kept by a competent bookkeeper, he was liable for funds misappropriated by the bookkeeper, where he had not given strict and upright attention to his duties. San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 Pac. 410.

[88] Franklin Fire Ins. Co. v. Jenkins, 3 Wend. (N. Y.) 130; Horn Silver Min.

in so far as the individual rights of the stockholders are concerned, has jurisdiction to call the directors to account for breach of trust, and to compel them to make satisfaction to the corporation for any loss sustained by it.[84] Such a suit should ordinarily be brought by the corporation, for the injury is to it, and not by individual stockholders. But a stockholder, as we have seen, may maintain a derivative suit in equity for the benefit of the corporation, where the directors cannot or will not institute the suit in the name of the corporation, and relief cannot be obtained by applying to a stockholders' meeting.[85] An individual stockholder cannot, however, maintain an action at law against the directors or other officers of the corporation for fraud or negligence resulting in loss of corporate property. There is, in the eye of the law, no privity or relation between the stockholders and directors. The directors are not the agents of the stockholders, but of the corporation, the legal entity; and therefore, at law, the corporation alone can sue for injuries to it.[86] The stockholders' only remedy lies, therefore, in a

Co. v. Ryan, 42 Minn. 196, 44 N. W. 56. Cf. Dykman v. Keeney, 154 N. Y. 483, 48 N. E. 894. Under a statute providing that for wrongs done to property, rights, or interests of another, for which an action might be maintained against the wrongdoer, an action may be brought, after his death, against his representatives, a bank, in an action against its president for negligent conduct, by which it sustained losses, may, after his death, revive and continue it against his executors. Seventeenth Ward Bank v. Smith, 67 App. Div. 228, 73 N. Y. Supp. 648. The corporation cannot sue the delinquent directors in equity for their negligence, as the remedy at law is adequate. Dykman v. Keeney, supra. Contra, Emerson v. Gaither, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114.

[84] Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Brinckerhoff v. Bostwick, 88 N. Y. 52; Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Davis v. Hofer, 38 Or. 159, 63 Pac. 56; Bosworth v. Allen, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667; Pollitz v. Wabash R. Co., 167 App. Div. 669, 152 N. Y. Supp. 803.

[85] Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Horn Silver Min. Co. v. Ryan, 42 Minn. 196, 44 N. W. 56; Greaves v. Gouge, 69 N. Y. 154; Brinckerhoff v. Bostwick, 88 N. Y. 52; Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Heath v. Erie Ry. Co., 8 Blatchf. 347, Fed. Cas. No. 6,306; Hersey v. Veazie, 24 Me. 9, 41 Am. Dec. 364; Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487; Pencille v. State Farmers' Mut. Hail Ins. Co., 74 Minn. 67, 76 N. W. 1026, 73 Am. St. Rep. 326; Wineburgh v. United States Steam & Street Railway Advertising Co., 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261; Montgomery Light Co. v. Lahey, 121 Ala. 131, 25 South. 1006; Flynn v. Third Nat. Bank, 122 Mich. 642, 81 N. W. 572; Continental Securities Co. v. Belmont, 206 N. Y. 7, 99 N. E. 138, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914A, 777; Towers v. African Tug Co., [1904] 1 Ch. Div. 558.

[86] SMITH v. HURD, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; Wormser Cas. Corporations, 375; Converse v. United Shoe Machinery Co., 185 Mass. 422, 70 N. E. 444.

representative or derivative action brought in a court of equity. If a corporation becomes insolvent, creditors may enforce in equity a liability of its officers to the corporation for fraud or neglect resulting in loss to the corporation.[37] In most states corporate officers are by statute expressly made liable to creditors of the corporation for certain delinquencies in the performance of their duties.[38]

Statute of Limitations

The statute of limitations does not run against the claim of a corporation against its officers for misappropriation of corporate funds, since their relation to such funds is fiduciary.[39] But in some cases it is said that the directors are not technical trustees, but at most implied trustees, in whose favor the statutes of limitation do run.[40]

LIABILITY OF OFFICERS AND AGENTS ON CONTRACTS

206. The liability of officers and agents upon contracts made by them on behalf of the corporation, both where they have authority, and where they have no authority at all, or exceed their authority, is the same as if they were contracting for a natural person.

The liability of officers and agents of a corporation on contracts entered into by them is the same as in the case of any other person assuming to act as agent for another. The questions that arise in this connection are not at all peculiar to the law of corporations, but depend entirely upon established principles of the law of agency. An agent of a corporation may enter into a contract without disclosing the fact that he is acting for the corporation. His liability in such a case is precisely the same as if he acted for an undisclosed natural principal. For the law on this subject, therefore, reference must be had to works on the law of agency.[41]

So where an officer or agent of a corporation enters into a contract for the corporation in excess of his authority, or where a person enters into a contract for a corporation without any authority

[37] Post, p. 750. [38] Post, p. 754.

[39] Ellis v. Ward, 137 Ill. 509, 25 N. E. 530. But see Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684; Williams v. Halliard, 38 N. J. Eq. 373; Mason v. Henry, 152 N. Y. 529, 46 N. E. 837.

[40] Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684. And it would seem that if an officer misappropriates funds and the fact is known to the directors, the statute of limitations would run from said time. See cases in this note, and note 374, ante.

[41] See Tif. Ag. 230 et seq.

at all, his liability is the same as if he were acting for a natural person—neither greater nor less. It will be found, upon consulting the law of agency, that if a person contracts as agent on behalf of a principal who does not exist, or who cannot contract, or if he enters into a contract in excess of his authority, he is personally liable, in some form of action, to the other party. Whether he is liable ex contractu, or whether he is liable only in tort, is an unsettled question. Some of the courts hold that the agent in such a case is liable in contract if he acted in good faith, and in tort if he acted in bad faith. If he believed that he had authority which he did not have, he may be sued as upon an implied warranty of authority. This rule has often been applied to contracts by persons contracting for a corporation without authority, or in excess of authority.[42] Thus, where the president of a corporation executed a written guaranty in the name of the company, but without authority, he was held individually liable on the guaranty, as upon an implied warranty of authority.[43] So where a person, assuming to represent a foreign corporation doing business in a state without compliance with the statute prescribing the conditions upon which foreign corporations may do business, engaged the services of a person and purchased goods for the corporation, he was held personally liable therefor.[44]

Some courts have refused to recognize this doctrine of implied warranty of authority, and hold that the liability of an agent acting without authority, or in excess of authority, is in tort, whether he acted in bad faith or not. In these jurisdictions a person who assumes to contract for a corporation without authority, or in excess of authority, is personally liable, whether he acted in bad faith or not, but he is liable only in an action of tort.[45] "If one falsely represents that he has an authority, by which another, relying on the representation, is misled, he is liable; and by acting as agent for another when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized, without knowing the fact to be true, it is in the nature of a false warranty, and he is liable. But in both cases his liability is founded on the ground of deceit, and the remedy is by action of tort." [46]

[42] Farmers' Co-op. Trust Co. v. Floyd, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846; Nellegan v. Campbell, 65 Hun, 622, 20 N. Y. Supp. 234; Lasher v. Stimson, 145 Pa. 30, 23 Atl. 552; Lewis v. Tilton, 64 Iowa, 220, 19 N. W. 911, 52 Am. Rep. 436; Seeberger v. McCormick, 178 Ill. 404, 53 N. E. 340.

[43] Nellegan v. Campbell, 65 Hun, 622, 20 N. Y. Supp. 234.

[44] Lasher v. Stimson, 145 Pa. 30, 23 Atl. 552.

[45] Jefts v. York, 10 Cush. (Mass.) 392; Farmers' & Mechanics' Bank v. Colby, 64 Cal. 352, 28 Pac. 118.

[46] Jefts v. York, supra.

LIABILITY OF CORPORATION FOR TORTS OF OFFICERS AND AGENTS

207. A corporation is generally liable for the torts of its officers, servants, and agents committed in the course of their employment, to the same extent as a natural person.

208. A corporation is liable for the fraud of its officer or agent in the course of his employment, and within the scope of his authority, actual or apparent, though, by reason of facts peculiarly within the knowledge of the officer or agent, the particular act is unauthorized.

209. As to whether a corporation is liable for torts committed by its agents in the performance of ultra vires acts, the courts do not agree. Some decisions hold it is liable in such a case if it authorized the ultra vires acts, but not otherwise; while, according to other decisions, a corporation is liable for every wrong it commits, and in such cases the ultra vires doctrine has no application.

We have seen in a previous chapter that a corporation can be guilty of a tort.[47] Of course, a corporation, being impersonal, cannot personally commit a tort. It can act only through agents, but, like a natural person, it is liable for the torts of its agents. The general rule is that a corporation is liable for the wrongful acts of its servants and agents to the same extent, and only to the same extent, as a natural person is liable for the wrongful acts of his servants and agents. Most of the rules and principles are the same in both cases. If a corporation expressly authorizes a person to do a particular act, there would seem to be no question as to its liability. Thus, if a majority of the directors and stockholders should, by vote, direct an agent to enter unlawfully upon the land of another, the corporation would clearly be liable in trespass. The difficulties arise in those cases where the authority of the agent is to be implied.

It is a general rule that a corporation, like a natural person, is liable for any act of its agent that is committed in the conduct of its business, and in the course of his employment. "A principal," said Mr. Justice Story, "is to be held liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment although the

[47] Ante, p. 242.

principal did not authorize or justify or participate in, or, indeed, know of, such misconduct, or even if he forbade the acts, or disapproved of them. In all such cases the rule applies, respondeat superior, and is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."[48] This statement of the rule applies to officers and agents of corporations.[49] As said by the Court of Appeals of New York: "A corporation can act only through agents, and where a branch of its business, whether broad or narrow, is intrusted to an agent, without any restriction, whatever he does which directly relates to that part of the corporate business and tends to promote it is binding upon the corporation." [50]

Some of the cases are very clear. For example, if an agent having authority to sell goods for a corporation should be guilty of false and fraudulent representations as to their quality, the corporation is clearly liable to an action for deceit. The fraud in such a case is, for all purposes, the fraud of the corporation, though it may not have authorized it, since it is committed by the agent in the course of his employment; that is, in selling goods.[51] And so, generally, a corporation is liable for all frauds of its agents committed in the course of their employment.[52] And, as we have seen in a former chapter, a corporation is liable for assault and battery, or other trespasses, for conversion, for libel, for malicious prosecution, or malicious attachment of goods, or for conspiracy, or for negligence, by or of its officers or agents, if committed in the course of their employment.[53] Some cases are, however, not so

[48] Story, Ag. § 452.

[49] Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712; Philadelphia, W. & B. R. Co. v. Quigley, 21 How. (U. S.) 207, 16 L. Ed. 73; Denver & R. G. Ry. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146; Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176; State v. Morris & E. R. Co., 23 N. J. Law, 360.

[50] NOWACK v. METROPOLITAN ST. RY. CO., 166 N. Y. 433, 438, 60 N. E. 32, 54 L. R. A. 592, 82 Am. St. Rep. 691, Wormser Cas. Corporations, 369.

[51] Ante, p. 246. See 8 Am. Law Rev. 631.

[52] New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; note 6, infra. It is liable for the fraud of agents in procuring subscriptions to its stock. Ante, p. 354.

[53] Ante, pp. 243, 244, and cases there cited. See, also, Savannah Electric

clear. In a well-known New York case,[54] it was held that an investigator employed by a street railway corporation "to see to the witnesses and take statements and to interview witnesses," upon the trial of actions against it, without any limitation as to the means to be employed, is the agent of the corporation in whatever he does which directly relates to and promotes that part of the corporate business, and his acts within the scope of his employment, even if unlawful, are corporate acts, and that if, in order to promote the interests of the corporation, he sees fit to use the power intrusted to him by attempting to bribe a witness to testify falsely in favor of the corporation, he must be deemed to have acted in the course of his employment, and his act is that of the corporation, and therefore admissible in evidence against it. Three judges dissented, however, on the ground that "some evidence tending to support the inference of permission or acquiescence on the part of the master should be given."

The fact that an officer or agent acts without the scope of his actual authority, in committing a fraud, does not exempt the corporation from liability, if his act was apparently done in the course of his employment, and within the scope of the general authority conferred upon him. If an act is apparently within the scope of the general authority and employment of the agent, though, by reason of facts necessarily and peculiarly within his knowledge, it is unauthorized, the corporation is liable. Thus, where the secretary and treasurer of a corporation, who was also its agent for the transfer of stock and authorized to countersign and issue certificates of stock when signed by the president, forged the president's name to a certificate, and fraudulently issued it, the corporation was held liable to a bank which accepted the certificate, in good faith, as security for a loan; and there are many other cases to substantially the same effect.[55] So, also, a street railway company is liable for

Co. v. Wheeler, 128 Ga. 550, 58 S. E. 38, 10 L. R. A. (N. S.) 1176; Wells Fargo & Co. Express v. Sobel, 59 Tex. Civ. App. 62, 125 S. W. 925.

[54] NOWACK v. METROPOLITAN ST. RY. CO., 166 N. Y. 433, 60 N. E. 32, 54 L. R. A. 592, 82 Am. St. Rep. 691, Wormser Cas. Corporations, 369.

[55] Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712. It was said in this case: "It is true that the secretary and transfer agent had no authority to issue a certificate of stock except upon the surrender and cancellation of a previously existing valid certificate, and the signature of the president and treasurer first obtained to the certificate to be issued; but these were facts necessarily and peculiarly within the knowledge of the secretary, and the issue of the certificate in due form was a representation by the secretary and transfer agent that these conditions had been complied with, and that the facts existed upon which his right to act depended. It was a certificate ap-

a tort committed by one of its conductors in the prosecution and within the scope of its business, whether by negligence or willfully.[56] A corporation is liable for the tort of its agent or servant, acting within the apparent scope of his authority, though done in disregard of express instructions.[57]

If the transaction in which an officer or agent of a corporation commits a fraud is not even apparently within the scope of his authority, the corporation is not liable.[58] Clearly a corporation cannot be held liable for the fraud of its president, who, in negotiating for a loan to himself individually, falsely represents that certificates of stock in the corporation, which he offers as collateral, are genuine.[59] So, where a corporation delivers to the manager of its business surrendered certificates of stock containing blank indorsements, with directions to cancel them, and he transfers them to a purchaser in good faith, it was held that the title of the purchaser cannot be upheld, as against the corporation, on the ground of any implied agency on the part of the manager to transfer them. As was said in such a case: "If it can be said that the direction of the president to the manager to cancel the certificates made him the agent of the company for that purpose, it was an authority to destroy, and not to use. His act in abstracting them from the safe,

parently made in the course of his employment, as the agent of the company, and within the scope of the general authority conferred upon him; and the defendant is under an implied obligation to make indemnity to the plaintiff for the loss sustained by the negligent or wrongful exercise by its officers of the general powers conferred upon them." See, also, Griswold v. Haven, 25 N. Y. 599, 82 Am. Dec. 380; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Titus v. President, etc., of Great Western Turnpike Road, 61 N. Y. 237; Bank of Batavia v. New York, L. E. & W. R. Co., 106 N. Y. 199, 12 N. E. 433, 60 Am. Rep. 440; Manhattan Beach Co. v. Harned (C. C.) 27 Fed. 484; Tome v. Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540; Shaw v. Mining Co., 13 Q. B. Div. 103; Allen v. South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 47 N. E. 249, 43 L. R. A. 777; First Ave. Land Co. v. Parker, 111 Wis. 1, 86 N. W. 604, 87 Am. St. Rep. 841; Smith v. Martin, 135 Cal. 247, 67 Pac. 779. Cf. Moores v. Citizens' Nat. Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385; ante, p. 555, note 52; Farrington v. South Boston R. Co., 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222; Hill v. C. F. Jewett Pub. Co., 154 Mass. 172, 28 N. E. 142, 13 L. R. A. 193, 26 Am. St. Rep. 230.

[56] Savannah Electric Co. v. Wheeler, 128 Ga. 550, 58 S. E. 38, 10 L. R. A. (N. S.) 1176.

[57] Gann v. Great Southern Lumber Co., 131 La. 400, 59 South. 830.

[58] Weckler v. First Nat. Bank of Hagerstown, 42 Md. 581, 20 Am. Rep. 95.

[59] Manhattan Life Ins. Co. v. Forty-Second St. & G. St. Ferry R. Co., 64 Hun, 635, 19 N. Y. Supp. 90, affirmed 139 N. Y. 146, 34 N. E. 776; Moores v. Citizens' Nat. Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385.

and uttering them as valid certificates, had no relation to the authority conferred. It was not an act of the same kind as that which he was authorized to perform. He had no apparent authority to issue them as genuine certificates, for he had no authority to issue certificates for any purpose; and what he did was a willful and criminal act, perpetrated for private gain, and not connected with any official authority or semblance of authority, which he possessed as the defendant's agent." [60] The decision is an exceedingly close one. If the tort is committed by the agent in the course of his employment and in furtherance of it, the corporation cannot escape liability on the ground that it was not authorized, or even that it was expressly forbidden, and it can make no difference that the agent acts willfully and deliberately.[61] This rule is not peculiar to corporations. It is a well-settled principle of the general law of agency.[62] Thus, a railroad company has repeatedly been held liable for the act of its conductor in assaulting a passenger, and the rule has been applied to other employés.[63] A railroad company has been held liable to a woman passenger for the tortious conduct of the conductor in kissing her.[64] Such a case as the last cited is, however, really based upon the peculiar and extraordinary duty of a common carrier to carry safely and to protect passengers, accordingly, from insults. This strict rule would not apply to all corporations, and it is submitted that no action would lie against a bank, for example, if its cashier or receiving teller should kiss a woman depositor against her will. Such an act is outside of his authority.

[60] Knox v. Eden Musee American Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700. Cf. Russell v. American Bell Telephone Co., 180 Mass. 467, 62 N. E. 751; NATIONAL SAFE DEPOSIT, SAVINGS & TRUST CO. v. HIBBS, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241, Wormser Cas. Corporations, 332.

[61] Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571; Gann v. Great Southern Lumber Co., 131 La. 400, 59 South. 830.

[62] See works on Agency and on Torts.

[63] Passenger R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311; Rounds v. Delaware, L. & W. R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Dwinelle v. New York Cent. & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; North Chicago City Ry. Co. v. Gastka, 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481; Southern Exp. Co. v. Platten, 93 Fed. 936, 36 C. C. A. 46; Maisenbacker v. Society Concordia, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; Wells Fargo & Co. Express v. Sobel, 59 Tex. Civ. App. 62, 125 S. W. 925; Savannah Electric Co. v. Wheeler, 128 Ga. 550, 58 S. E. 38, 10 L. R. A. (N. S.) 1176.

[64] Craker v. Chicago & N. W. Ry. Co., 36 Wis. 657, 17 Am. Rep. 504.

Ratification

A corporation, like a natural principal, may become liable for torts of a person assuming to act for it, by ratifying his act, though the act was not authorized when it was committed. It will become liable by ratification if the act was done by such person assuming to act on its behalf, but not otherwise.[65] "He that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his subsequent agreement amounteth to a commandment." [66] If the servant of a railroad company arrests and imprisons a passenger without authority, for nonpayment of his fare, his act is one which might be for the benefit of the company; and, if the company subsequently ratifies the act, it is liable in tort, should the act prove to have been unlawful.[67] It is not necessary that the ratification should be by a formal vote. Whether there has been ratification is ordinarily an issue for the jury.[68]

Ultra Vires Transactions

There is a wide difference of opinion, and much conflict and confusion in the decisions, as to the liability of a corporation for torts committed by its officers or agents in the performance of ultra vires acts, or in the course of ultra vires transactions. Some of the authorities hold broadly, that a corporation is not liable for the tortious conduct of its officers or agents in the course of an ultra vires transaction, as it cannot authorize ultra vires acts. Thus where the teller of a national bank, acting for it in selling railroad bonds, made false representations to induce a person to buy the bonds, it was held that the bank was not liable, as the sale of railroad bonds was not within the corporate powers of national banks.[69] And where the officers of an agricultural society authorized to hold agricultural fairs employed certain persons to convey persons to and from the fair grounds, and one of these persons negligently injured a third person, it was held that the corporation was not liable, as the employment was not within the powers of the corporation.[70] There are other cases in which the same principle is laid down.[71]

[65] Eastern Counties Ry. Co. v. Broom, 6 Exch. 314; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467.

[66] 4 Inst. 317.

[67] Eastern Counties Ry. Co. v. Broom, supra.

[68] Nims v. Mt. Hermon Boys' School, supra.

[69] Weckler v. First Nat. Bank of Hagerstown, 42 Md. 581, 20 Am. Rep. 95.

[70] Bathe v. Decatur Co. Agricultural Soc., 73 Iowa, 11, 34 N. W. 484, 5 Am. St. Rep. 651. And see Hern v. Iowa State Agricultural Soc., 91 Iowa, 97, 58 N. W. 1092.

[71] Gunn v. Central R. R., 74 Ga. 509; Poulton v. London R. Co., L. R. 2 Q.

Many of these cases can be supported on the ground that the transaction was not authorized by the corporation, and that the tort, therefore, was not committed by the officer or agent within the scope of his employment. Thus, if, in the case above referred to, the officers of the agricultural society were not authorized by the corporation to employ persons to convey people to and from the fair grounds, they exceeded their authority in doing so, and for this reason, and not because the transaction was ultra vires of the corporation, the corporation could not be held liable. By the weight of authority, the principle does not go beyond this.[72] And most of the courts hold that if a corporation, as distinguished from the officers and agents of the corporation, engages in an ultra vires transaction, it will be liable for the frauds, negligence, or other torts of its agents in the course of that transaction; that a corporation has the power or capacity, as distinguished from the authority or right, to do ultra vires acts and to engage in ultra vires transactions; and that, if it does so, it cannot escape liability for torts committed in the course of such transactions merely on the plea of ultra vires. The question always narrows itself to this: Did the corporation authorize the transaction, or did it ratify the transaction, either expressly or impliedly? If it did, it is liable. Thus, where an educational corporation maintained a ferry, it was held liable for injuries to a passenger while being transported thereon, though the maintenance of the ferry by such a corporation was clearly ultra vires.[73] So, where railroad companies were operating

B. Cas. 534. Cf. Brokaw v. New Jersey R. & Transp. Co., 32 N. J. Law, 328, 90 Am. Dec. 659.

[72] See Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353.

[73] Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467. The court said: "There is no evidence of original authority from the defendant to anybody to operate the ferry on its account, but the evidence is plenary that persons connected with the management of its business assumed so to operate it. The important question is whether there was evidence that the corporation ratified the acts of these persons. * * * It is not necessary that the ratification should be by a formal vote. It is enough if the corporation, acting through its managing officers, knowing that the business had been done by those who assumed to act as its agents in doing it, and that the income of the business had been received and the expenses of it paid by its treasurer in his official capacity, and that the balance of the receipts above the expenditures was in its treasury, adopted the action of its treasurer, and elected to keep the money. It was a fair inference of fact, especially when the corporation failed to produce the treasurer's report after notice to produce it, that the report contained a true statement of the accounts which related to the ferry, and that it was accepted with full knowledge on the part of the trustees of what it contained. Whether there was a ratification by the corporation was a question of fact for the jury on all the evidence."

their roads jointly under an ultra vires agreement, they were held liable for injuries to a passenger.[74] And a railroad company was held liable for the negligence of the driver of a stagecoach which it was running without the right to engage in business of that kind.[75] So, where a bank which was accustomed to take deposits of United States bonds, with the knowledge and acquiescence of its directors, took such a deposit, and the bonds were lost through the gross carelessness of its agents, it was held liable for the loss, to the same extent as if the taking of the deposit had been authorized by its charter. "Corporations," it was said, "are liable for every wrong they commit, and in such cases the doctrine of ultra vires has no application."[76] Many other cases to the same effect may be found.[77] In Hannon v. Siegel-Cooper Co.,[78] a department store held itself out to the public as carrying on the practice of dentistry, an undertaking quite beyond its corporate powers. In fact, this branch of its business was carried on by one Hayes individually, who was the real owner of that department in the store. Plaintiff was unskillfully treated, for which malpractice she claimed damages from the department store. The court held that the store was liable, on the ground that it was estopped to deny its liability for the negligent acts of Hayes, whom it held out to the

[74] Bissell v. Michigan Southern & N. I. R. Co., 22 N. Y. 258.

[75] Buffett v. Troy & B. R. Co., 40 N. Y. 168. And see, to substantially the same effect, Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; New York, L. E. & W. Ry. Co. v. Haring, 47 N. J. Law, 137, 54 Am. Rep. 123; Hutchinson v. Western & A. R. Co., 6 Heisk. (Tenn.) 634. See, apparently contra, cases in notes 69–71, supra.

[76] First Nat. Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750. "This phrase" says Mr. Taylor, "contains endless ambiguities." Taylor, Priv. Corp. § 337. "The question is not whether the wrongful act was ultra vires, any more than the question would be whether the act itself had been authorized by the corporation. The question is whether the employment or general transaction, in the course of which the tort was committed, was ultra vires; and, if this is answered in the affirmative, the corporation should not be held liable for the act, except on principles of acquiescence and ratification of the employment or transaction." Id. § 338. Mr. Taylor refers to acquiescence and ratification on the part of stockholders, and perhaps creditors. It is difficult to escape the force of this statement. See Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Brokaw v. New Jersey R. & Transp. Co., 32 N. J. Law, 328, 90 Am. Dec. 659. The cases, however, speak of authorization and ratification by the corporation.

[77] See Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176; Denver & R. G. Ry. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146; Id., 3 N. M. (Johns.) 109, 2 Pac. 369; Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845; Fishkill Sav. Inst. v. National Bank of Fishkill, 80 N. Y. 162, 36 Am. Rep. 595; Chesapeake & O. R. Co. v. Howard, 178 U. S. 153, 20 Sup. Ct. 880, 44 L. Ed. 1015.

[78] Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429.

public in general as its agent in the dentistry practice. This decision is especially interesting, since the corporation itself was not, in reality, carrying on the ultra vires business wherein the tort transpired, yet there can be no question of the correctness and justice of the result reached.

LIABILITY OF OFFICERS AND AGENTS TO THIRD PERSONS FOR TORTS

210. If the officers of a corporation, in transacting its business, are guilty of false and fraudulent representations, or other torts, whereby third persons are injured, they are personally liable.

It is well settled that, if the directors or other officers of a corporation commit frauds upon third persons in their transactions as officers of the company, they are personally liable to an action therefor, though the corporation also may be liable. Their liability does not depend upon their agency for the corporation. They are liable simply because they have been guilty of a tort. Thus, the directors of a corporation are personally liable to a third person for fraudulent representations whereby he was induced to contract with the corporation to his injury. There is no privity of contract between them and such person, but that can make no difference, for the action is not founded upon the contract at all, nor upon a breach thereof, but upon the personal tort of the directors.[79] So a director or other officer of a corporation who knowingly issues or sanctions a false report or prospectus, containing untrue statements of material facts, the natural tendency of which is to mislead and deceive the community, and to induce the public to purchase stock of the corporation, or to deal with it, is personally liable, in an action of deceit, to persons who purchase stock or deal with the corporation in reliance thereon, and are defrauded.[80] But

[79] Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255; Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432; Clark v. Edgar, 84 Mo. 106, 54 Am. Rep. 84; Schley v. Dixon, 24 Ga. 273, 71 Am. Dec. 121; Zinn v. Mendel, 9 W. Va. 580.

[80] Morgan v. Skiddy, 62 N. Y. 319; Downey v. Finucane, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A. (N. S.) 307; Mack v. Latta, 178 N. Y. 525, 71 N. E. 97, 67 L. R. A. 126; Lehman-Charley v. Bartlett, 135 App. Div. 674, 120 N. Y. Supp. 501, affirmed 202 N. Y. 524, 95 N. E. 1125. The publication by savings bank directors that the directors and stockholders are personally responsible for its debts does not constitute a contract with depositors, but, if intentionally false, affords the basis of an action of deceit. Westervelt v. Demarest, 46 N. J. Law, 37, 50 Am. Rep. 400; Stickel v. Atwood, 25 R. I. 456, 56 Atl. 687. Where di-

a director is not liable for misrepresentations contained in a prospectus issued by his codirectors without his knowledge or participation.[81] Whether, in such a case, the director could be held liable for negligence in an action brought by one who had been misled by the false prospectus, would depend upon the circumstances.

To render the officers of a corporation liable to third persons for fraud, the case must come within the rules governing other cases of false representations. Therefore the representation must have been false. It must also have been fraudulent; that is, they must have known it to be false, or must have made it willfully, or in reckless disregard of whether it was true or false.[82] The person seeking to hold them liable must have relied on the representation,[83] and must have sustained injury in consequence thereof.[84]

To render an officer or member of a corporation personally liable for torts committed in the conduct of its business, he must have personally taken part in the act, or knowingly acquiesced in it, when it was his duty to object and take steps to prevent it.[85]

rectors of a national bank by their gross neglect permitted fraudulent statements of its condition to be published, they were liable to persons injured. Houston v. Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

[81] Rives v. Bartlett, 215 N. Y. 33, 697, 109 N. E. 83, 1091.

[82] Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Arthur v. Griswold, 55 N. Y. 400; Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432; Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Zinn v. Mendel, 9 W. Va. 580; Utley v. Hill, 155 Mo. 232, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569; Lyon v. James, 97 App. Div. 385, 90 N. Y. Supp. 28, affirmed 181 N. Y. 512, 73 N. E. 1126; Downey v. Finucane, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A. (N. S.) 307. But see Cassidy v. Uhlmann, 170 N. Y. 505, 63 N. E. 554, where it was held that a bank director, who, after discovering the insolvency of the bank, permitted deposits to be received, without taking steps to close the bank, was liable to a subsequent depositor for fraud.

[83] Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551.

[84] Clark, Cont. (2d Ed.) 220.

[85] People v. England, 27 Hun (N. Y.) 139; Davenport v. Newton, 71 Vt. 11, 42 Atl. 1087; Libbey v. Atchison, T. & S. F. R. Co., 69 Kan. 869, 77 Pac. 541; Rives v. Bartlett, 215 N. Y. 33, 697, 109 N. E. 83, 1091. But see Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 56 Pac. 358, 44 L. R. A. 508, 74 Am. St. Rep. 602; Houston v. Thornton, supra.

COMPENSATION OF DIRECTORS AND OFFICERS

211. A director of a corporation, or an officer of a corporation who is also a director, in the absence of express provision or agreement, is not entitled to compensation for performing the ordinary duties of his office; but he can recover, on an implied contract, the value of extraordinary services rendered at the request of the corporation. Where an officer is not a director or stockholder, even in the absence of an express agreement, there is an implied obligation upon the corporation to pay for the reasonable value of his services. Express provision is, however, usually made for the compensation of officers. An officer of a corporation cannot fix his own salary.

When a director, or an officer of a corporation who is also a director, performs the usual and ordinary duties of his office, as defined by the charter or by-laws, he cannot recover any compensation therefor, unless it has been so specially agreed. He cannot, in the absence of such a contract, recover, on an implied contract, what the services were reasonably worth.[86] The reason for this

[86] Citizens' Nat. Bank v. Elliott, 55 Iowa, 104, 7 N. W. 470, 39 Am. Rep. 167; American Cent. Ry. Co. v. Miles, 52 Ill. 174; Cheeney v. Lafayette, B. & M. Ry. Co., 68 Ill. 570, 18 Am. Rep. 584; Ellis v. Ward, 137 Ill. 509, 25 N. E. 530; New York & N. H. R. Co. v. Ketchum, 27 Conn. 170; Blue v. Capital Nat. Bank, 145 Ind. 518, 43 N. E. 655; Schoening v. Schwenk, 112 Iowa, 733, 84 N. W. 916; Henry Wood's Sons Co. v. Schaefer, 173 Mass. 443, 53 N. E. 881, 73 Am. St. Rep. 305; Taussig v. St. Louis & K. R. Co., 166 Mo. 28, 65 S. W. 969, 89 Am. St. Rep. 674; Bagley v. Carthage, W. & S. H. R. Co., 165 N. Y. 179, 58 N. E. 895; Grafner v. Pittsburg, N. I. & C. St. R. Co., 207 Pa. 217, 56 Atl. 426; McConnell v. Combination Min. & Mill. Co., 30 Mont. 239, 76 Pac. 194, 104 Am. St. Rep. 703. "Directors of corporations, however, usually serve without wages or salary. They are generally financially interested in the success of the corporation they represent, and their service as directors secures its reward in the benefit which it confers upon the stock which they own. In other words, the custom is to pay the ordinary employés of corporations for the services they render; but it is the custom of directors of corporations to serve gratuitously, without compensation or the expectation of it. The presumption of law follows the custom. From the employment of an ordinary servant, the law implies a contract to pay him. From the service of a director, the implication is that he serves gratuitously. The latter presumption prevails, in the absence of an understanding or an agreement to the contrary, when directors are discharging the duties of other offices of the corporation to which they are chosen by the directory, such as those of president, secretary, and treasurer." National Loan & Investment Co. v. Rockland Co., 94 Fed. 335, 36 C. C. A. 370. And see Montana Tonopah Min. Co. v. Dunlap, 196 Fed. 612, 116 C. C. A. 286.

rule is because directors are regarded as trustees serving gratuitously. An officer who is not, however, a director or stockholder, is entitled, like any other employé, to be paid the reasonable value of his services rendered on request, even in the absence of an express contract.[87] Where an officer, though, who is also a director, without any agreement with the corporation, has voluntarily rendered services, it is beyond the power of the directors, after such services are rendered, to pay for them out of the funds of the corporation, or to create a debt of the corporation on account of them.[88] But if an officer, even though also a director, at the request of the corporation, performs extraordinary services, not within the usual duties of his office, he may recover therefor without a special agreement. Thus, a director of a railroad company, who, at its request, rendered services as an attorney, and in procuring aid notes, right of way, etc., was held to be entitled to recover the reasonable value of such services, on an implied contract, as they were not embraced in his ordinary duties as director.[89] And if an officer, although he is also a director, renders his services under an agreement, express or implied, with the corporation, that he shall receive reasonable, but indefinite, compensation, it is not beyond the powers of the directors to fix and pay a reasonable salary to him after he has discharged the duties of his office.[90]

Unless otherwise provided in the charter or by-laws of the corporation, the power to fix the salaries of the officers of the corpora-

[87] Smith v. Long Island R. Co., 102 N. Y. 190, 6 N. E. 397 (secretary).

[88] Ellis v. Ward, 137 Ill. 509, 25 N. E. 530; Danville, H. & W. R. Co. v. Kase (Pa.) 39 Atl. 301; Ravenswood, S. & G. Ry. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. 285. And see Beers v. New York Life Ins. Co., 66 Hun, 75, 20 N. Y. Supp. 788; National Loan & Investment Co. v. Rockland Co., supra. The rule regarding the compensation of directors applies to the officers of a corporation, who are also directors or stockholders, so far as their usual duties are concerned. Lowe v. Ring, 123 Wis. 370, 101 N. W. 698, 3 Ann. Cas. 731.

[89] Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 633. And see Corinne Mill, Canal & Stock Co. v. Toponce, 152 U. S. 405, 14 Sup. Ct. 632, 38 L. Ed. 493; Bassett v. Fairchild (Cal.) 61 Pac. 791; Id., 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611; Brown v. Creston Ice Co., 113 Iowa, 615, 85 N. W. 750; Bagley v. Carthage, W. & S. H. R. Co., 165 N. Y. 179, 58 N. E. 895; Greensboro & N. C. J. Turnpike Co. v. Stratton, 120 Ind. 294, 22 N. E. 247; Flynn v. Columbus Club, 21 R. I. 534, 45 Atl. 551; Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312, 67 N. E. 17. Cf. Wilson v. Metropolitan El. R. Co., 120 N. Y. 145, 24 N. E. 384, 17 Am. St. Rep. 625. But see Stout v. Security Trust & Life Ins. Co., 82 App. Div. 129, 81 N. Y. Supp. 708.

[90] National Loan & Investment Co. v. Rockland Co., 94 Fed. 335, 36 C. C. A. 370. See, also, Huffaker v. Krieger's Assignee, 107 Ky. 200, 53 S. W. 288, 46 L. R. A. 384.

tion vests in the board of directors. In doing so they must act in good faith, and for the benefit of the corporation. They have no authority to pay claims which the corporation is under no obligation to pay. Thus, they cannot pay an officer anything for past services, which have been rendered and paid for at a fixed salary previously agreed.[91] In some jurisdictions, as we have seen, if they fix their own salaries as officers, where they occupy other positions, such as that of president, secretary, etc., the transaction may be repudiated, at the election of the corporation, and this without regard to whether they acted in good faith or not.[92] In other jurisdictions, perhaps, in the absence of any provision in the charter or by-laws, they may fix their salaries as officers of the company, and the transaction will be sustained, if in perfect good faith and free from any suspicion of fraud or unfairness; but, if there is any bad faith or unfairness, their act will be set aside, at the election of the corporation.[93] An officer who is also a director is not qualified to vote at a meeting of the board on a resolution fixing his salary.[94]

Indemnity of Directors and Officers

Directors, being both agents of and, generally speaking, trustees for the corporation, are entitled to be indemnified by it against all losses and expenses properly sustained and incurred by them in the due performance of the duties of their office.[95]

[91] Jones v. Morrison, 31 Minn. 140, 16 N. W. 854. See, also, Harvard Brewing Co. v. Pratt, 185 Mass. 406, 70 N. E. 435.

[92] Ante, p. 640. A stockholder's suit would accomplish the same result. Ante, p. 482.

[93] Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Harris v. Lemming-Harris Agricultural Works (Tenn. Ch. App.) 43 S. W. 869. See, also, Ft. Payne Rolling Mill Co. v. Hill, 174 Mass. 224, 54 N. E. 532; Davis v. Thomas & Davis Co., 63 N. J. Eq. 572, 52 Atl. 717; Lillard v. Oil, Paint & Drug Co., 70 N. J. Eq. 197, 56 Atl. 254, 58 Atl. 188.

[94] Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; McNulta v. Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; Ravenswood, S. & G. Ry. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. 285; Adams v. Burke, 201 Ill. 395, 66 N. E. 235; Crichton v. Webb Press Co., 113 La. 167, 36 South. 926, 67 L. R. A. 76, 104 Am. St. Rep. 500; ante, p. 618. Cf. Bassett v. Fairchild, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611. This result was also reached where the president attended but did not vote. Beers v. New York Life Ins. Co., 66 Hun, 75, 20 N. Y. Supp. 788.

[95] In re National Financial Co., L. R. 3 Ch. App. Cas. 791; Young v. Naval Society, Limited, [1905] 1 K. B. 687; Shively v. Eureka Tellurium Gold Min. Co., 5 Cal. App. 236, 89 Pac. 1073.

REMOVAL OF DIRECTORS, OFFICERS AND AGENTS

212. The principal rules in regard to the removal of officers and agents of a corporation are these:

(a) A corporation has a right to remove an officer or agent, where there is a contract for a fixed term, only where he violates his contract, or is incompetent. But it can at any time revoke the authority of an agent, rendering itself liable for breach of contract.

(b) An officer or agent who is appointed by vote of the stockholders, or whose tenure is fixed by the charter, cannot be removed, nor his authority revoked, by the directors.

(c) In some states, by express provision, the directors may remove their own appointees at pleasure, and they may do so without such a provision in the absence of a contract for a fixed time.

(d) In some jurisdictions a court of equity will remove a director whose election is void, but, by the better opinion, the remedy is at law, by quo warranto, and a court of equity will grant relief only where it has acquired jurisdiction on some other ground.

(e) As a general rule, corporate officers may resign at will, and the validity of their resignation does not depend upon a formal acceptance.

Every corporation has within itself the power of guarding against any abuses of its officers. The right of amotion of an officer, without any express provision for that purpose, is considered at common law an inseparable incident of corporate powers. Such right may be exercised when gross delinquency or other misconduct of officers indicates the necessity and propriety of such action.[96] Without some statute or provision of the corporate charter authorizing his suspension or removal, a director or officer cannot be removed or suspended from office until the end of his term, at least without cause.[97] This rule has been sometimes evaded by the amendment of the by-laws on the part of stockholders so as to increase the number of directors.[98]

[96] Bayless v. Orne, Freem. Ch. (Miss.) 161; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; Robertson v. Bullions, 11 N. Y. 243.

[97] People ex rel. Manice v. Powell, 201 N. Y. 194, 94 N. E. 634. See General Corporation Law N. Y. (Consol. Laws, c. 23), §§ 90, 91.

[98] Gold Bluff Mining & Lumber Corp. v. Whitlock, 75 Conn. 669, 55 Atl. 175. But cf. Ripin v. United States Woven Label Co., 145 App. Div. 916, 130 N. Y. Supp. 20, affirming 71 Misc. Rep. 510, 130 N. Y. Supp. 20.

Officers and agents of a corporation who do not hold their office under contract for a fixed time may be removed at pleasure by the corporation, or by the superior officer or officers who appointed them.[99] But, if there is a contract for a fixed term between an officer and the corporation, he cannot be removed without cause, without rendering the corporation liable for breach of contract. Thus, although the directors of a corporation have power, under its by-laws, to remove the managing director of the corporation, such power does not carry with it the right to discharge him from the employment of the corporation which had employed him under a special contract for one year.[1] In such a case, however, like any other employé, he may be removed for cause, as for breach of contract or incompetency. And it seems that a corporation, like any other principal, may at any time revoke the authority of its officer or agent, subject to liability for breach of contract.[2] If the tenure of a person to a corporate office is fixed by charter, and there is no provision for removal, there is no power to remove him, at least without cause, until his term of office expires. If an officer is appointed by vote of the stockholders the directors have no implied authority to remove him.[3]

By the weight of authority, a court of equity will not primarily take jurisdiction to determine the legality of an election of directors, or to remove a director who is in possession of the office.[4] The court will inquire into the regularity of the election, or the right of the person to the office, only when the question arises incidentally and collaterally in a suit of which the court has rightful jurisdiction, and the grant of the relief depends upon its decision. If the right to the office only is in question, the remedy is at law, by quo warranto.[5] A proceeding by mandamus is not proper.[6]

[99] 1 Thomp. Corp. §§ 802, 805; Mobile, J. & K. C. R. Co. v. Owen, 121 Ala. 505, 25 South. 612; In re A. A. Griffing Iron Co., 63 N. J. Law, 357, 46 Atl. 1097.

[1] Cuppy v. Stollwerck Bros., 216 N. Y. 591, 111 N. E. 249. Cf. Douglass v. Merchants' Ins. Co., 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822.

[2] 1 Thomp. Corp. § 805.

[3] Id. § 804. As to removal of directors in general, see 10 Cyc. 742, et seq. A court may remove directors for their misconduct. Ward v. Davidson, 89 Mo. 445, 463, 1 S. W. 846.

[4] As to the grounds of removal, and the mode of exercising the power, see 1 Thomp. Corp. §§ 806–841; Bayless v. Orne, Freem. Ch. (Miss.) 161; People ex rel. Manice v. Powell, 201 N. Y. 194, 94 N. E. 634.

[5] Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co., 93 Ala. 364, 9 South. 217; Nathan v. Tompkins, 82 Ala. 437, 2 South. 747; Johnston v. Jones, 23 N. J. Eq. 216; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312, 67 N. E. 17. But see Wright v. Central Cali-

[6] People ex rel. Manice v. Powell, 201 N. Y. 194, 94 N. E. 634.

Resignation

As a general rule, corporate officers may resign at will and the validity of their resignations does not depend upon their acceptance.[7] Directors or officers cannot terminate their agency or accept the resignation of others if the immediate consequence would be to leave the interests of the corporation without proper care and protection.[8] Thus, where the officers and directors of a corporation resigned for the sole purpose of evading their official responsibilities and of throwing the corporation's property into the hands of a receiver, the attempted resignations are ineffectual and illegal, and do not confer jurisdiction on the court to appoint a receiver, although the statute authorized the appointment of a receiver whenever a corporation is without officers.[9] It has been held that, though the corporate charter provides that an officer shall hold over until the election or appointment and qualification of his successor, by resignation without acceptance he vacates the office for all general purposes, unless the charter specifically requires an acceptance of such resignation.[10]

fornia C. W. Co., 67 Cal. 532, 8 Pac. 70, where it was held that a court of equity has jurisdiction of a bill to set aside an illegal election, though no other ground of jurisdiction exist.

[7] Zeltner v. Henry Zeltner Brewing Co., 174 N. Y. 247, 252, 66 N. E. 810, 95 Am. St. Rep. 574; President, etc., of Manhattan Co. v. Kaldenberg, 165 N. Y. 1, 58 N. E. 700; Noble v. Euler, 20 App. Div. 540, 47 N. Y. Supp. 302. See, Dodge v. Kenwood Ice Co., 204 Fed. 577, 580, 123 C. C. A. 103. But in a recent federal case, Ross v. Western Land & Irrigation Co. (D. C.) 223 Fed. 680, Wade, J., said: "Where an officer of a corporation is elected under bylaws providing that he shall serve until his successor is elected and qualified, I hold that, so far as the public is concerned, a resignation tendered before the election of his successor, and not acted upon by the corporation, its stockholders, or board of directors, has no effect. The public has the right to treat him as an officer of the corporation. This is certainly true for the purpose of service upon the corporation, and may be true for many other purposes."

[8] Zeltner v. Henry Zeltner Brewing Co., 174 N. Y. 247, 66 N. E. 810, 95 Am. St. Rep. 574. Cf. Carnaghan v. Exporters' & Producers' Oil Co., 57 Hun, 588, 11 N. Y. Supp. 172.

[9] Zeltner v. Henry Zeltner Brewing Co., supra.

[10] In re McNaughton's Will, 138 Wis. 179, 118 N. W. 997, 120 N. W. 289. And see, Fearing v. Glenn, 73 Fed. 116, 19 C. C. A. 388.

RELATION BETWEEN OFFICERS AND STOCKHOLDERS

213. The directors and officers of a corporation are not the agents of the individual stockholders, but of the corporation; nor do they occupy a fiduciary relation towards the stockholders individually.

It is often said that the directors of a corporation are trustees of the stockholders, and that the relation of trustee and cestui que trust, with its consequences, exists between them, but they do not occupy any such relation towards the stockholders individually. They are simply the agents of the corporation. There is no privity, in law, between them and the stockholders. They are not the agents of the stockholders, but of the corporation—of the legal entity. And, when it is said that they are trustees for the stockholders, it can only be meant that they occupy a fiduciary relation to the corporation, and that they are bound to act for the benefit of all the shareholders alike, and not for their own advantage, nor for the advantage of particular shareholders to the exclusion of others. "There is," said Chief Justice Shaw, "no legal privity, relation, or immediate connection between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of the bank, on the other. The directors are not the bailees, the factors, agents, or trustees of such individual stockholders."[11] If they commit a breach of trust, the injury, in the eye of the law, is to the corporation, and primarily the corporation is the proper party to sue for redress. It is well settled that an action at law cannot be maintained by a stockholder against a director or other officer of the corporation for fraud, negligence, misapplication of funds, or other wrongs resulting in injury to the corporation. Such an action can only be maintained by the corporation, the injury being to it; and it can make no difference in such a case, that the value of the shares is diminished, and that the stockholder therefore individually suffers a loss.[12] The directors of a bank, said the Connecticut court, in such a case, "are the agents of the bank. The bank is the only principal, and there is no such trust for or relation to a stockholder as has been claimed by the plaintiff. The entire duty of the directors, growing out of their agency, is owed to the bank, which,

[11] SMITH v. HURD, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, Wormser Cas. Corporations, 375.

[12] SMITH v. HURD, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, Wormser Cas. Corporations, 375; Allen v. Curtis, 26 Conn. 456; Converse v. United Shoe Machinery Co., 185 Mass. 422, 70 N. E. 444.

under the charter, is the sole representative of the stockholders, and the legal protector and defender of their property." [13] As we have seen, if the agents of the corporation will not or cannot sue for injuries to it, so that such injuries cannot be redressed through the corporate body, a court of equity will look behind the corporation, and recognize the stockholders, and will allow them to sue on the corporate behalf in their own names.[14]

An officer of a corporation occupies no fiduciary relation towards an individual stockholder, so as to impose upon him, in dealing with the stockholder as an individual, any duties which he would not owe to strangers. Thus, where the president of a corporation, who was also a director, having knowledge through his official position that the company's stock was worth more than its nominal market value, purchased stock from a stockholder for the market price, without disclosing to him the facts within his knowledge as to the real value, it was held that there was, in such transaction, no fiduciary relation between him and the stockholder, binding him to make such a disclosure, and that, in the absence of actual fraud, the purchase was valid.[15] And the Supreme Court of Illinois recently said: "Officers of a corporation may purchase the stock of stockholders on the same terms and as freely as they might purchase of a stranger." [16] We have seen, however, that in proper cases the courts look behind the fiction of the corporate entity,[17] and it is evident in the last analysis that the stockholder is the real party in interest in respect to the property of the corporation which is under control of the directors. In accordance with this view, in a well-considered case in Georgia, the court held that a director occupies toward the individual stockholders a fiduciary relation, imposing upon him, when purchasing the stock, the duty of disclosing to the stockholder material facts which are known to himself as director, and which, if generally known, would raise the value of the stock, and that concealment of such facts entitles the seller to rescind the sale as fraudulent.[18] And, in a recent case, where the director was

[13] Allen v. Curtis, supra.

[14] Ante, p. 482.

[15] Board of Commissioners of Tippecanoe County v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245. To the same effect: Crowell v. Jackson, 53 N. J. Law, 656, 23 Atl. 426; O'Nelle v. Ternes, 32 Wash. 528, 73 Pac. 692. And see Walsh v. Goulden, 130 Mich. 531, 90 N. W. 406; Hooker v. Midland Steel Co., 215 Ill. 444, 74 N. E. 445, 106 Am. St. Rep. 170; Carpenter v. Danforth, 52 Barb. (N. Y.) 581; Grant v. Attrill (C. C.) 11 Fed. 469; Percival v. Wright, [1902] 2 Ch. Div. 421.

[16] Bawden v. Taylor, 254 Ill. 464, 98 N. E. 941.

[17] Ante, p. 10. And see article by I. Maurice Wormser, 12 Columbia Law Rev. 496.

[18] Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232. In this case a director

the general manager of the corporation as well, the United States Supreme Court held that a fiduciary relation existed.[19]

bought shares from a stockholder at 110, concealing the fact that there was a contemplated sale of the entire plant, which made the stock worth 185. A director or managing officer of a corporation having a knowledge of the condition of its affairs, because of the trust relation and the superior opportunities afforded for acquiring information, before he can rightfully purchase the stock of one not actively engaged in the management, must inform him of the true condition of the affairs of the corporation. Stewart v. Harris, 69 Kan. 498, 77 Pac. 277, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873. But see Crowell v. Jackson, 53 N. J. Law, 656, 23 Atl. 426.

[19] Strong v. Repide, 213 U. S. 419, 29 Sup. Ct. 521, 53 L. Ed. 853. See article by H. L. Wilgus, 8 Mich. Law Rev. 267.

CHAPTER XIV

RIGHTS AND REMEDIES OF CREDITORS

214. Relation between Creditors and the Corporation—Remedies in General.
215. Property Subject to Execution.
216. Assets of a Corporation as a "Trust Fund" for Creditors.
217. Interference in Management of Corporation.
218. Fraudulent Conveyances and Transfers.
219. Suits for Injunction and Receiver.
220. Assignment for Benefit of Creditors—Preferences.
221. Dissolution of Corporation.
222. Consolidation of Corporations.
223. Extension of Charter—New Corporation.
224. Set-Off by Debtor of Corporation.
225–226. Relation between Creditors and Stockholders.
227–230. Statutory Liability of Stockholders.
231. Who are Liable as Stockholders under the Statutes.
232–233. Who may Enforce Statutory Liability.
234–236½. Remedies of Creditors against Stockholders.
237. Necessity for Judgment against Corporation.
238. Effect of Judgment against Corporation.
239. Statute of Limitations.
240. Set-Off by Stockholders.
241. Contribution among Stockholders.
242–243. Relation between Creditors and Officers.
244. Preferences to Officers Who are Creditors.
245. Statutory Liability of Officers.

RELATION BETWEEN CREDITORS AND THE CORPORATION—REMEDIES IN GENERAL

214. Generally the creditors of a corporation have the same rights and remedies against the corporation and its property as if it were a natural person. Thus,

(a) They may obtain judgment against it, and enforce the same

(1) At law, by execution against its property.

(2) In equity, by bill to subject equitable assets of the corporation, which cannot be reached by execution.

(b) They may proceed by attachment where by statute they may so proceed against a natural person.

As a general rule the rights and remedies of the creditors of a corporation against it are the same, both at law and in equity, as the rights and remedies of the creditors of a natural person are

against him. They may sue the corporation at common law, and recover a judgment against it, and may enforce the judgment by execution against the corporate assets.[1] Like creditors of a natural person, also, they may come into a court of equity and reach and subject equitable assets of the corporation to the satisfaction of their claims.[2] Creditors of a corporation may also attach the property of a corporation under the statutes, where the property of a natural person could be attached. A corporation is a "person," within the meaning of the attachment laws.[3]

SAME—PROPERTY SUBJECT TO EXECUTION

215. The property of a corporation is subject to seizure and sale on execution against it, with this exception:

EXCEPTION—At common law neither the franchises of a corporation, nor property of a quasi public corporation that is necessary to enable it to exercise its franchises, are subject to execution. This has been very generally changed by statute.

Ordinarily the property of a corporation may be seized on execution by its creditors to the same extent, and in the same manner, as the property of a natural person.[4] But there are some exceptions. At common law the franchises of a corporation are not subject to seizure and sale upon execution.[5] Nor can lands, easements, or things essential to the existence of the corporation and the execution of a public corporate duty, and without which its franchise would be of no practical use, be levied upon and sold on execution at law, so as to detach them from the franchise, and thus destroy its use.[6] The reason is because otherwise the corporation would

[1] As to what property is subject to execution, see section 215, infra.
[2] Post, pp. 687, 698, 701.
[3] Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 Am. Dec. 124; ante, p. 26.
[4] Plymouth R. Co. v. Colwell, 39 Pa. 337, 80 Am. Dec. 526.
[5] State v. Turnpike Co. of Middletown, 65 N. J. Law, 73, 46 Atl. 569.
[6] Louisville, N. A. & C. Ry. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Gue v. Tide Water Canal Co., 24 How. (U. S.) 257, 16 L. Ed. 635; East Alabama Ry. Co. v. Doe ex dem. Visscher, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 136; Brunswick Gaslight Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385; Overton Bridge Co. v. Means, 33 Neb. 857, 51 N. W. 240, 29 Am. St. Rep. 514. Although the property of a private sanitation corporation was paid for by voluntary subscriptions of citizens, and its purpose was public, its property was subject to seizure by creditors. In re New Orleans Auxiliary Sanitary Ass'n, 105 La. 172, 29 South. 337, 83 Am. St. Rep. 230.

be disabled from performing its functions to the public. Accordingly, where, upon an execution issued on a judgment recovered against a canal company, the marshal seized and advertised for sale a toll house and sundry canal locks, and other tangible property, an injunction was granted to prevent the sale; the court holding that, in the absence of a statute, neither the franchise of the company, nor any lands or works essential to the enjoyment of the franchise, and which could not be separated from it without destroying or impairing its value, could be sold on execution.[7] So it has been held as to the right of way of a railroad company.[8] On the other hand, property of a quasi-public corporation which is not in actual use in the discharge of its public duty, or which is not essential to the performance of such duty, is not exempt.[9] Thus it is generally held that cars and rolling stock of a railroad corporation, not in actual use, are subject to seizure.[10] In most jurisdictions the rule of the common law is changed by express statutory provisions.[11]

SAME—ASSETS OF A CORPORATION AS A "TRUST FUND" FOR CREDITORS

216. The capital stock and assets of a corporation belong to it, and may be disposed of by it, if it does not violate its charter, as fully and as freely as if it were a natural person, subject only to the right of creditors to attack transactions as fraudulent. No direct trust attaches to its property in favor of its creditors.

In most of the text-books and in a great number of the cases, it is said broadly, and without qualification, that the capital stock and assets of a corporation constitute a "trust fund" for the payment of its creditors, and cannot be squandered or given away when neces-

[7] Gue v. Tide Water Canal Co., supra.

[8] East Alabama Ry. Co. v. Doe ex dem. Visscher, supra; McColgan v. Baltimore Belt R. Co., 85 Md. 519, 36 Atl. 1026.

[9] Gardner v. Mobile & N. W. R. Co., 102 Ala. 635, 15 South. 271, 48 Am. St. Rep. 84; Johnson Co. v. Miller, 174 Pa. 605, 34 Atl. 316, 52 Am. St. Rep. 833.

[10] Boston, C. & M. R. R. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336; Risdon Iron & Locomotive Works v. Citizens' Traction Co., of San Diego, 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25 (cars and other movables of street railway company).

[11] See Simmons v. Worthington, 170 Mass. 203, 49 N. E. 114; Williams v. East Wareham, O. B. & P. I. St. Ry. Co., 171 Mass. 61, 50 N. E. 646; Philadelphia & B. C. R. Co.'s Appeal, 70 Pa. 355; Greensburg Fuel Co. v. Irwin Natural Gas Co., 162 Pa. 78, 29 Atl. 274; Bell v. Wood, 181 Pa. 175, 37 Atl. 201.

sary for the satisfaction of their claims.[12] And it is also said (applying the equitable rule by which trust funds may be followed) [13] that, if this is done, the property may be followed in equity by the creditors of the corporation into the hands of any person other than a bona fide purchaser for value.[14] Late decisions, however, and a careful consideration of most of the cases in which this dictum may be found, will show that in reality both the capital stock of a corporation and its other assets—so long, at least, as it is doing business—belong to the corporation itself, both in law and in equity, just as completely as does the property of a natural person belong to him, and they are not, in any true sense, held in trust for its creditors.[15]

The doctrine that the capital stock of a corporation is a trust fund for creditors was first laid down by Mr. Justice Story in Wood v. Dummer.[16] In this case a bank had distributed part of its cap-

[12] Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; BARTLETT v. DREW, 57 N. Y. 587, Wormser Cas. Corporations, 393; Hastings v. Drew, 76 N. Y. 9; COLE v. MILLERTON IRON CO., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615, Wormser Cas. Corporations, 379; Nevitt v. Bank of Ft. Gibson, 6 Smedes & M. (Miss.) 513; Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539; Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co., 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; State v. Commercial State Bank, 28 Neb. 677, 44 N. W. 998; Singer v. Hutchinson, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133. Cf. SOUTHWORTH v. MORGAN, 205 N. Y. 293, 98 N. E. 490, 51 L. R. A. (N. S.) 56, Wormser Cas. Corporations, 304.

[13] Fetter, Eq. 207–209.

[14] Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; COLE v. MILLERTON IRON CO., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615, Wormser Cas. Corporations, 379; Hibernia Ins. Co. v. St. Louis & New Orleans Transp. Co. (C. C.) 13 Fed. 516; Montgomery Web Co. v. Dienelt, 133 Pa. 585, 19 Atl. 428, 19 Am. St. Rep. 663; Vance v. McNabb Coal & Coke Co., 92 Tenn. 47, 20 S. W. 424; Fisk v. Union Pac. R. Co., 10 Blatchf. 518, Fed. Cas. No. 4,830.

[15] Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; First Nat. Bank of Crawfordsville v. Dovetail Body & Gear Co., 143 Ind. 550, 40 N. E. 810, 52 Am. St. Rep. 435; O'Bear Jewelry Co. v. Volfer, 106 Ala. 205, 17 South. 525, 28 L. R. A. 707, 54 Am. St. Rep. 31; Butler v. Harrison Land & Mining Co., 139 Mo. 467, 41 S. W. 234, 61 Am. St. Rep. 464; Kelly v. Clark, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668; Corey v. Wadsworth, 118 Ala. 488, 25 South. 508, 44 L. R. A. 766; Grand De Tour Plow Co. v. Rude Bros. Mfg. Co., 60 Kan. 145, 55 Pac. 848; Marvin v. Anderson, 111 Wis. 387, 87 N. W. 227; Ames & Frost v. Heslet, 19 Mont. 188, 47 Pac. 805, 61 Am. St. Rep. 496.

[16] 3 Mason, 308, Fed. Cas. No. 17,944.

ital stock among its stockholders, leaving debts unpaid, and nothing with which to pay them. It was said that the property so distributed was a trust fund for the payment of the debts of the corporation, and it was held that the creditors could follow it in equity into the hands of the stockholders. The doctrine was thus stated: "It appears to me very clear upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the Legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank, in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead. Credit is universally given to this fund by the public as the only means of repayment. During the existence of the corporation it is the sole property of the corporation, and can be applied only according to its charter; that is, as a fund for payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? If the stock may, the next day after it is paid in, be withdrawn by the stockholders, without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholder so diligently required? To me this point appears so plain, upon principles of law as well as common sense, that I cannot be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The billholders and other creditors have the first claims upon it, and the stockholders have no rights until all the other creditors are satisfied. They have the full benefit of all the profits made by the establishment, and cannot take any portion of the fund until all the other claims on it are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid. On a dissolution of the corporation the billholders and the stockholders have each equitable claims, but those of the billholders possess, as I conceive, a prior, exclusive equity."

This is the decision and the dictum upon which the so-called trust fund doctrine is based. But it requires no argument to show that the facts of the case did not render it necessary to hold the capital stock of a corporation a trust fund for creditors, in the strict sense of the term. All that the case decided was that a corporation cannot distribute its capital stock among its stockholders, and thereby leave creditors unpaid—a transaction which is clearly a

fraud upon existing creditors, just as a voluntary conveyance by a natural person is a fraud upon his existing creditors, who are thereby prevented from collecting their claims. So, if a corporation releases subscribers from liability to contribute to the capital stock, or distributes part of the capital stock to them, the transaction is a fraud upon subsequent creditors who are ignorant of the transaction, and deal with it on the faith of its capital stock being fully paid, and the transaction may be avoided by them on this ground. Many of the courts base the right of creditors to hold stockholders liable in these cases upon the ground that the capital stock is a trust fund for creditors. And it is in these cases, chiefly, that we find the trust fund doctrine declared.[17] No such doctrine, however, is necessary. The stockholders are liable on the ground of fraud. Persons who deal with a corporation and become its creditors after such a transaction, and with knowledge of it, cannot complain, because they are not defrauded.[18] If the capital stock were really a trust fund for creditors, they could complain.

Other cases in which the doctrine is announced, and seemingly relied upon, are cases in which the corporation has transferred its property to third persons in fraud of creditors.[19] Thus, in Cole v. Millerton Iron Co.,[20] a corporation had transferred all its property to another corporation, having the same officers and stockholders, pending an action against it, which afterwards resulted in a judgment. The only consideration for the transfer was the assumption by the grantee of the grantor's debts. The court, in holding the transfer illegal and void as against this judgment creditor, said, "The assets of a corporation are a trust fund for the payment of its debts, upon which the creditors have an equitable lien, both as against the stockholders and all transferees except those purchasing in good faith and for value." Clearly, it was unnecessary to

[17] Such is the case in Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; BARTLETT v. DREW, 57 N. Y. 587, Wormser Cas. Corporations, 393; Hastings v. Drew, 76 N. Y. 9; and in most cases in which the doctrine is announced.

[18] Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637. Cf. Sprague v. National Bank of America, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17 (statutory).

[19] Sutton Mfg. Co. v. Hutchinson, 11 C. C. A. 320, 63 Fed. 496.

[20] COLE v. MILLERTON IRON CO., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615, Wormser Cas. Corporations, 379. See, also, Hurd v. New York & C. Steam Laundry Co., 167 N. Y. 89, 60 N. E. 327; Grenell v. Detroit Gas Co., 112 Mich. 70, 70 N. W. 413; Ewing v. Composite Shoe Brake Co., 169 Mass. 72, 47 N. E. 241. Cf. Chase v. Michigan Tel. Co., 121 Mich. 631, 80 N. W. 717.

resort to any trust fund theory to sustain this decision. The decision might be based on elementary principles of the law applicable to fraud.

The trust fund doctrine was ably repudiated by the Supreme Court of Minnesota in the case of Hospes v. Northwestern Mfg. & Car Co.;[21] Judge Mitchell delivering the opinion of the court. It was held that the capital stock of a corporation is its own property, which it may use and dispose of, if not prohibited by its charter, the same as a natural person; that it is not held in trust for creditors, except in the sense that there can be no distribution of it among stockholders without provision being first made for the payment of corporate debts; and that, as in the case of a natural person, any disposition of it in fraud of creditors is void. "The phrase," said Judge Mitchell, "that 'the capital of a corporation constitutes a trust fund for the benefit of creditors,' is misleading. Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests—one equitable and one legal; one person, as trustee, holding the legal title, while another, as the cestui que trust, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further."

In Sanger v. Upton,[22] in the Supreme Court of the United States, it was said, in substance, as by Mr. Justice Story in Wood v. Dummer:[23] "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn, or applied otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the

[21] 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637. Accord, DOWNER v. UNION LAND CO. OF ST. PAUL, 113 Minn. 410, 129 N. W. 777, Wormser Cas. Corporations, 381.

[22] 91 U. S. 56, 23 L. Ed. 220.

[23] 3 Mason, 308, Fed. Cas. No. 17,944.

company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation." This dictum is broad enough to imply that all the assets of a corporation constitute a trust fund, in the strict sense, for the payment of its debts, but it must be taken in connection with the facts before the court. Except as applied to them, it is mere dictum. In this case the assignee in bankruptcy of a corporation was seeking to compel stockholders to pay a balance due for their stock. It was merely an effort to reach debts due to the corporation—equitable assets of the corporation—and apply them in payment of its debts. There was no necessity at all to resort to any trust fund doctrine. And the later decisions of the Supreme Court of the United States clearly show that they do not regard corporate assets as a trust fund for the payment of debts. Thus, it has been held that persons who become creditors of a corporation, with knowledge that its stock has not been paid in full, and that it was issued under an agreement by which the stockholders are not bound, as between them and the corporation, to pay it in full, cannot compel further payments.[24] The reason is that no fraud is committed upon them. If the capital stock were a trust fund for their benefit, they could compel payment in such a case. So it has been held that a conveyance of its property by a corporation cannot be questioned by those who subsequently deal with it.[25] Such rulings as these are inconsistent with the so-called trust fund doctrine.

It may, perhaps, be said that the capital stock of a corporation is a trust fund for creditors who deal with it on the faith of its being full paid, and that it is on this ground that they may compel its payment notwithstanding any contrary agreement by the corporation. It is not necessary, however, to rest their right in this respect on any trust fund theory, and to do so merely tends to confuse. Their right in such a case may well be rested on the ground of fraud. As was said by Judge Mitchell: "By putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation, and the relation which its stockholders bear to it and to the public, we have

[24] Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637. And see State Trust Co. v. Turner, 111 Iowa, 664, 82 N. W. 1029, 53 L. R. A. 136.

[25] Post, p. 688.

at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having, and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, 'Make that representation good by paying for your stock.' It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity." [26]

In Hollins v. Brierfield Coal & Iron Co.,[27] the Supreme Court of the United States virtually repudiate the so-called trust fund doctrine. They say that, when it is said that the assets of a corporation constitute a trust fund for the benefit of creditors, it is not meant to convey the idea that there is any direct and express trust attached to the property of a corporation in favor of its creditors; that a corporation, as against creditors, is entitled to hold its property, if it does not violate its charter, as absolutely, and as free from the claims of or interference by its creditors, as an individual can hold his property; that all that is meant by the trust fund doctrine is that, when a court of equity takes into its possession the assets of an insolvent corporation, it will administer them on the theory that they, in equity, belong to the creditors, if necessary in order to satisfy their claims, rather than to the corporation itself, or to its stockholders. "In other words—and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation—the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as an individual holds his, free from the touch of a creditor who has acquired no lien; free, also, from the touch of a stockholder, who, though equitably interested in, has no legal right to, the porperty. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, place the property in a condition of trust, first for the creditors, and then for the stockholder. What-

[26] Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; DOWNER v. UNION LAND CO. OF ST. PAUL, 113 Minn. 410, 129 N. W. 777, Wormser Cas. Corporations, 381.

[27] 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. And see McDonald v. Williams, 174 U. S. 397, 19 Sup. Ct. 743, 43 L. Ed. 1022; Hageman v. Southern Electric R. Co., 202 Mo. 249, 100 S. W. 1081; Marvin v. Anderson, 111 Wis. 387, 87 N. W. 226.

ever of trust there is arises from the peculiar and diverse equitable rights of the stockholders, as against the corporation, in its property, and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." It was held in this case that the rule that simple contract creditors cannot come into equity to obtain the seizure of their debtor's property, and its application to their claims, applies with the same force when the debtor is a corporation; and the rule is not changed by the insolvency of the corporation, its failure to collect in full all stock subscriptions, its execution of an illegal trust deed, or the pendency in the same court of a suit to foreclose the same, for neither of these things, nor all together, operates to charge upon the corporation's property any lien or direct trust in favor of simple contract creditors.

SAME—INTERFERENCE IN MANAGEMENT OF CORPORATION

217. The creditors of a corporation have no right, either at law or in equity, merely because they are creditors, to interfere in its management, or to come into a court of equity to restrain it from making contracts or disposing of its property, unless there is fraud or breach of trust to give a court of equity jurisdiction, or corporate insolvency is thereby threatened.

This rule seems to be well settled.[28] The property of a corporation, so long at least as it is doing business, belongs to it as fully as the property of a natural person belongs to him, and, as a rule, it may make contracts and dispose of its property to the same extent as a natural person. If it makes conveyances or transfers of property on which creditors have a lien, or if it makes them, not in good faith, but with intent to hinder and delay its creditors, they may come into a court of equity, after obtaining judgment, and obtain relief by subjecting the property to the satisfaction of the

[28] See Mills v. Buenos Ayres Co., 5 Ch. App. 621; POND v. FRAMINGHAM & L. R. CO., 130 Mass. 194, Wormser Cas. Corporations, 386; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479, 7 N. W. 65.

judgment, just as the creditors of a natural person may do. Or, if the remedy is given by statute, they may proceed by attachment, and in that way secure their claim. But, in the absence of fraud or breach of trust, the creditors of a corporation cannot come into a court of equity and enjoin it from making a particular contract or conveyance on the ground that the transaction will prevent them from enforcing their claims. And it can make no difference that the transaction sought to be enjoined is alleged to be ultra vires. However, if the ultra vires acts threaten the solvency of the corporation, it would seem that creditors may object. A creditor cannot attack a corporate transaction as ultra vires merely. An act might be ultra vires and yet increase the corporate assets. A creditor can only assail the act on the ground that its effect would be fraudulently to divert the corporate assets from his debt.[29]

In Mills v. Northern Railway of Buenos Ayres Co.,[30] it was held that creditors of a corporation could not come into a court of equity and enjoin the corporation from issuing debenture stock, and applying money raised thereon to the payment of dividends to shareholders, and from doing other acts claimed to be ultra vires. "So far," said Lord Hatherley, "as the case rests on the simple fact of the plaintiffs being creditors of the company, it seems to me hardly capable of argument. Work is done for a limited company; no engagement is taken from them by way of security; no debenture or mortgage is granted by them; but the work is done simply on the credit of the company. The only remedy for a creditor, in that case, is to obtain his judgment and to take out execution; or it may be that he may have a power, if the case warrants it, of applying to wind up the company. But it is wholly unprecedented for a mere creditor to say, 'Certain transactions are taking place within the company, and dividends are being paid to shareholders which they are not entitled to receive, and therefore I am entitled to come here and examine the company's deed, to see whether or not they are doing what is ultra vires, and to interfere, in order that, as by a bill quia timet, I may keep the assets in a proper state of security for the payment of my debt whensoever the time arrives for its payment.' The case must have occurred, of course, many years ago, before joint-stock companies were so abundant, but certainly within the last twenty or thirty years the money due to creditors must have been many millions, and the number of creditors must have been many thousands; yet I have never before heard—and I asked in vain for any such precedent—of any attempt on the part of a

[29] Force v. Age-Herald Co., 136 Ala. 271, 33 South. 866. Cf. POND v. FRAMINGHAM & L. R. CO., 130 Mass. 194, Wormser Cas. Corporations, 386.

[30] 5 Ch. App. 621.

creditor to file a bill of this description against a company, claiming the interference of this court on the ground that he, having no interest in the company, except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands which he had not established in a court of justice, but which he was about to proceed to establish. If there is this power in any case of course, it would apply, not only to the raising of money by debentures and to paying shareholders, but it would extend to an interference in every possible way with the dealings of the company."

A similar decision was made by the Massachusetts court in Pond v. Framingham & Lowell Railroad Co.[31] The bill alleged that the plaintiffs were creditors of the defendant corporation; that it was insolvent; that all its property was mortgaged for the benefit of one class of its creditors; that it owed large amounts to other creditors, one of whom had attached all its property; that it was about to execute a lease to the attaching creditor for 999 years, at a rental which would not pay the interest on its indebtedness; and that the lease would be injurious to its creditors and stockholders. The prayer was for an injunction to restrain it from further prosecuting its business and for a receiver. The court said: "The plaintiffs cannot maintain this bill, unless upon the ground that any creditor can maintain a bill in equity against an individual debtor upon like allegations. But there is no allegation of fraud or breach of trust or any other ground of jurisdiction which brings the case within the general equity powers of a court of chancery. The bill is an attempt by a creditor to restrain his debtor from making what is alleged to be an improvident contract. The rights of the parties are governed by the rules of the common law. The plaintiffs, as creditors, might, by an attachment, have obtained security which would take precedence of the contemplated lease; but, if they could not, the court has no power to restrain the debtor from making a disposition of his property which is permitted by the common law, unless fraud or a breach of trust is alleged and shown. The allegation that the defendant corporation is insolvent does not aid the plaintiffs. In the absence of any statute giving the power, this court has no authority to act as a court of insolvency for the liquidation of the affairs of an insolvent railroad corporation."

[31] POND v. FRAMINGHAM & L. R. Co., 130 Mass. 194, Wormser Cas. Corporations, 886. See, also, Smith-Dimmick Lumber Co. v. Teague, 119 Ala. 385, 24 South. 4.

SAME—FRAUDULENT CONVEYANCES AND TRANSFERS

218. Conveyances and transfers of its property by a corporation with intent to hinder, delay, and defraud its creditors are invalid to the same extent, and on the same principles, as fraudulent conveyances and transfers by a natural person. As a rule,

(a) They can be questioned, and the property reached, only by persons who were creditors at the time they were made.

(b) Before a creditor can come into equity to set them aside and subject the property to his claim, he must have recovered a judgment against the corporation, and issued execution thereon.

If a corporation conveys or transfers its property fraudulently, with intent to hinder or delay creditors in the enforcement of their claims, they may come into a court of equity and set aside the transaction, as against any person other than a bona fide purchaser for value, and subject the property so disposed of to the satisfaction of their claims. They have such rights, and such rights only, in this respect, as creditors of a natural person would have under the same circumstances. The principles of law which govern are the same in both cases.[32]

The stockholders of a corporation cannot transfer the corporate property to themselves, directly or indirectly, and so defeat the rights of creditors of the corporation. And they cannot do this by forming a new corporation in which they are the principal stockholders, and procuring a transfer to it of the property of the old company. Such a transfer is a fraud upon the creditors of the old company, and may be treated as void as to them, or the new corporation may be held liable for the debts of the old, to the extent of the property received by it.[33] The fiction of corporate entity may

[32] Graham v. La Crosse & M. R. Co., 102 U. S. 148, 26 L. Ed. 106; Sutton Mfg. Co. v. Hutchinson, 11 C. C. A. 320, 63 Fed. 496; Shoemaker v. Washburn Lumber Co., 97 Wis. 585, 73 N. W. 333; Hamilton v. Menominee Falls Quarry Co., 106 Wis. 352, 81 N. W. 876.

[33] Montgomery Web Co. v. Dienelt, 133 Pa. 585, 19 Atl. 428, 19 Am. St. Rep. 663; Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. (C. C.) 13 Fed. 516; Vance v. McNabb Coal & Coke Co., 92 Tenn. 47, 20 S. W. 424; Brum v. Merchants' Mut. Ins. Co. (C. C.) 16 Fed. 140; Ewing v. Composite Brake Shoe Co., 169 Mass. 72, 47 N. E. 241; Hurd v. New York & C. Steam Laundry Co., 167 N. Y. 89, 60 N. E. 327; Vicksburg & Y. C. Tel. Co. v. Citizens' Tel. Co., 79 Miss. 341, 30 South. 725, 89 Am. St. Rep. 656; Central of Georgia Ry. Co. v. Paul, 93 Fed. 878, 35 C. C. A. 639; Wilson v. Aeolian Co., 64 App. Div. 337, 72 N. Y. Supp. 150, affirmed 170 N. Y. 618, 63 N. E. 1123; Shadford v. Detroit, Y. & A.

not be employed to work a fraud on creditors, or hinder and delay them in the collection of their claims, or to defeat the provisions of the bankruptcy act.[34] But where a new corporation is formed, and purchases the assets of the old company, the new company cannot be made to satisfy a judgment recovered against the old company for a cause of action arising after the transfer.[35]

Subsequent Creditors

A conveyance made with intent to defraud persons to whom the grantor expects to become immediately or soon indebted may be attacked and avoided by such person in a proper case. But it is a well-settled rule of law that if an individual, being solvent at the time, without any actual intent to defraud creditors, dispose of property for an inadequate consideration, or even make a voluntary conveyance of it, subsequent creditors cannot question the transaction, for they are not injured thereby. They are presumed to give credit to the debtor in the status which he has after the conveyance. In Graham v. La Crosse & M. R. Co.,[36] it was held that this principle

A. Ry., 130 Mich. 300, 89 N. W. 960; Douglas Printing Co. v. Over, 69 Neb. 320, 95 N. W. 656. And see, to the same effect, where the members of an embarrassed firm formed a corporation, and transferred to it the partnership property. BOOTH v. BUNCE, 33 N. Y. 139, 88 Am. Dec. 372, Wormser Cas. Corporations, 388. Where a failing debtor forms a corporation, composed of himself and members of his family, he taking substantially all the stock, and at once conveys all his property to the corporation in exchange for the stock by him taken; and immediately places all his stock, except one share, with certain of his creditors, who have knowledge of the facts, as collateral security to their claims, and, as president and general manager, retains control of the property, and manages it for his own use,—such a conveyance is a fraud on his other creditors, and may be set aside by a court at their suit, and the property administered for the benefit of all his creditors under the insolvent laws. First Nat. Bank of Chicago v. F. C. Trebein Co., 59 Ohio St. 316, 52 N. E. 834. And see Reed Bros. Co. v. First Nat. Bank of Weeping Water, 46 Neb. 168, 64 N. W. 701. Cf. Campbell v. Farmers' & Merchants' Bank, 49 Neb. 143, 68 N. W. 344; Andres v. Morgan, 62 Ohio St. 236, 56 N. E. 875, 78 Am. St. Rep. 712. See, also, article by I. Maurice Wormser, 12 Columbia Law Rev. at pp. 502–506.

[34] In re Rieger, Kapner & Altmark (D. C.) 157 Fed. 609; Hunter v. Baker Motor Vehicle Co. (D. C.) 225 Fed. 1006; Gay v. Hudson River Electric Power Co., 187 Fed. 12, 15, 109 C. C. A. 66.

[35] Gray v. National Steamship Co., 115 U. S. 116, 5 Sup. Ct. 1166, 29 L. Ed. 309. See, also, Chase v. Michigan Tel. Co., 121 Mich. 631, 80 N. W. 717; Seaboard Air Line Ry. v. Leader, 115 Ga. 702, 42 S. E. 38; Anderson v. War Eagle Consolidated Min. Co., 8 Idaho, 789, 72 Pac. 671. But where a corporation, while a going concern, but without property enough to pay its debts, and when all believed that its continuance would bring financial success, executes a mortgage to its directors, sureties on its notes, to secure them and induce renewals and further advances, the mortgage is not invalid. Sanford Fork & Tool Co. v. Howe, Brown & Co., 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713.

[36] 102 U. S. 148, 26 L. Ed. 106.

applies to conveyances by a corporation; that the disposal by a corporation of any of its property cannot be questioned by subsequent creditors any more than a like disposition of property by an individual may be. It was contended in this case that a corporation debtor does not stand on the same footing as an individual debtor; that, while the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of the stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. "We do not concur in this view," it was said. "It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights—not adverse to the corporate interests, but coincident with them. When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds which, in other circumstances, are as much the absolute property of the corporation as any man's property is his. We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each."

Necessity for Judgment against the Corporation

Before a creditor who has no lien on the property of his debtor can come into a court of equity to reach equitable assets of his debtor and subject them to the payment of his claim, he must obtain a judgment and issue execution thereon. He must, as a rule, do this before he can sue to set aside alleged fraudulent conveyances by his debtor and subject the property to the payment of his debt. This principle applies where a creditor of a corporation seeks to set aside conveyances or transfers by it on the ground that they are fraudulent as to him. It is only in the position of a judgment credi-

tor that he can question them.[37] This rule is well settled in the federal courts, and, as to them, it is not affected by the fact that statutes may authorize such proceedings in the state courts by simple contract creditors.[38] It has lately been held by the Supreme Court of the United States that this rule is not changed either by the insolvency of the corporation, its failure to collect in full all stock subscriptions, its execution of an illegal trust deed or mortgage, or the pendency of a suit to foreclose the mortgage; for neither of these things, nor all of them together, operate to charge any lien or direct trust in favor of simple contract creditors.[39]

SAME—SUITS FOR INJUNCTION AND RECEIVER

219. Creditors who have recovered judgment against a corporation, and exhausted their legal remedy, and, in exceptional cases, simple contract creditors, may maintain a bill in equity to reach assets of an insolvent corporation which have been unlawfully diverted, and, if necessary, a receiver may be appointed. A court of equity may also restrain a threatened diversion of property in such a case.

We have just seen that, where the officers of an insolvent corporation have fraudulently and illegally diverted its property, creditors who have obtained judgments against the corporation, on which execution has been returned unsatisfied, may maintain a bill in equity to reach such property and subject it to the payment of their claims, as against any person who is not a bona fide purchaser for value. In such a suit, if necessary, the court may appoint a receiver to take charge of the corporate assets, collect debts due the corporation, and make distribution.[40] Jurisdiction in such a case is very generally conferred by statute. Where a receiver has been appointed, a creditor cannot maintain a suit to reach assets, unless the receiver refuses to sue.[41]

There are a number of cases in which it has been held, upon the

[37] Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 713, 35 L. Ed. 358; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Smith v. Ft. Scott, H. & W. R. Co., 99 U. S. 398, 25 L. Ed. 437; Tawas, etc., R. Co. v. Iosco Circuit Judge, 44 Mich. 479, 7 N. W. 65; Atlas Nat. Bank v. John Moran Packing Co., 138 Mo. 59, 39 S. W. 71.

[38] Scott v. Neely, supra; Hollins v. Brierfield Coal & Iron Co., supra.

[39] Hollins v. Brierfield Coal & Iron Co., supra.

[40] Turnbull v. Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375.

[41] First Nat. Bank of Crawfordsville v. Dovetail Body & Gear Co., 143 Ind. 534, 42 N. E. 924.

theory that the assets of a corporation are a trust fund for the payment of its debts, that where the officers of a corporation are about to commit waste, or divert the assets of the corporation, when it is insolvent, and thereby cause irreparable loss to creditors, the creditors may come into a court of equity and obtain an injunction to restrain the threatened diversion and the appointment of a receiver, if this is necessary to control and secure the corporate property to the payment of its debts.[42] And it has been held that such a suit may be maintained by simple contract creditors, where immediate action is necessary.[43] It is not necessary to base the jurisdiction in such cases on the ground that the property of a corporation is a trust fund for creditors. It is enough that creditors are entitled to enforce their claims against it, and that they can only do so in the particular case by resort to a court of equity.[44]

A receiver should not be appointed on an ex parte application, without giving the defendants an opportunity of being heard;[45] but it may be done in an extraordinary case, where there is immediate danger of the assets being misappropriated or wasted.[46]

SAME—ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES

220. A corporation may make an assignment for the benefit of creditors, and by the weight of authority, in the absence of express statutory prohibition, it may prefer certain creditors. In many jurisdictions preferences after insolvency are prohibited by statute.

A corporation, like a natural person, may make an assignment of its property for the benefit of its creditors.[47] This right "exists in-

[42] 2 Mor. Priv. Corp. §§ 797-799; Conro v. Gray, 4 How. Prac. (N. Y.) 166; Covington Drawbridge Co. v. Shepherd, 21 How. (U. S.) 112, 16 L. Ed. 38; Gaylord v. Ft. Wayne, M. & C. R. Co., Fed. Cas. No. 5,284; Fisk v. Union Pac. R. Co., Fed. Cas. No. 4,830; Irons v. Manufacturers' Nat. Bank, Fed. Cas. No. 7,068; Lothrop v. Stedman, 42 Conn. 583, Fed. Cas. No. 8,519. Cf. Fenn v. Ostrander, Inc., 132 App. Div. 311, 116 N. Y. Supp. 1083.

[43] See cases above cited.

[44] See Kearns v. Leaf, Adelbert v. Kearns, 1 Hem. & M. 681; Evans v. Coventry, 5 De G., M. & G. 911; Foster v. Borax Co., 80 L. T. (N. S.) 461, 637.

[45] Cook v. Detroit & M. R. Co., 45 Mich. 453, 8 N. W. 74.

[46] Turnbull v. Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375.

[47] State v. Commercial Bank of Manchester, 13 Smedes & M. (Miss.) 569, 53 Am. Dec. 106; Chamberlain v. Bromberg, 83 Ala. 576, 3 South. 434; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Wilkinson v. Bauerle, 41 N. J. Eq.

herently in all corporations unless specially forbidden." [48] And this may be done by the board of directors, who are intrusted with the general management of the corporation, without a vote of the stockholders.[49]

In a number of states it is held that, when a corporation becomes insolvent and ceases to carry on business, its property and assets constitute a trust fund for the benefit of all its creditors, and the officers in possession of the property, being trustees for all the creditors, cannot lawfully dispose of it otherwise than for the equal benefit of all. And it is therefore held in these states that the officers of a corporation which has become insolvent and ceased to do business cannot prefer certain creditors over others, either by mortgage, provision in an assignment for the benefit of creditors, or otherwise.[50] By the weight of authority, however, the rights and powers of a corporation in this respect are identical with those of an individual, and it may lawfully prefer particular creditors, unless prohibited by statute; [51] in other words, that the rights of a corpora-

635, 7 Atl. 515; Kendall v. Bishop, 76 Mich. 634, 43 N. W. 645; Hutchinson v. Green, 91 Mo. 367, 1 S. W. 853; and cases hereafter referred to.

[48] Vanderpoel v. Gorman, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. Rep. 601.

[49] Ante, p. 609.

[50] Rouse v. Merchants' Nat. Bank, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 378, 15 Am. St. Rep. 644; Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co., 86 Tex. 143, 24 S. W. 16, 22 L. R. A. 802; Thompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; Cook v. Moody, 18 Wash. 114, 50 Pac. 1020, 63 Am. St. Rep. 872; Brown v. Morristown Co-op. Stove Co. (Tenn. Ch. App.) 42 S. W. 161; Washington Liquor Co. v. Alladio Café Co., 28 Wash. 176, 68 Pac. 444. The keeping secret of an arrangement between an insolvent corporation and creditors by which the latter were put in control of the corporation and were given judgment notes to secure them a preference for the purpose of enabling the corporation to continue in business, with the knowledge that such continuance necessarily involved the obtaining of new credits by the corporation, which could not be obtained if the facts were known, constitutes a fraud on those who were thus induced to become creditors, although there was no specific intention to defraud them, and the parties may have believed it possible for the corporation eventually to pay in full. United States Rubber Co. v. American Oak Leather Co., 96 Fed. 891, 37 C. C. A. 599. A chattel mortgage executed by an insolvent corporation, created by the laws of Iowa, but doing business in Texas, covering property in Texas, and giving a preference to creditors, cannot be enforced there, though valid in Iowa. Fowler v. Bell, 90 Tex. 150, 37 S. W. 1058, 39 L. R. A. 254, 59 Am. St. Rep. 788. An insolvent corporation cannot prefer a creditor stockholder. Lamb v. Russell, 81 Miss. 382, 32 South. 916.

[51] Bank of Montreal v. J. E. Potts Salt & Lumber Co., 90 Mich. 345, 51 N. W. 512 (collecting cases); Catlin v. Eagle Bank of New Haven, 6 Conn. 233; Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 515; Gould v. Little Rock, M. R. & T. Ry. Co. (C. C.) 52 Fed. 680; Schufeldt v. Smith, 131 Mo. 280, 31 S. W. 1039, 29 L. R. A. 830, 52 Am. St. Rep. 628; Ames & Frost Co. v. Heslet,

tion in this regard are "as unrestricted and absolute as is the common-law right of an individual to make preferences among his creditors." [52] In a number of states the question has been settled by express statutory prohibition against preferences.[53] The effect of preferences to officers who are creditors is elsewhere considered.[54]

SAME—DISSOLUTION OF CORPORATION

221. At common law, the dissolution of a corporation seems to have extinguished its debts; but it is otherwise in equity, and very generally by statute. In equity the assets of a dissolved corporation may be subjected to the payment of its debts.

At common law, debts due to and from a corporation were extinguished by its dissolution. This was declared necessarily to be so, for after dissolution there is no one, in law, to sue or be sued.[55] This rule, however, very properly did not obtain in equity. A court of equity will recognize and enforce debts due to the corporation,

19 Mont. 188, 47 Pac. 805, 61 Am. St. Rep. 496; State Nat. Bank of St. Joseph v. Union Nat. Bank, 168 Ill. 519, 48 N. E. 82; Corey v. Wadsworth, 118 Ala. 488, 25 South. 503, 44 L. R. A. 766; Grand De Tour Plow Co. v. Rude Bros. Mfg. Co., 60 Kan. 145, 55 Pac. 848; National Bank of Commerce v. Allen, 90 Fed. 545, 33 C. C. A. 169; First Nat. Bank of Latrobe v. Garretson, 107 Iowa, 196, 77 N. W. 856; Nappanee Canning Co. v. Reid, 159 Ind. 614, 64 N. E. 870, 1115, 59 L. R. A. 199. And see Vail v. Jameson, 41 N. J. Eq. 648, 7 Atl. 520; State v. President, etc., of Bank of Maryland, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; Coats v. Donnell, 94 N. Y. 168, 178; Sells v. Rosedale Grocery & Commission Co., 72 Miss. 590, 17 South. 236; Glover v. Lee, 140 Ill. 102, 29 N. E. 680. And cf. Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; United States Rubber Co. v. American Oak Leather Co., 181 U. S. 434, 21 Sup. Ct. 670, 45 L. Ed. 938. Though a corporation is insolvent, and contemplates making a general assignment, where it has not ceased to carry on its business in the general course of trade, its creditors may obtain preferences by attachment. American Nat. Bank of Dallas v. Dallas Tinware Mfg. Co., 15 Tex. Civ. App. 631, 39 S. W. 955.

[52] Gould v. Little Rock, M. R. & T. Ry. Co. (C. C.) 52 Fed. 680.

[53] See Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 66; Caesar v. Bernard, 156 App. Div. 737, 141 N. Y. Supp. 669, affirmed 209 N. Y. 570, 103 N. E. 1122; Montague v. Hotel Gotham Co., 208 N. Y. 442, 102 N. E. 513. In the case last cited, it was held that the payment of its entire assets by an insolvent stock corporation to a single creditor while largely indebted to others is an illegal preference under section 66, supra.

[54] Post, p. 752.

[55] Ante, p. 318. Cf. IN RE HIGGINSON & DEAN, L. R. [1899] 1 Q. B. Div. 325, Wormser Cas. Corporations, 238.

and will lay hold of and apply its assets to the payment of its debts.[56]

The dissolution of a corporation, as we have seen, in pursuance of charter or statutory authority, cannot be objected to by creditors as an impairment of the obligation of their contract with it; for the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of bona fide purchasers.[57]

SAME—CONSOLIDATION OF CORPORATIONS

222. In most jurisdictions, where corporations are consolidated, the new corporation, in acquiring the rights and property of the old corporations, impliedly assumes their debts. It is generally so provided by statute.

It is an open question in some jurisdictions whether or not, in the absence of a statute,[58] where corporations are consolidated the debts of the original companies follow as an incident of the consolidation, and become by implication the obligations of the new corporation; but, by the weight of authority, the question should be answered in the affirmative. The act of consolidation involves an implied assumption by the new company of all the valid debts and liabilities of the old companies, at least to the extent of the property acquired from them. "The rule which the authorities support seems to be that where one corporation goes entirely out of existence, by being incorporated into another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist the corporation into which it is merged will succeed to all its property, and be answerable for all its liabilities." [59] The new company is liable for the torts of the old companies.[60]

[56] Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412.

[57] Ante, p. 262; Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 8 L. Ed. 945; Coulter v. Robertson, 24 Miss. 278, 57 Am. Dec. 168. And see Smith v. Chesapeake & O. Canal Co., 14 Pet. (U. S.) 45, 10 L. Ed. 347. Equity will not enjoin the stockholders of a corporation from dissolving it, in the absence of fraud, at the suit of attaching creditors. Cleveland City Forge Iron Co. v. Taylor Bros. Iron Works Co. (C. C.) 54 Fed. 85.

[58] Frequently liability for the debts of the old company is imposed by statute. See New Bedford R. Co. v. Old Colony R. Co., 120 Mass. 397; Welsh v. First Division of St. Paul & P. R. Co., 25 Minn. 314; In re Utica Nat. Brewing Co., 154 N. Y. 268, 48 N. E. 521.

[59] Louisville, N. A. & C. Ry. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435. See Indianapolis, C. & L. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec.

[60] See Note 60 on following page.

SAME—EXTENSION OF CHARTER—NEW CORPORATION

223. If the charter of a corporation is merely extended, it remains liable, as before, for its debts. But if, when a charter is about to expire, a new corporation is created, though with the same name and the same members, it is not liable for the debts of the old except to the extent of property received by it from the old without consideration.

We have seen, in a preceding chapter, that if, when the charter of a corporation is about to expire, a new corporation is created, though with the same name and the same members as those of the old corporation, the new corporation is not liable for the debts of the old.[61] It is otherwise, of course, if the existence of the old corporation is merely extended, the identity of the corporation not being changed.[62] And, as we have seen, if the stockholders of a corporation form a new corporation, and transfer to it the property of the old corporation, the transfer is fraudulent as to the creditors of the old corporation, and they may hold the new one liable to the extent of the property so received by it.[63] But one corporation may, under some circumstances, succeed to the franchises and property of another without becoming responsible for its liabilities.

654; Thompson v. Abbott, 61 Mo. 176; Mount Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699; Pullman's Palace Car Co. v. Missouri Pac. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; Tompkins v. Augusta Southern R. Co., 102 Ga. 436, 30 S. E. 992; Cleveland, C., C. & St. L. Ry. Co. v. Prewitt, 134 Ind. 557, 33 N. E. 367; United States Capsule Co. v. Isaacs, 23 Ind. App. 533, 55 N. E. 832; Morrison v. American Snuff Co., 79 Miss. 330, 30 South. 723, 89 Am. St. Rep. 598; Camden Interstate Ry. Co. v. Lee, 27 Ky. Law Rep. 75, 84 S. W. 332. Cf. Parkinson v. West End St. Ry. Co., 173 Mass. 446, 53 N. E. 891. In an action against a corporation it is a defense that it was consolidated with another before commencement of the action, unless separate existence of the constituent companies is preserved by legislative enactment. Copp v. Colorado Coal & Iron Co., 29 Misc. Rep. 109, 60 N. Y. Supp. 293.

[60] Chicago, R. I. & P. R. Co. v. Moffitt, 75 Ill. 524; Louisville, E. & St. L. Con. R. Co. v. Summers, 131 Ind. 241, 30 N. E. 873; Berry v. Kansas City, Ft. S. & M. R. Co., 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371; McWilliams v. City of New York (D. C.) 134 Fed. 1015; Louisville & N. R. Co. v. Biddell, 112 Ky. 494, 66 S. W. 34. Contra, Von Cotzhausen v. Johns Mfg. Co., 100 Wis. 473, 76 N. W. 622.

[61] Bellows v. Hallowell & A. Bank, 2 Mason, 31, Fed. Cas. No. 1,279; ante, p. 90.

[62] Bellows v. Hallowell & A. Bank, supra; President, etc., of Lincoln & Kennebec Bank, v. Richardson, 1 Greenl. (Me.) 79, 10 Am. Dec. 34.

[63] Ante, p. 687.

Thus, where a statute empowers a railroad corporation to mortgage its franchises and property, and authorizes the purchasers at a mortgage sale to organize anew and be invested with all the rights and powers of the old company, the company so organized does not become liable to pay the debts of the old company.[64]

SAME—SET-OFF BY DEBTOR OF CORPORATION

224. A debtor of a corporation, who is also a creditor, may set off his claim against his indebtedness, as against other creditors. But this rule does not apply to a stockholder who is indebted on account of his stock.

If a creditor of a corporation is also a stockholder, he cannot, when sued upon his subscription by or for creditors, set off the debt due him from the corporation, but must pay his subscription, and then share ratably with other creditors in the assets.[65] This does not apply to other cases. If a person who is indebted to a corporation otherwise than for stock is also a creditor, he may set off his demand when sued on his indebtedness for the benefit of creditors.[66] Thus, though claims for losses by fire due from an insurance company cannot be set off by the assured against notes given by him for the capital stock of the company, such claim can be set off by the assured against a claim by the company for moneys deposited with him as a private banker.[67] A person who holds property in trust for the corporation cannot, when sued therefor after an assignment for the benefit of creditors, set off a debt due him from the corporation.[68]

[64] Vilas v. Milwaukee & P. du C. R. Co., 17 Wis. 497. See, also, National Foundry & Pipe Works v. Oconto City Water Supply Co., 105 Wis. 48, 81 N. W. 125; Hoard v. Chesapeake & O. R. Co., 123 U. S. 222, 8 Sup. Ct. 74, 31 L. Ed. 130; Cook v. Detroit, G. H. & M. R. Co., 43 Mich. 349, 5 N. W. 390.

[65] Post, p. 747. And see Sawyer v. Hoag, 17 Wall. (U. S.) 610, 21 L. Ed. 731.

[66] Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483; Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059.

[67] Scammon v. Kimball, supra.

[68] Thus, where money is placed by a corporation in the hands of its general manager, as trustee, for safe-keeping, and to be paid out in the ordinary course of its business, he cannot set off a debt due to him by the corporation against the money in his hands, after an assignment by the corporation for the benefit of creditors. First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 58 Mich. 124, 24 N. W. 543, 55 Am. Rep. 660; Id., 58 Mich. 315, 25 N. W. 202. See, also, Oregon Gold Min. Co. v. Schmidt, 60 S. W. 530, 22 Ky. Law Rep. 1330.

RELATION BETWEEN CREDITORS AND STOCKHOLDERS

225. Stockholders are not liable at all to creditors of the corporation, at common law,

(a) Unless the corporation is otherwise insolvent and they are indebted to the corporation on account of their stock, and payment of the debt is necessary for the payment of creditors;

(b) Or unless the capital stock of the corporation, or a part of it, has been unlawfully distributed or paid out to them, directly or indirectly, leaving creditors unpaid.

226. In most states, constitutional provisions have been adopted, or statutes enacted, making stockholders individually liable, to a greater or less extent, for corporate debts.

One of the characteristics of a corporation, at common law, distinguishing it from a partnership, is the exemption of the members from liability for the debts of the corporation beyond the proportions of the capital stock owned by them. Partners are individually liable, as joint contractors, for all the debts of the firm, but it is otherwise with members of a corporation. If they have not paid the full amount of their subscriptions, and the corporation becomes insolvent, their liability to the corporation may be enforced by, or for the benefit of, creditors. But beyond the balance thus due from them to the corporation, and the amount paid in by them, they are under no liability to creditors, at common law, however insolvent the corporation may be. Creditors must look to the assets of the company, and, if the assets are insufficient to pay the debts in full, they must suffer the loss.

The only way in which liability can be imposed upon stockholders, as such, for corporate debts, is by the charter, or by statute.[69] When neither the charter of a corporation nor any general statute imposes on the individual members any personal liability to pay its debts, such liability cannot be imposed by a by-law of the corporation.[70] And the fact that individual members may have repre-

[69] Post, p. 703. See Duluth Club v. MacDonald, 74 Minn. 254, 76 N. W. 1128, 73 Am. St. Rep. 344; Enterprise Ditch Co. v. Moffit, 58 Neb. 642, 79 N. W. 560, 45 L. R. A. 647, 76 Am. St. Rep. 122; Redkey Citizens' Natural Gas, Light, Fuel & Petroleum Co. v. Orr, 27 Ind. App. 1, 60 N. E. 716.

[70] Reid v. Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563; Free Schools in Andover, Trustees of v. Flint, 13 Metc. (Mass.) 539; Carr v. Iglehart, 3 Ohio St. 457.

sented to the public that they were so liable will not make them liable as stockholders. If they have incurred liability as individuals disconnected with their corporate capacity, they should be proceeded against in their individual capacity, and not in their capacity as stockholders.[71]

Liability on Subscriptions

The liability of a stockholder to pay the amount of his subscription to the capital stock of the corporation is part of the capital stock, and therefore it forms a part of the assets to which creditors of the corporation are entitled to look for the payment of their debts. Whenever, therefore, a stockholder is indebted to a corporation, which is otherwise insolvent, on his subscription, the debt may be enforced by, or for the benefit of, creditors, in an appropriate action. This is well settled.[72] A corporation cannot defeat the rights of creditors to hold the stockholders liable on their unpaid subscriptions by a dissolution.[73]

Conditional Subscriptions

Where a subscription is made upon a valid condition precedent, the subscriber, as we have seen, does not become a stockholder, nor incur any liability to the corporation, until the condition is fulfilled. Nor, until then, assuming that the condition is valid, does he incur any liability on his subscription to creditors of the corporation.[74] If a conditional subscription is unauthorized and invalid, because made prior to organization under a statute requiring a certain amount of stock to be subscribed,[75] it is held by some courts that the subscription is void, so that it imposes no liability either to the corporation or to creditors.[76] Others hold that the condition only is void, and that the subscription may be treated as absolute and unconditional, so that the subscriber would be liable thereon to creditors.[77]

It must be remembered that performance of a condition precedent may be waived. It may be waived impliedly as well as expressly, and the waiver may be relied upon by creditors. A subscriber,

[71] Reid v. Eatonton Mfg. Co., supra.

[72] Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Allen v. Montgomery R. Co., 11 Ala. 437; Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Ogilvie v. Knox Insurance Co., 22 How. (U. S.) 380, 16 L. Ed. 349; Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Bissit v. Kentucky R. Navigation Co. (C. C.) 15 Fed. 353; World's Fair Excursion & Transportation Boat Co. v. Gasch, 162 Ill. 402, 44 N. E. 724; Barron v. Paine, 83 Me. 312, 22 Atl. 218; Germantown Pass. Ry. Co. v. Fitler, 60 Pa. 124, 100 Am. Dec. 546; Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74; Nevitt v. Bank of Fort Gibson, 6 Smedes & M. (Miss.) 513.

[73] Germantown Pass. Ry. Co. v. Fitler, 60 Pa. 124, 100 Am. Dec. 546.

[74] Ante, p. 368. [75] Ante, p. 385. [76] Ante, p. 373. [77] Ante, p. 373.

therefore, who waives performance of a condition by acting as a stockholder, with knowledge that it has not been performed, cannot set up the condition to defeat liability to creditors on his subscription.[78]

As we have seen, there is an implied condition that the whole amount of stock specified in the charter, articles of association, or contract of subscription, shall be taken by bona fide, binding, and unconditional subscriptions, before the subscribers shall be liable on their subscriptions, unless the implication is rebutted.[79] This, like other conditions, may be waived.[80]

Subscriptions upon Special Terms

We have considered subscriptions upon special terms in a preceding chapter. And we have seen that a corporation cannot make special terms with a subscriber by which it releases him from liability to pay his subscription, in whole or in part.[81] An agreement between a corporation and a subscriber by which the subscription is not to be payable, or is to be payable in part only, though it may be binding, upon the corporation and upon the other stockholders, by their consenting to it, is void as against creditors of the corporation who contracted with it on the faith of its capital stock being fully paid. And the subscription may be enforced in full for the benefit of creditors.[82]

Release of Subscriber by Corporation

A subscriber may be released, in whole or in part, from his contract by the corporation, with the consent of the other stockholders, provided no claims of creditors intervene; but he cannot be released if the amount due from him is required to pay the debts of the corporation.[83] And if a subscriber is sued by a creditor or receiver of the corporation, on his subscription, and claims in defense that the number of his shares was reduced with the consent of the corporation and the other subscribers, it is incumbent upon him to show that it was at a time when it might lawfully be done.[84]

[78] Ante, p. 374; Cornell's Appeal, 114 Pa. 153, 6 Atl. 258; Mack's Appeal (Pa.) 7 Atl. 481.

[79] Ante, p. 381.

[80] Note 78, supra.

[81] Ante, p. 375.

[82] Ante, p. 377, and cases there collected. See, particularly, Burke v. Smith, 16 Wall. (U. S.) 390, 21 L. Ed. 361; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203.

[83] World's Fair Excursion & Transportation Boat Co. v. Gasch, 162 Ill. 402, 44 N. E. 724; Cartwright v. Dickinson, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. Rep. 910; ante, p. 404, and cases there cited.

[84] Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74.

"Watered" and "Bonus" Stock

Difficult questions arise in regard to the liability to creditors of the corporation where stock is issued gratuitously, or under an agreement by which the holder pays less than the par value, either in money or property. We have already considered this subject at length in a preceding chapter. We have seen that the following propositions are supported by the weight of authority, though on most of them there is some conflict of opinion:

(1) The transaction may be valid and binding as far as the corporation and the stockholders are concerned, but the fact that it is so does not necessarily render it binding upon creditors of the corporation.[85]

(2) If the stock is original stock, issued on subscription, any agreement between the corporation and a subscriber, by which he pays less than its par value, is a fraud upon creditors of the corporation, who deal with it on the faith of the stock being full paid, and, if the corporation becomes insolvent, the original holders of such stock, and purchasers with notice, may be held liable for its full par value for the payment of creditors.[86]

(3) When the corporation is an active and going concern, it may issue stock at its market value, instead of its par value, either in payment of a debt, or to raise money or purchase property necessary for carrying on its business; and if the stock is issued as full paid, and the transaction is in good faith, the holders of the stock will not be liable to creditors.[87]

(4) If stock is issued as a bonus, and without consideration, the holders will be liable for the par value of the stock to creditors who deal with the corporation on the faith of the stock being full paid. The contrary is held at common law in New York.[88]

(5) In any case, only those creditors who have dealt with the corporation on the faith of the stock being full paid can complain. Therefore the holders of stock issued as full paid, without being paid in fact, are not liable (a) to persons who became creditors before the stock was issued, (b) or who became creditors with knowledge of the facts.[89]

(6) In the absence of constitutional or statutory prohibition, stock may be paid for in property or services, if they are such as the corporation has the power to purchase or engage; and, by the weight of authority, the transaction will be valid as against creditors, if it was free from fraud, though the property may in fact

[85] Ante, p. 458.
[86] Ante, p. 455.
[87] Ante, p. 462.
[88] Ante, p. 466.
[89] Ante, p. 473.

have been worth less than the stock. If the overvaluation is intentional the transaction is fraudulent, as a matter of law; and obvious and gross overvaluation, if unexplained, is conclusive evidence of intentional overvaluation.[90]

(7) These rules are to some extent inapplicable under peculiar constitutional or statutory provisions in force in some states.[91]

Profits and Dividends

Until dividends have been declared, the surplus profits are part of the assets of the company, and do not belong to the stockholders, even though the circumstances are such that a dividend ought to be declared;[92] and therefore, where a corporation becomes insolvent before its surplus profits have been set apart for the stockholders by declaring a dividend, the surplus, as well as the capital stock, must be applied to satisfy its debts, to the exclusion of any claim by the stockholders.[93] Where, however, while the corporation is solvent, a dividend is lawfully declared, and money or property equal thereto is specifically set apart as a fund appropriated to its payment, the share of each stockholder is thereby severed from the common funds of the corporation, and becomes his individual property, as against the claims of creditors.[94] Insolvency of the corporation after a dividend has been declared and set apart does not defeat the preferential right of the stockholders to their shares, as against creditors.[95] Even where no specific fund has been set apart for the payment of the dividend, the stockholders come in pro rata with the general creditors for the unpaid dividend.[96]

Diversion of Capital—Unauthorized Dividends

The directors of a corporation cannot lawfully diminish the capital required to enable the corporation to do business, either by directly distributing it among the stockholders, or by indirectly doing so, by distributing funds as dividends when there are no surplus profits. The whole capital stock of a corporation is bound, in the hand of all but bona fide purchasers, for the payment of debts of the corporation contracted on the faith of it; and it cannot be diverted by distributing it, either directly or indirectly, among the stockholders. If it is done, the stockholders may be compelled to

[90] Ante, p. 468. [91] Ante, p. 475. [92] Ante, p. 418.

[93] Scott v. Eagle Fire Co., 7 Paige (N. Y.) 198; ante, p. 419.

[94] In re Le Blanc, 14 Hun, 8; Id., 75 N. Y. 598; Le Roy v. Globe Insurance Co., 2 Edw. Ch. (N. Y.) 657; Ford v. Easthampton Rubber Thread Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. Rep. 462; McLaran v. Crescent Planing Mill Co., 117 Mo. App. 40, 93 S. W. 819.

[95] Id.

[96] Hunt v. O'Shea, 69 N. H. 600, 45 Atl. 480; Lowne v. American Fire Ins. Co., 6 Paige (N. Y.) 482.

refund to, or for the benefit of, creditors. Such a distribution is a fraud upon bona fide creditors.[97]

Dividends cannot lawfully be paid except out of surplus profits earned by the company. This is expressly declared by statute in some jurisdictions, but the rule is so even at common law.[98] A payment of dividends, when they cannot lawfully be paid, so as to impair the capital stock, is a fraud upon creditors. It is, in effect, a distribution of the capital among the stockholders, and the stockholders who receive the same may be made to account and refund for the benefit of creditors.[1] Besides this, by statute, in many jurisdictions, officers of a corporation are made liable for its debts if they pay dividends when there are no funds out of which they may lawfully be paid, and they may render themselves liable at common law.[2] But, if dividends are paid by a corporation when it may lawfully pay them, the stockholders cannot be compelled to refund, at the suit of creditors, upon the corporation's subsequently becoming insolvent.[3]

Preferred Stockholders

Ordinarily holders of preferred stock in a corporation are not to be regarded as creditors, though the stock may have been issued by the corporation for the purpose of raising money; but they are to be regarded as stockholders, and they cannot claim the right to corporate assets until the rights of creditors have been satisfied.[4] The issue of preferred stock, however, may take the form of a loan, so as to give the holders the standing of creditors.[5] Resort must be had in each case to the statute or contract under which the preferred stock was issued, in order to determine the special properties and qualities which it possesses.

[97] Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; BARTLETT v. DREW, 57 N. Y. 587, Wormser Cas. Corporations, 393; Hastings v. Drew, 76 N. Y. 9; Gratz v. Redd, 4 B. Mon. (Ky.) 178, 194.

[98] Ante, p. 422.

[1] Wood v. Dummer, supra; BARTLETT v. DREW, supra; Main v. Mills, 6 Biss. 98, Fed. Cas. No. 8,974; Gratz v. Redd, 4 B. Mon. (Ky.) 178, 189, 191; Reid v. Eatonton Mfg. Co., 40 Ga. 98, 104, 2 Am. Rep. 563; IN RE FECHHEIMER-FISHEL CO., Bankrupt, 212 Fed. 357, 129 C. C. A. 33, Wormser Cas. Corporations, 129; ante p. 434.

[2] Post, pp. 750, 752.

[3] Reid v. Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563.

[4] Ante, p. 450.

[5] Ante, p. 453.

SAME—STATUTORY LIABILITY OF STOCKHOLDERS

227. In most of the states, statutes have been enacted making stockholders individually liable to some extent for corporate debts. The statutes vary in the different states. They are generally

(a) Statutes making stockholders jointly and severally liable, absolutely and unconditionally, for all the debts of the corporation.

(b) Statutes making them so liable until the whole capital stock is paid in, and a certificate thereof filed or recorded.

(c) Statutes making them liable, absolutely and unconditionally, to an amount equal to the amount of stock held by them, in addition to the amount that may be due on the stock.

(d) Statutes requiring certain acts to be done, as the filing of annual statements, and making stockholders individually liable for corporate debts, on failure to comply.

228. In a number of states there are constitutional provisions imposing individual liability upon stockholders. Such provisions are self-executing, if they fix the liability, so that they do not depend upon legislation to give them effect.

229. Some of the statutes impose a quasi contractual liability, as in (a), (b), and (c), supra, while the liability imposed by others is penal, as in (d), supra. The nature of the quasi contractual liability must depend in each case upon a construction of the statute. The liability may be either

(a) In the nature of that of a surety or guarantor.

(b) Or it may be original, as principal debtor.

230. In regard to the statutory liability of stockholders the following points may be particularly mentioned:

(a) Where a statute makes stockholders individually liable on dissolution of the corporation, total insolvency, and an assignment for creditors, or appointment of an assignee in insolvency, or a trustee in bankruptcy, or a receiver, is equivalent to a dissolution.

(b) The words "debts," "demands," etc., used in the statute,

(1) In some states are held to include only debts arising from contract, express or implied.

(2) In others they are held to include a demand for unliquidated damages for a tort.

(c) A statute making stockholders liable for debts due "servants

and laborers" for services includes only servants performing manual labor.

(d) The Legislature may impose individual liability upon stockholders of existing corporations, if the power to alter, amend, or repeal the charter is reserved, but not otherwise.

(e) The Legislature may repeal a statute imposing individual liability after a debt is contracted, if the liability is penal, but not if it is quasi contractual.

The statutes imposing individual liability upon stockholders for corporate debts vary so much in the different states that it is impossible to lay down general rules that will apply in all cases. There are some rules and principles, however, which are of very general application, and these may be shown, leaving the student to examine the statutes and decisions of his own state. On some questions it will be found that the courts do not agree.

The statutory liability of stockholders to creditors may be excluded by express agreement between the corporation and creditors at the time the debt is contracted.[6]

Unpaid Installments of Subscriptions

In almost all of the states, constitutional provisions have been adopted, or statutes have been enacted, expressly declaring stockholders liable for debts of the corporation to the extent of all unpaid installments on stock owned by them, or, in some states, on stock transferred by them for the purpose of defrauding creditors. Such liability exists, however, independently of any statutory provision, and has already been considered.[7] We are concerned in this section only with the liability of stockholders to creditors of the corporation which is imposed by statute, and which does not exist independently of the statute.

Unlimited Statutory Liability

Sometimes, but not often, stockholders are made jointly and severally liable, absolutely and unconditionally, for all the debts of the corporation. Such a statute does away altogether with the common-law exemption of members from individual liability for corporate debts, and, in effect, renders them liable as partners.[8] The corporation, under such circumstances, is a "full liability corporation."[9]

[6] Brown v. Eastern Slate Co., 134 Mass. 590. And see United States v. Stanford, 70 Fed. 346, 17 C. C. A. 143, affirmed 161 U. S. 412, 16 Sup. Ct. 576, 40 L. Ed. 751. Cf. Oswald v. Minneapolis Times Co., 65 Minn. 249, 68 N. W. 15.

[7] Ante, p. 698.

[8] See Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287.

[9] See Business Corporation Law N. Y. (Consol. Laws, c. 4) § 6; Sanford v.

Limited Statutory Liability

More general statutes are those imposing a limited liability. In many states each stockholder in certain corporations is made absolutely liable for the debts of the corporation, "to the amount of stock held or owned by him." Such a statute creates an absolute liability of a contractual, or, more accurately, of a quasi contractual, nature,[10] on the part of each stockholder, in a sum equal to the amount of his stock, in addition to his liability to the corporation for his stock, and not merely for the amount due on his stock.[11] The liability in such a case is, in most states, held to be primary and original. The stockholders are liable as principal debtors, substantially as if they were partners, except that the liability of each is limited to a sum equal to the amount of his stock.[12] The National Banking Act declared that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." [13] Under this act, it will be noticed, the shareholders are severally liable. "The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in any wise affect the liability of another; and if the bank itself, in such case, holds any of its stock, it is regarded in all respects as if such stock were in the hands of a natural person, and the extent of the several liability of the other stockholders is computed accordingly." [14]

Rhoads, 113 App. Div. 782, 99 N. Y. Supp. 407; Adams v. Slingerland, 87 App. Div. 312, 84 N. Y. Supp. 323.

[10] McClaine v. Rankin, 197 U. S. 154, 159, 25 Sup. Ct. 410, 49 L. Ed. 705, 3 Ann. Cas. 500.

[11] McDonnell v. Alabama Gold Life Insurance Co., 85 Ala. 401, 5 South. 120; Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Root v. Sinnock, 120 Ill. 350, 11 N. E. 339, 60 Am. Rep. 558; Coleman v. White, 14 Wis. 700, 80 Am. Dec. 797; Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626.

[12] Coleman v. White, 14 Wis. 700, 80 Am. Dec. 797; Booth v. Dear, 96 Wis. 516, 71 N. W. 816.

[13] Rev. St. U. S. § 5151. The statute has been superseded by Federal Reserve Act Dec. 23, 1913, c. 6, § 23, 38 Stat. 273 (U. S. Comp. St. 1913, § 9689). As to the meaning of the words "equally and ratably," when used in a statute, see Cheney v. Scharmann, 145 App. Div. 456, 129 N. Y. Supp. 993; Van Tuyl v. Schwab, 165 App. Div. 412, 414, 150 N. Y. Supp. 786. In the case last cited, the court held that, where stockholders are by statute made equally and ratably responsible for debts of the corporation, those stockholders who are also creditors cannot set off against their liability as stockholders claims which they have against the corporation.

[14] U. S. ex rel. Citizens' Nat. Bank v. Knox, 102 U. S. 422, 26 L. Ed. 216.

A stockholder is not liable at law for corporate debts, under a statute making him liable to the amount of his stock, where he has already paid, on account of the debts of the corporation, a sum equal to the amount of his stock, in addition to paying for his stock.[15]

Statutory Liability Until Capital is Paid in

In a number of states, stockholders are made jointly and severally liable for debts of the corporation until the whole, or a specified proportion, of the capital stock is paid in, and a certificate thereof is made, and recorded or filed as prescribed in the statute. In some states the liability is unlimited, while in others they are made liable only to the amount of their stock; that is, as we have seen, to an amount equal to the amount of their stock in addition to any amount that may have been paid or that may be due on their stock.[16] The fact that a stockholder has fully paid for his stock does not relieve him from liability, under such statutes, if the capital stock of the company, or the required proportion, is not paid in, and the certificate made and recorded or filed. Two things are necessary, under these statutes, to end the stockholder's liability. The whole capital stock, or the prescribed proportion thereof, must be paid in, and the certificate must be recorded or filed.[17] The certificate is not conclusive evidence, as against creditors, that the capital stock has been paid.[18] The question of liability under such statutes as these frequently arises in cases where stock is paid for in property, and it is claimed that the property was taken at an overvaluation. We have, in a preceding chapter, considered the effect of such payments.[19]

If the capital stock is increased after the original stock has all been paid in, the liability of holders of the original stock, who refuse to take the new stock, is not revived under a statute making stockholders liable for the debts of the corporation until its whole capital stock is paid in, and a certificate of the fact recorded or filed. The liability in such a case rests solely upon the holders of the new stock.[20]

[15] Garrison v. Howe, 17 N. Y. 458; Mathez v. Neidig, 72 N. Y. 100; Sedgwick City Bank v. Sedgwick Milling & Elevator Co., 59 Kan. 654, 54 Pac. 681; Munson v. Warren, 63 Kan. 162, 65 Pac. 222; post, p. 747.

[16] Note 11, supra.

[17] Veeder v. Mudgett, 95 N. Y. 295. This case was decided under the former statute. For the present statute, see Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 56. And see Heinberg Bros. v. Thompson, 47 Fla. 163, 37 South. 71.

[18] Id.

[19] Ante, p. 468.

[20] Sayles v. Brown (C. C.) 40 Fed. 8; Veeder v. Mudgett, 95 N. Y. 295.

Constitutional Provisions

In a number of states there are constitutional provisions declaring stockholders liable, to a greater or less extent, for the debts of the corporation. Whether these provisions are self-executing, or whether they require statutory enactment to carry them into effect, depends upon a construction of the language of the provision. If, said Judge Mitchell in a Minnesota case, the nature and extent of the liability imposed is fixed by the provision itself, so that it can be determined by an examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, the provision should be construed as self-executing, and its language as addressed to the courts. And it was held that a constitutional provision that "each stockholder in any corporation * * * [with certain exceptions] shall be liable to the amount of stock held or owned by him" was self-executing.[21] If, on the other hand, the provision leaves anything to be fixed by law before it can be given effect, or if, on a construction of the entire provision in the light of other provisions bearing upon the same subject, it appears that it is addressed to the Legislature, and contemplates action by it, the provision cannot be regarded as self-executing.[22]

Effect of Dissolution of Corporation

The dissolution of a corporation by its own voluntary act, or by its ceasing to act as a corporation, does not destroy the right of its creditors to enforce the statutory liability of stockholders.[23]

[21] Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626. The fact that no remedy is provided for does not show that the provision is not self-executing, since the liability being imposed, the common law furnishes a remedy. Willis v. Mabon, supra. And see Whitman v. Oxford Nat. Bk., 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587.

[22] French v. Teschemaker, 24 Cal. 518; Morley v. Thayer (C. C.) 3 Fed. 737. The provision of the Kansas Constitution that "dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law," is not self-executing without the aid of legislation. Bell v. Farwell, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 804, 68 Am. St. Rep. 194. See, also, Tuttle v. National Bank of Republic, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750. Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654; Western Nat. Bank of New York v. Lawrence, 117 Mich. 669, 76 N. W. 105; Hancock Nat. Bank v. Farnum, 20 R. I. 466, 40 Atl. 341; Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331; Winchester v. Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153.

[23] Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335, 337; Kincaid v. Dwinelle, 59 N. Y. 548.

Nature of Stockholders' Liability—Penal or Contractual

The liability of stockholders under some statutes is contractual, while under others it is penal. This distinction is very important. For instance, penal statutes will not be enforced in a foreign jurisdiction,[24] and liability for a penalty does not survive the death of the person liable.[25] Again, one is strictly construed being penal in character, whereas the other is not. The effect of the statute, and not the form, determines its character.[26] A statute which directs or prohibits some act, and imposes some forfeiture for its transgression, is a penal statute. Therefore a statute providing that a corporation shall not transact business until certain preliminaries have been complied with, and that, if it does, the members shall be personally liable to the creditors, has been held to impose a penalty.[27] So, where the corporation is required to file annually a certificate setting forth certain facts, such as the amount of assessments voted by the company and actually paid in, and the amount of all existing debts, and it is provided that, if it shall fail to do so, all the stockholders shall be jointly and severally liable for all the debts of the company, the liability thus imposed is penal, and not contractual.[28]

But the liability under a statute providing that all stockholders shall be severally or jointly and severally liable individually to the creditors of the corporation, to an amount equal to the amount of their stock, for all debts or contracts made by the company, until the whole amount of the capital stock shall have been paid in, and a certificate thereof filed, is not in the nature of a penalty, but a liability arising upon a contract.[29] The same is true of a statute making stockholders liable, absolutely and unconditionally, for the debts of the corporation, or liable to the extent of their stock, as in the national banking act.[30] In some states such liability is declared to be, not contractual, but statutory.[31]

[24] Post, p. 735. [25] Post, p. 725.

[26] Diversey v. Smith, 103 Ill. 378, 42 Am. Rep. 14. See Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654. Contra, Hale v. Hardon, 95 Fed. 747, 37 C. C. A. 240.

[27] Id.

[28] Sayles v. Brown (C. C.) 40 Fed. 8; Wing v. Slater, 19 R. I. 597, 35 Atl. 302, 33 L. R. A. 566. But see Fitzgerald v. Weidenbeck (C. C.) 76 Fed. 695. See, also, Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123.

[29] Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; Id., 16 Fla. 428, 26 Am. Rep. 721; Cuykendall v. Miles (C. C.) 10 Fed. 342; Heinberg Bros. v. Thompson, 47 Fla. 163, 37 South. 71; Whitman v. Oxford Nat. Bk., 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587.

[30] Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; Cochran v. Wiechers, 119 N. Y. 399, 23 N. E. 803, 7 L. R. A. 553; Grand Rapids Sav.

[31] Hancock Nat. Bank v. Farnum, 20 R. I. 466, 40 Atl. 341.

Same—Nature of Contractual Liability

The statutory or constitutional liability of stockholders ex contractu for corporate debts to the amount of their stock, though sui generis, is in some cases, but not in all, in the nature of the liability of a surety or guarantor.[32] Sometimes it is said to be that of a guarantor or surety or partner,[33] but it is clear that this is going too far. In some respects it is similar, but in many respects it is different.[34] "The truth is," says Mr. Taylor, "the liability of shareholders under statutes imposing individual liability for corporate indebtedness is the liability of shareholders under such statutes; and to speak of it as the liability of guarantors, or the liability of partners, is to call it what it is not."[35] The nature of the liability must depend upon the particular statute. It may be in the nature of the liability of a surety or guarantor, or it may not. Thus, where the charter of a bank provided that the persons and property of the stockholders should be "at all times liable, pledged and bound for the redemption of the bills and notes of the bank, at any time issued, in proportion to the number of shares that each individual might hold and possess," it was held that the stockholders were liable, as principals, to redeem the bills of the bank at their face, after the bills had been presented to the bank and payment refused, although the assignee of the bank had assets in his hands sufficient to pay them.[36] And under a statute making stockholders, upon de-

Bank v. Warren, 52 Mich. 557, 18 N. W. 356; Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Queenan v. Palmer, 117 Ill. 619, 7 N. E. 613; Hencke v. Twomey, 58 Minn. 550, 60 N. W. 667; Hanson v. Davison, 73 Minn. 454, 76 N. W. 254.

[32] Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626. It was therefore held in this case that the insolvent law, providing that the release of any debtor under the act should not discharge "any other party liable as surety, guarantor, or otherwise for the same debt," included stockholders who were liable for the debts of the corporation. See, also, National Loan & Building Ass'n v. Lichtenwalner, 100 Pa. 100, 45 Am. Rep. 359; Pacific Elevator Co. v. Whitbeck, 63 Kan. 102, 64 Pac. 984, 88 Am. St. Rep. 229.

[33] Hanson v. Donkersley, 37 Mich. 184. But see Grand Rapids Sav. Bank v. Warren, 52 Mich. 557, 18 N. W. 356.

[34] In Grand Rapids Sav. Bank v. Warren, supra, it was said by Chief Justice Cooley: "The shareholder, it is true, occupies, as regards the creditor, the position of surety for the bank [citing Hanson v. Donkersley, supra], but he is something more than a surety; he is one of the associates of the bank, and, by the very terms of the association, he is deemed to undertake for the debts which the bank contracts."

[35] Tayl. Corp. § 714.

[36] Hatch v. Burroughs, 1 Woods, 439, Fed. Cas. No. 6,203. And see Harger v. McCullough, 2 Denio (N. Y.) 123; Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; Parrott v. Colby, 6 Hun (N. Y.) 57; Id., 71 N. Y. 597; Jagger Iron Co. v. Walker, 76 N. Y. 521. An extension of the debt by

fault of the corporation in the payment of any debt, individually responsible, without any limitation, or individually liable for an amount equal to the amount of their stock, it has been held that the liability of the stockholders is primary, and the same as the liability of partners, except that, in the latter case, they are only liable to the amount of their stock.[37]

The liability under a statute making stockholders liable for corporate debts until the capital stock is paid in, and a certificate thereof filed, has been held to be unconditional, original, and immediate, and not collateral to the liability of the corporation, nor in any degree dependent upon the insufficiency of the corporate assets.[38]

What Constitutes "Dissolution"

A statute making stockholders liable for debts of the corporation at the time of its dissolution does not mean a dissolution by expiration of the charter, or by action of the state. A dissolution, so as to render stockholders liable under the statute, is effected by its total insolvency, and the appointment of a receiver, or trustee in bankruptcy, or an assignee in insolvency, to take charge of its property and wind up its business, or an assignment for the benefit of creditors, and suspension of business.[39]

But a right of action does not accrue against stockholders upon the corporation becoming insolvent in the sense, simply, that its property is insufficient for the payment of its debts, nor upon the appointment of a receiver merely for the purpose of carrying on its business, and not on account of its insolvency, or to wind up its business.[40]

"Debts," "Demands," etc., within the Statutes

There is some difference of opinion in the construction of the word "debts" or "demands" or "dues," used in the statutes under

the creditor, without the stockholders' consent, does not release them from liability, though it would release one who was strictly a surety or guarantor. Grew v. Breed, 10 Metc. (Mass.) 569.

[37] Schalucky v. Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; Thompson v. Meisser, 108 Ill. 359; Fuller v. Ledden, 87 Ill. 310; Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Parker v. Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

[38] Marine & R. Phosphate Min. & Mfg. Co. v. Bradley, 105 U. S. 175, 26 L. Ed. 1034.

[39] Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; McDonnell v. Alabama Gold Life Insurance Co., 85 Ala. 401, 5 South. 120; Barrick v. Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; Bronson v. Schneider, 49 Ohio St. 438, 33 N. E. 233; Younglove v. Lime Co., 49 Ohio St. 663, 33 N. E. 234.

[40] Bronson v. Schneider, supra; Younglove v. Lime Co., supra.

consideration. It has been held that the term "debt" does not include unliquidated claims for damages for torts of the corporation, for which no judgment has been recovered, but is intended to include only "those obligations arising on express and implied contracts, growing out of dealings between the corporation and other corporations or individuals, where the financial condition of such corporation would or might be the foundation of credit." [41] Some courts hold that more broadly framed statutes cover a demand for unliquidated damages arising from a tort.[42] A judgment for a tort has been held to be an "indebtedness," within the meaning of a statute.[43]

The statutory liability of members of a corporation for its debts extends to debts contracted in another state. They are liable for such debts to the same extent as for debts contracted at home.[44] But the statutory liability does not extend to obligations incurred by the corporation in an ultra vires undertaking.[45]

Debts Due Clerks, Laborers, etc.

In some states a liability is imposed by statute upon stockholders for debts due clerks, servants, and laborers for services performed for the corporation. Of course, the statutes vary in the different states. A foreman or superintendent who is not an officer of the corporation, but an employé, has been held a servant, within the meaning of a statute making stockholders liable for debts due "clerks, servants, and laborers for services," though he does not

[41] Doolittle v. Marsh, 11 Neb. 243, 9 N. W. 54. It was held that the word "demands," in a New York statute, did not include damages sustained by reason of a bridge of the corporation being out of repair. Heacock v. Sherman, 14 Wend. (N. Y.) 58. So in Massachusetts it has been held that the liability for infringement of letters patent is not, before judgment, a "debt," within a statute making officers liable. Child v. Boston & Fairhaven Iron Works, 137 Mass. 516, 50 Am. Rep. 328. A debt arising on a contract for the purchase of goods, entered into in November, 1891, but under which there was no delivery until October, 1892, was not, until such delivery, an existing debt, within the meaning of a statute providing that, upon the failure of a manufacturing corporation to file a statement of its condition on or before the 15th day of February in each year, the stockholders shall be liable for any debt then existing. Wing v. Slater, 19 R. I. 597, 35 Atl. 302, 33 L. R. A. 566.

[42] Rider v. Fritchey, 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513. Here the statute used the word "dues." Carver v. Braintree Mfg. Co., 2 Story, 432, Fed. Cas. No. 2,485; Kelly v. Clark, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668 ("acts and contracts"). But see Brown v. Trail (C. C.) 89 Fed. 641.

[43] Powell v. Oregonian R. Co. (C. C.) 36 Fed. 726, 2 L. R. A. 270.

[44] Hutchins v. New England Coal Min. Co., 4 Allen (Mass.) 580.

[45] Ward v. Joslin, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093.

perform manual labor.[46] But a bookkeeper employed at a yearly salary was held not to be within a statute imposing liability for debts due a "laborer, servant, or apprentice," as it was considered that the statute was intended to include only persons performing menial or manual services—the services of that class of persons who look to the reward of a day's labor for present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence.[47] It has also been held that a traveling salesman is not a laborer, within the meaning of such statutes.[48]

Excepted Classes of Corporations

Sometimes the statutes except certain corporations from their operation. Thus, Minnesota corporations organized for the purpose of carrying on any kind of manufacturing or mechanical business are excepted. To come within such an exception a corporation must have been organized exclusively for carrying on a manufacturing or mechanical business.[49] But the mere fact that a corporation organized to carry on a manufacturing business engages in some business not authorized by its articles does not deprive its stockholders of the benefit of the exception.[50]

Release or Discharge of Corporation

Where the statute makes stockholders liable for the debts and contracts of the corporation jointly with the corporation, there must be a debt due from the corporation, to render a stockholder liable. If a creditor of the corporation, therefore, releases the corporation from the debt, in insolvency proceedings or otherwise, there is no longer any debt upon which he may hold the stockholders. The liability of the stockholders is in the nature of the liability of partners for a debt of the firm, and whatever releases the corporation releases them also.[51]

[46] Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335. Compare State ex rel. Peck v. Rusk, 55 Wis. 465, 13 N. W. 452.

[47] Wakefield v. Fargo, 90 N. Y. 213. See, also, Bristor v. Smith, 158 N. Y. 157, 53 N. E. 42.

[48] Jones v. Avery, 50 Mich. 326, 15 N. W. 494.

[49] State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; Mohr v. Minnesota Elevator Co., 40 Minn. 343, 41 N. W. 1074; Arthur v. Willius, 44 Minn. 409, 46 N. W. 851; Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528, 681; First Nat. Bank of Winona v. Winona Plow Co., 58 Minn. 167, 59 N. W. 997.

[50] Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334. See, also, Senour Mfg. Co. v. Church Paint & Mfg. Co., 81 Minn. 294, 84 N. W. 109.

[51] Mohr v. Minnesota Elevator Co., 40 Minn. 343, 41 N. W. 1074. Under the Maryland statute, which makes stockholders directly liable to creditors of the corporation for double the par value of their stock, such liability is not secondary, but primary, and, as between them, the stockholder is a principal

Constitutional Law—Laws Affecting Existing Corporations

If the Legislature has reserved the right to amend, alter, or repeal the charter of a corporation, it may, by a law passed after incorporation, impose individual liability upon the stockholders for corporate debts.[52] And it has been held that it can do so even where the power of alteration, amendment, or repeal has not been reserved; that such a law is not unconstitutional as impairing the obligation of the contract between the stockholders and the state as evidenced by the charter.[53]

Same—Repeal or Change of Law

It has been generally held that, where the liability imposed upon stockholders for debts and contracts of the corporation is contractual, the claim of a creditor of the corporation against a stockholder is within the protection of the clause of the federal Constitution [54] prohibiting laws impairing the obligation of contract; and, therefore, that where a statute or the charter of a corporation imposes upon the stockholders liability for the debts of the corporation to the extent of their stock, an act or constitutional provision repealing the statute or amending the charter so as to take away this liability is unconstitutional and void as to existing creditors.[55] There is some authority, however, to the contrary.[56] Certainly the Legislature may modify the form of remedy for enforcing the liability,[57] provided the substituted remedy does not impair rights which have accrued under the contract.[58]

debtor, who may be sued without exhausting the remedy against the corporation; hence an agreement between a creditor and the corporation by which collaterals are applied on the debt at an agreed value in good faith, or a settlement with indorsers by which they are released on payment of an agreed sum, does not operate to discharge a stockholder from liability for a balance still due the creditor. Knickerbocker Trust Co. v. Myers (C. C.) 133 Fed. 764.

[52] Ante, p. 275; Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335.

[53] Ante, p. 265, note; Gray v. Coffin, 9 Cush. (Mass.) 192. But see Ireland v. Palestine, B., N. P. & N. W. Turnpike Co., 19 Ohio St. 369; Evans v. Nellis (C. C.) 101 Fed. 920, affirmed 187 U. S. 271, 23 Sup. Ct. 74, 47 L. Ed. 173.

[54] Article 1, § 10.

[55] Hathorn v. Calef, 2 Wall. (U. S.) 10, 17 L. Ed. 776; Grand Rapids Sav. Bank v. Warren, 52 Mich. 557, 18 N. W. 356; McDonnell v. Alabama Gold Life Insurance Co., 85 Ala. 401, 5 South. 120; Western Nat. Bank v. Reckless (C. C.) 96 Fed. 70; Evans v. Nellis, supra; Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176.

[56] Coffin v. Rich, 45 Me. 507, 71 Am. Dec. 559.

[57] Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825; Hill v. Merchants' Mut. Ins. Co., 134 U. S. 515, 10 Sup. Ct. 589, 33 L. Ed. 994; Straw & Ellsworth Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co., 80 Minn. 125, 83 N. W. 36.

[58] Western Nat. Bank v. Reckless, supra; Evans v. Nellis, supra; Webster

SAME—WHO ARE LIABLE AS STOCKHOLDERS UNDER THE STATUTES

231. Those who appear on the books of the corporation are prima facie liable under the statutes as stockholders. But there are some exceptions:

(a) A person is not liable if stock is registered in his name, without his knowledge or consent, express or implied.

(b) As to the effect of a transfer of shares, the authorities are conflicting:

(1) In some states the transferror is relieved from liability, and the transferee takes his place.

(2) In others, the transferror remains liable for debts contracted while he was owner of the shares, and no liability therefor attaches to the transferee.

(3) In others, both are liable for debts contracted while the transferror owned the shares.

(4) Generally this question is settled by the express terms of the statute.

(5) Where the shares are transferable on the books of the corporation a transferror is not relieved from liability unless he has his transfer registered, or takes due steps to have it done.

(6) A transfer to a person who is incapable of holding the stock and of assuming liability in respect thereto does not relieve the transferror from liability.

(7) Nor is he relieved by a transfer to an insolvent person for the purpose of escaping liability, when he knows the corporation to be insolvent.

v. Bowers (C. C.) 104 Fed. 627; Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331. Acts Md. 1904, p. 179, c. 101, repealing the pre-existing remedy of a creditor to bring a separate action at law to enforce a several statutory liability against a stockholder of a banking association for corporate debts to the extent of an amount equal to the par value of the stock held by him, conferred by Acts Md. 1892, p. 156, c. 109, § 85L, and substituting therefor a remedy by bill in equity on behalf of all creditors against all stockholders in the state, and declaring that such statutory liability shall constitute an asset of the corporation if necessary to pay debts, etc., not only changed the remedy, but abrogated the contract right conferred by such former statute, and was therefore unconstitutional, as impairing the obligation of contract, as against creditors of a corporation who became such and had brought suit to enforce such statutory liability prior to the passage of the act. Myers v. Knickerbocker Trust Co., 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171. Contra, Miners' & Merchants' Bank of Lonaconing v. Snyder, 100 Md. 57, 59 Atl. 707, 68 L. R. A. 312, 108 Am. St. Rep. 390. Cf. Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 77 N. E. 877, 113 Am. St. Rep. 863.

(8) Nor is he relieved by a colorable transfer.

(9) Nor is he relieved by a transfer after the corporation has become insolvent and ceased to do business.

(10) Where stock transferable on the books of the corporation is transferred to a pledgee, trustee, etc., he is personally liable thereon if he appears on the books as the absolute owner, but not otherwise.

(11) Creditors must elect whether to hold the real or the apparent owner. They cannot hold both.

(c) Married women, if capable of holding stock, are subject to the statutory liability, though they may not have capacity to contract, as the liability is imposed by statute.

(d) The statutory liability survives, as against the personal representative of a deceased stockholder, if the liability is contractual, but not if it is penal.

(e) Forfeiture of stock for nonpayment of assessments releases the stockholder from statutory liability, if he thereby ceases to be a stockholder.

(f) Holders of certificates of unauthorized stock are not liable unless the circumstances estop them as against creditors.

Where the statute makes stock transferable on the books of the corporation, and makes "shareholders" or "stockholders" liable for the debts of the corporation,[59] the general rule is that every person in whose name, as owner, stock is registered on the books of the corporation, with his knowledge and consent, is liable. He is a "shareholder" or "stockholder," within the meaning of the statutes. When the name of an individual appears on the stock book of a corporation as a stockholder, prima facie he is the owner of the stock, and, in an action against him as stockholder, he has the burden of rebutting the presumption.[60] To this rule there are some exceptions. These will be pointed out as we go along. By some cases, indeed, it is held that the books are not even prima facie evidence of ownership,[61] and that one is not bound as a stockholder of a corporation merely because his name has been entered on its

[59] Ante, p. 703, where some of the statutes are given.

[60] Turnbull v. Payson, 95 U. S. 418, 24 L. Ed. 437; Holland v. Duluth Iron Mining Development Co., 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480; Sherwood v. Illinois Trust & Savings Bank, 195 Ill. 112, 62 N. E. 835, 88 Am. St. Rep. 183; Sigua Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194; Semple v. Glenn, 91 Ala. 245, 260, 6 South. 46, 9 South. 265, 24 Am. St. Rep. 894, regarding the rule as well-settled, although illogical.

[61] Carey v. Williams, 79 Fed. 906, 25 C. C. A. 227; Sigua Iron Co. v. Greene, 104 Fed. 854, 44 C. C. A. 221.

books as a stockholder, unless expressly or impliedly, he consented to such entry.[62]

Shares Registered in Name of Person without His Knowledge

It is clear that a person cannot be compelled to become a stockholder, and to assume liability as such, without his consent. Membership in a corporation can only result from contract, express or implied, and there can be no contract without mutual consent. It follows that, if shares in a corporation are registered in the name of a person without his knowledge or consent, he cannot be held liable.[63] He may become liable, however, by acquiescence after knowledge of the facts, for consent in such a case will be implied.[64] And if a person is elected to an office in the corporation for which ownership of stock is a necessary qualification, and shares are transferred to him on the books, and he acts as such officer, he will be chargeable with knowledge of the fact that shares stand in his name.[65]

Effect of Transfer of Shares

In President, Directors, etc., of Middletown Bank v. Magill,[66] under a charter declaring that members of a corporation should at all times be liable for all debts due by the corporation, it was contended by the plaintiffs, and held by two of the judges, that the Legislature intended to subject members to the same liability as if they had not been incorporated—that is, to the liability of partners —and that members of the corporation at the time a debt was contracted became subject to a liability therefor, which continued notwithstanding a valid sale and transfer of their shares, and that transferees became liable only for debts contracted after the transfer. A majority of the court, however, held that no liability at-

[62] Grier v. Union Nat. Life Ins. Co. (D. C.) 217 Fed. 287, 290. In New York, by statute, the stockbook is made presumptive evidence of the facts stated therein. Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 32.

[63] Stephens v. Follett (C. C.) 43 Fed. 842. In this case it was held that a person who had subscribed and paid for a specified number of shares of a "proposed increase" of the capital stock of a national bank was not liable as a shareholder, where the increase was never in fact issued, but the bank officials transferred to him instead, on the books of the bank, old stock of the bank, without his consent or knowledge. It was further held that he was not estopped to deny that he was a shareholder by the fact that he received a dividend on the old shares so transferred to him, where he received it in the belief that it was paid him by virtue of his subscription to the new stock. And see Simmons v. Hill, 96 Mo. 679, 10 S. W. 61, 2 L. R. A. 476; Glenn v. Garth, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344.

[64] Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531; Finn v. Brown, 142 U. S. 56, 12 Sup. Ct. 136, 35 L. Ed. 936.

[65] Finn v. Brown, supra.

[66] 5 Conn. 28.

taches under such a statute until the corporate property fails, and it becomes necessary to resort to the stockholders' liability; and, therefore, that such persons, and such persons only, as are then stockholders are subject to the liability, and that a valid and complete transfer of stock, in the absence of express charter or statutory provision to the contrary, relieves the transferror of all liability to creditors of the corporation under such statutes, and the transferee becomes liable in his place.

On this point the terms of the statutes in different states vary, and in consequence the decisions are conflicting. Clearly, a valid transfer relieves the transferror of liability for debts subsequently contracted.[67] In most states, but not in all, it is held that the transferee of shares is liable for debts contracted before he acquired the shares if he holds them when the liability is sought to be enforced;[68] but that he is not liable if he does not own the shares when the liability is sought to be enforced.[69] In some states the transferror of shares is relieved of any liability, even for debts contracted while he was a stockholder, if the transfer was bona fide.[70] But others hold, without qualification, that he remains liable on the stock, while some hold that he is liable if the transferee is insolvent, or for any other reason the liability cannot be enforced against him, though the transfer was bona fide.[71] In a Rhode Island case it was held that the liability under a statute making stockholders liable for the debts of the corporation until the capital stock is paid in, and a certificate thereof recorded, includes all persons who were stockholders when the debt was contracted, and all persons who are

[67] Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644; Yule v. Bishop, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094.

[68] Curtis v. Harlow, 12 Metc. (Mass.) 3; Brown v. Hitchcock, 36 Ohio St. 667; Barrick v. Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; Root v. Sinnock, 120 Ill. 350, 11 N. E. 339, 60 Am. Rep. 558; Sayles v. Bates, 15 R. I. 342, 5 Atl. 497; Dauchy v. Brown, 24 Vt. 197; National Commercial Bank v. McDonnell, 92 Ala. 387, 9 South. 149. Contra, Chesley v. Pierce, 32 N. H. 388; Moss v. Oakley, 2 Hill (N. Y.) 265; McCullough v. Moss, 5 Denio (N. Y.) 567; Olson v. Cook, 57 Minn. 552, 59 N. W. 635; Maine Trust & Banking Co. v. Southern Loan & Trust Co., 92 Me. 444, 43 Atl. 24.

[69] Sayles v. Bates, 15 R. I. 342, 5 Atl. 497; Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183.

[70] Dauchy v. Brown, 24 Vt. 197; Bond v. Appleton, 8 Mass. 472, 5 Am. Dec. 111; President, etc., of Middletown Bank v. Magill, 5 Conn. 28. But see Curtis v. Harlow, 12 Metc. (Mass.) 3.

[71] Moss v. Oakley, 2 Hill (N. Y.) 265; Brown v. Hitchcock, 36 Ohio St. 667; Mason v. Alexander, 44 Ohio St. 318, 7 N. E. 435; Harpold v. Stobart, 46 Ohio St. 397, 21 N. E. 637, 15 Am. St. Rep. 618; Sayles v. Bates, 15 R. I. 342, 5 Atl. 497; Jackson v. Meek, 87 Tenn. 69, 9 S. W. 225, 10 Am. St. Rep. 620; Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray (Mass.) 216.

stockholders when the liability is sought to be enforced, but does not extend to persons becoming stockholders after the debt was contracted, and ceasing to be such before the debt becomes payable and action is brought.[72] And such seems to be the rule in Massachusetts.[73]

Sometimes the statute, as is the case with the National Banking Act, expressly declares that transferees of stock shall succeed to the liabilities of the transferror. In such a case there can be no doubt that a valid and complete transfer relieves the transferror of liability, and substitutes the transferee in his place.[74] But the transferror continues liable if the bank was insolvent, and this fact was known or should have been known to him, at the time of the transfer.[75] Under some statutes the stockholder's liability continues, notwithstanding his transfer.[76] Under some statutes his liability continues for a limited time after the transfer.[77]

Same—Registration of Transfer

Where, by the charter, or by statute, shares are transferable on the books of the corporation, the rule is that the person who appears on the books as owner is the one to whom the statutory liability attaches. In order, therefore, that a shareholder may relieve himself from liability, even by an actual and bona fide sale of his stock, he must take all due precautions to have the transfer properly registered. Thus, where a shareholder in a national bank had sold his stock several months before the insolvency of the bank, but the transfer was not registered on the books until the date of the bank's failure, and it did not appear that any steps were taken by him to have it registered, he was held subject to the statutory liability.[78] But the vendee of shares, who fails to have the transfer registered,

[72] Sayles v. Bates, supra. [73] Holyoke Bank v. Burnham, supra.

[74] Johnson v. Laflin, 5 Dill. 65, Fed. Cas. No. 7,393; Johnston v. Laflin, 103 U. S. 800, 26 L. Ed. 532; Whitney v. Butler, 118 U. S. 655, 7 Sup. Ct. 61, 30 L. Ed. 266; Cleveland v. Burnham, 55 Wis. 598, 13 N. W. 677, 680.

[75] See McDonald v. Dewey, 202 U. S. 510, 26 Sup. Ct. 731, 50 L. Ed. 1128; 6 Ann. Cas. 419.

[76] Gunnison v. United States Inv. Co., 70 Minn. 292, 73 N. W. 149; Tiffany v. Giesen, 96 Minn. 488, 105 N. W. 901.

[77] Harper v. Carroll, 62 Minn. 152, 64 N. W. 145; Id., 66 Minn. 487, 69 N. W. 610, 1069.

[78] Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; Price v. Whitney (C. C.) 28 Fed. 297; Irons v. Manufacturers' Nat. Bank (C. C.) 27 Fed. 591; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray (Mass.) 216; Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Giesen v. London & Northwest American Mortg. Co., 102 Fed. 584, 42 C. C. A. 515; Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571; Knickerbocker Trust Co. v. Myers (C. C.) 133 Fed. 764. But see, contra, Harpold v. Stobart, 46 Ohio St. 397, 21 N. E. 637, 15 Am. St. Rep. 618.

will be liable to the vendor for anything which the latter may be compelled to pay by reason of his appearing on the books as the owner of the shares.[79]

A shareholder who has sold his stock will not be liable merely because the transfer has not been made on the books, where he is not in any way to blame for such omission. If it affirmatively appears that he has done all that a careful and prudent business man could reasonably do to effect a transfer on the books he cannot be held liable.[80]

Same—Transfer to Person Incapable of Assuming Liability

The transfer, to relieve the transferror from liability, must be made to some one who is capable in law of taking and holding the stock, and of assuming the transferror's liability with respect thereto.[81]

Same—Transfer to Infant

Thus, a transfer to an infant, even in ignorance of his minority, does not relieve the transferror from liability, unless the transferee has attained his majority, and become himself liable by ratification.[82]

Same—Transfer to Corporation

As has been shown, some cases hold that a corporation has no power to deal in its own stock. The National Banking Act expressly declares that national banking associations shall not do so. A sale or transfer of shares to the corporation itself, therefore, is ultra vires; and a transfer, either to the corporation itself, or to a known trustee for it, is ineffectual to change the relation of the parties, and does not release the transferror from liability as a stockholder for the debts of the corporation.[83] But it has been held that a corporation which, without authority, purchases and holds shares in another corporation, will be liable as a stockholder, notwithstanding the ultra vires character of the transaction.[84] If a stockholder acts

[79] Johnson v. Underhill, 52 N. Y. 203.

[80] Whitney v. Butler, 118 U. S. 655, 7 Sup. Ct. 61, 30 L. Ed. 266; Young v. McKay (C. C.) 50 Fed. 394; Hayes v. Shoemaker (C. C.) 39 Fed. 319; Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644; Earle v. Carson, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373. Cf. Giesen v. London & Northwest American Mortg. Co., 102 Fed. 584, 42 C. C. A. 515.

[81] Nickalls v. Merry, L. R. 7 H. L. 530; Symons' Case, 5 Ch. App. 298; Weston's Case, 5 Ch. App. 614, 620.

[82] Mann's Case, 3 Ch. App. 459; cases cited in preceding note. Cf. Foster v. Lincoln's Ex'r, 79 Fed. 170, 24 C. C. A. 470.

[83] Johnson v. Laflin, 5 Dill. 65, Fed. Cas. No. 7,393; Johnston v. Laflin, 103 U. S. 800, 26 L. Ed. 532.

[84] Citizens' State Bank v. Hawkins, 18 C. C. A. 78, 71 Fed. 369. The decision is questioned, if not overruled, in East St. Louis Connecting Ry. Co. v.

in good faith in selling his shares, even though it may be to the president of the corporation, not knowing that the purchase is really on behalf of the corporation, the transfer is valid, and he ceases to be a stockholder for any purpose; but in such a case the president or other person becomes the real transferee, in his individual capacity, and is substituted for the transferror, and he becomes liable on the shares as a stockholder.[85]

Same—Transfer to Insolvent

In this country it is generally held that a stockholder who knows that the corporation is insolvent cannot transfer his shares to an irresponsible or insolvent person, for the purpose of escaping liability to creditors of the corporation. In such a case the transfer is void as to the creditors, and the transferror remains liable. And it makes no difference that the transfer is "out and out," so as to divest the transferror of all interest therein.[86] In England the rule is different. It is there held that a stockholder may sell and transfer his shares to an insolvent person, or man of straw, and if the transaction is a bona fide, "out and out" sale and transfer, he cannot be held liable to creditors, even though his motive was to escape liability.[87]

It has been held that a sale by a pledgee of stock, pursuant to a power of sale in his contract, is not voidable, as a fraud on creditors of the corporation, though made to an insolvent person for the purpose of escaping liability.[88]

In the absence of actual fraudulent intent, the fact that the trans-

Jarvis, 92 Fed. 735, 744, 34 C. C. A. 639. See, also, California Nat. Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198.

[85] Johnson v. Laflin, supra.

[86] Marcy v. Clark, 17 Mass. 330; Nathan v. Whitlock, 3 Edw. Ch. (N. Y.) 215; Bowden v. Johnson, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386; Dauchy v. Brown, 24 Vt. 197; Stuart v. Hayden, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639; Foster v. Lincoln's Ex'r, 79 Fed. 170, 24 C. C. A. 470; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319; People's Home Sav. Bank v. Rickard, 139 Cal. 285, 73 Pac. 858. But see Chouteau Spring Co. v. Harris, 20 Mo. 382. Where a stockholder in a national bank, with knowledge of its insolvency, sold his stock to escape liability to assessment, and two years later the bank failed, in a suit by the receiver against him to recover an assessment, he was liable only to creditors before the transfer. McDonald v. Dewey, 202 U. S. 510, 26 Sup. Ct. 731, 50 L. Ed. 1128, 6 Ann. Cas. 419. See, also, Peter v. Union Mfg. Co., 56 Ohio St. 181, 46 N. E. 894. As between the corporation and the transferror, the corporation may be barred by its laches from repudiating the transfer. Rochester & K. F. Land Co. v. Raymond, 158 N. Y. 576, 53 N. E. 507, 47 L. R. A. 246. And see Sinclair v. Fuller, 158 N. Y. 607, 53 N. E. 510.

[87] De Pass' Case, 4 De Gex & J. 544.

[88] Holyoke Bank v. Burnham, 11 Cush. (Mass.) 187; Magruder v. Colston, 44 Md. 349, 22 Am. Rep. 47.

feree was insolvent will not prevent the transfer from being effectual so as to release the transferror from further liability as a stockholder, though knowledge of insolvency would be strong evidence of fraud.[89]

Same—Sham or Colorable Transfers

Not only in this country, but in England as well, it is settled law that in case of a transfer to an insolvent or irresponsible person, if the transaction is not a bona fide, "out and out" sale and transfer, but a mere simulation to avoid appearing as a stockholder, the transferror will remain liable. Stockholders have often tried to escape liability by thus transferring the shares gratuitously to their clerk, or some other irresponsible party. But it has always been held that the actual owners of stock cannot shield themselves against liability by thus putting the title to the stock in the name of an irresponsible person. "Creditors have the right to call upon the actual stockholders for contribution, and this right cannot be defeated by a merely colorable transfer of the legal title to some third party, who in fact holds the same for the benefit of the real owner of the stock." [90] And the United States Supreme Court recently has said "that the real owner of the shares may be held responsible, although in fact the shares are not registered in his name. As to such owner the law looks through subterfuges and apparent ownerships and fastens the liability upon the shareholder to whom the shares really belong." [91]

The same is true where a man buys or takes stock, and has it entered on the books of the corporation in the name of an irresponsible person, without its ever having appeared on the books in his own name. In such a case the creditors of the corporation may hold him liable.[92]

[89] Miller v. Great Republic Insurance Co., 50 Mo. 55; Sykes v. Holloway (C. C.) 81 Fed. 432; Foster v. Row, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565; Earle v. Carson, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373. And see McDonald v. Dewey, 202 U. S. 510, 26 Sup. Ct. 731, 50 L. Ed. 1128, 6 Ann. Cas. 419.

[90] Welles v. Larrabee (C. C.) 36 Fed. 866, 868, 2 L. R. A. 471. See Hyam's Case, 1 De Gex, F. & J. 75; Williams' Case, L. R. 9 Eq. 225, note; Germania National Bank v. Case, 99 U. S. 628, 25 L. Ed. 448; Davis v. Stevens, 17 Blatchf. 259, Fed. Cas. No. 3,653; note, 15 C. C. A. 136, 137; Pauly v. State Loan & Trust Co., 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844; Peter v. Union Mfg. Co., 56 Ohio St. 181, 46 N. E. 894; American Alkali Co. v. Kurtz (C. C.) 134 Fed. 663.

[91] Ohio Valley Nat. Bk. v. Hulitt, 204 U. S. 162, 27 Sup. Ct. 179, 51 L. Ed. 423.

[92] Davis v. Stevens, 17 Blatchf. 259, Fed. Cas. No. 3,653.

Same—Transfer after Suspension of Business

It has been held that after a national bank has become insolvent, and has closed its doors and stopped doing business, the liability of shareholders to creditors is so far fixed that any transfer at all of their shares will be held fraudulent and inoperative as against the creditors.[93] And the same may be said of other corporations.[94]

Pledgees

It is well settled, where stock is transferable on the books of the corporation, that, if stock in a corporation is issued or transferred to a person in such a way that he appears on the books as the legal and absolute owner, the creditors of the corporation cannot be required to go behind the books and inquire into equities that may exist between him and the corporation, or between him and the person from whom he took the transfer. If he appears on the books as the legal and real owner, he is, as far as the rights of corporate creditors are concerned, a stockholder, and subject to the statutory liability, though he may in fact hold the stock merely as collateral security.[95] The chief reason for this rule is that the pledgee, by thus taking the absolute legal title, and holding himself out as the legal owner of the stock, estops himself from setting up the fact that he was merely a pledgee. "The true ground of liability, where it exists, is not because the pledgee is the owner in fact of the stock, for he is not, but the fact that the pledgee has received a transfer of the stock in such form that the legal ownership appears to be in him; and, by thus holding himself out as apparent owner, he is estopped from showing the contrary." [96] The rule ceases when the

[93] Irons v. Manufacturers' Nat. Bank (C. C.) 17 Fed. 308.

[94] May v. McQuillan, 129 Mich. 392, 89 N. W. 45.

[95] Germania National Bank v. Case, 99 U. S. 628, 25 L. Ed. 448; Wheelock v. Kost, 77 Ill. 296; Aultman's Appeal, 98 Pa. 516; Adderly v. Storm, 6 Hill (N. Y.) 624; Rosevelt v. Brown, 11 N. Y. 148; United States Trust Co. of New York v. United States Fire Ins. Co., 18 N. Y. 199; National Commercial Bank v. McDonnell, 92 Ala. 387, 9 South. 149; Magruder v. Colston, 44 Md. 349, 22 Am. Rep. 47; Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183; Crease v. Babcock, 10 Metc. (Mass.) 525; First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563; Hale v. Walker, 31 Iowa, 344, 7 Am. Rep. 137; Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335; Hoare's Case, 2 Johns. & H. 229; Moore v. Jones, 3 Woods, 53, Fed. Cas. No. 9,769; note, 15 C. C. A. 133, 134; State v. Bank of New England, 70 Minn. 398, 73 N. W. 153, 68 Am. St. Rep. 538. "It is now too well settled to be any longer a question that when stock is transferred to a man as collateral, and stands in his name, he incurs liability as a stockholder just as if he were the actual beneficial owner. Most especially is this just and right as to creditors who trust to his name, and have no notice of the secret trust upon which the stock is held." Aultman's Appeal, supra.

[96] Welles v. Larrabee (C. C.) 36 Fed. 866, 2 L. R. A. 471.

reason ceases. Therefore, if there is anything on the stock books of the corporation showing that the transferee takes as pledgee, he incurs no liability.[97] As was said by the supreme court of the United States, "It has never, to our knowledge, been held that a mere pledgee of stock is chargeable, where he is not registered as owner." [98] A pledgee, for instance, is not liable if the stock stands in his name on the books "as pledgee," or if it expressly appears to be held "as collateral." [99]

Under a statute rendering stockholders liable for corporate debts, but providing that no person holding stock as collateral security shall be personally subject to such liability, but the person pledging such stock shall be considered as holding the same, it has been held that the pledgee of shares cannot be held liable as a shareholder.[1] And it has also been held that this is true where the shares are issued by the corporation itself as collateral.[2]

Trustees, Executors, Agents, etc.

The same doctrine applies, in the absence of special statutory provision, where stock is held in trust. A person who appears on the books of the corporation as the absolute owner of stock will be personally liable to the creditors of the corporation, although he may in fact hold the stock as trustee, personal representative, guardian, etc.[3] But, by the weight of authority, if he appears on the books as holding, not in his own right, but as "trustee," "executor," etc., he will not be personally liable.[4] Of course, he may be liable

[97] Anderson v. Philadelphia Warehouse Co., 111 U. S. 479, 4 Sup. Ct. 525, 28 L. Ed. 478; Beal v. Essex Sav. Bank, 15 C. C. A. 128, 67 Fed. 816; Henkle v. Salem Mfg. Co., 39 Ohio St. 547; First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563; note, 15 C. C. A. 134; Pauly v. State Loan & Trust Co., 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844. If the stock ledger shows that one to whom a certificate was issued is pledgee, it is sufficiently shown, though the certificate, the book from which it was taken and other books of the corporation set him down as an ordinary stockholder. In re Noyes Bros. (D. C.) 136 Fed. 977. But see Grew v. Breed, 10 Metc. (Mass.) 569.

[98] Anderson v. Philadelphia Warehouse Co., supra.

[99] See cases in note 97, supra.

[1] McMahon v. Macy, 51 N. Y. 155; Union Sav. Ass'n v. Seligman, 92 Mo. 635, 15 S. W. 630, 1 Am. St. Rep. 776; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Matthews v. Albert, 24 Md. 527.

[2] Union Sav. Ass'n v. Seligman, supra; Burgess v. Seligman, supra; Matthews v. Albert, supra.

[3] See Adderly v. Storm, 6 Hill (N. Y.) 624; Welles v. Larrabee (C. C.) 36 Fed. 866, 2 L. R. A. 471; Crease v. Babcock, 10 Metc. (Mass.) 525, 545; Grew v. Breed, Id. 569; United States Trust Co. of New York v. United States Fire Ins. Co., 18 N. Y. 199; Kerr v. Urie, 86 Md. 72, 37 Atl. 789, 38 L. R. A. 119, 63 Am. St. Rep. 493; Foote v. Illinois Trust & Savings Bank, 194 Ill. 600, 62 N. E. 834.

[4] Welles v. Larrabee (C. C.) 36 Fed. 866, 2 L. R. A. 471; dictum in Adder-

in his representative capacity, to the extent of the trust estate.[5] It is sometimes expressly provided by statute that persons holding stock as executors, trustees, etc., shall not be personally subject to any liabilities as stockholders, but that the estates and funds in their hands shall be liable.[6]

A broker or other agent who purchases stock for his customer, but who takes the title in his own name, on the stock book of the company is liable as a stockholder.[7]

Election between Apparent and Real Owner

Where the person who appears on the books of the corporation as the owner of stock is not the real owner, creditors cannot hold both him and the real owner to the statutory liability; nor can they hold one of them after an unsuccessful attempt, with knowledge of the facts, to hold the other. They must elect between them. Thus, it was held that a person who was entered on the books of a national bank as the owner of stock, but who was admitted to hold the stock in trust for the real owner, could not be held liable to creditors of the bank after the real owner had been proceeded against to judgment, though nothing was realized upon the judgment.[8]

Assignees in Bankruptcy or Insolvency

The assignees or trustees in bankruptcy or insolvency of a stockholder are not subject to the statutory liability of the bankrupt or assignor for debts of the corporation.[9] It has been so held even where the assignee had attended and voted at meetings of the corporation, and done other acts of ownership of the stock,[10] but this seems questionable since such acts amount to consent to become a stockholder.

Married Women

Where a married woman is not only capable of holding stock in a corporation, but is also, by statute, capable of contracting as a feme

ly v. Storm, 6 Hill (N. Y.) 628. Contra, Grew v. Breed, 10 Metc. (Mass.) 569. In New York, Stock Corporation Law (Consol. Laws, c. 59) § 58, provides for the nonliability of executors, trustees, etc., unless they voluntarily invested the funds in the stocks, in which event they are personally liable as stockholders.

[5] See Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; Sayles v. Bates, 15 R. I. 342, 5 Atl. 497.

[6] There is such a provision in the National Banking Act. Rev. St. U. S. § 5152 (U. S. Comp. St. 1913, § 9690).

[7] McKim v. Glenn, 66 Md. 479, 8 Atl. 130.

[8] Yardley v. Wilgus (C. C.) 56 Fed. 965.

[9] American File Co. v. Garrett, 110 U. S. 288, 4 Sup. Ct. 90, 28 L. Ed. 149; Gray v. Coffin, 9 Cush. (Mass.) 192.

[10] Gray v. Coffin, 9 Cush. (Mass.) 192. But see Black, Bankr. § 318.

sole, it is clear enough that she may be held liable as a shareholder to the creditors of a corporation. The question is not so clear, however, in those jurisdictions where the common-law disability of married women to contract has not been wholly removed. In the federal courts it is held that, where a married woman is capable of holding stock in a corporation, she may be held liable, as a shareholder in a national bank, for the contracts and debts of the bank, even though by the law of the particular jurisdiction, she may not have the capacity to contract. The reason that she may be held is that her liability is imposed by the statute, and does not rest upon contract.[11] The same rule must apply to other corporations.

Death of Stockholder—Survival of Liability

If the liability imposed by a statute upon a stockholder for debts of the corporation is contractual, the cause of action does not abate upon his death, but survives, and may be enforced against his personal representatives.[12] But if, on the other hand, the liability is penal, it is within the rule, "Actio personalis moritur cum persona," and abates.[13] The estate of a deceased stockholder is liable for debts contracted after his death, and while it owns the stock.[14]

Forfeiture of Stock

One whose stock is forfeited for nonpayment of calls is not liable to creditors either for the unpaid balance of his subscription, or under statutes imposing additional liability, where the forfeiture is such as to deprive the stockholder of his character as such; but this is true only when the forfeiture is in good faith, and not collusive or fraudulent.[15]

Holders of Unauthorized Stock

Holders of certificates of unauthorized stock, as of an unauthorized increase of stock, incur no liability by virtue thereof to creditors who did not rely on the validity of the stock, so as to give rise

[11] Witters v. Sowles (C. C.) 32 Fed. 767; Id., 35 Fed. 640, 1 L. R. A. 64; Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531; Robinson v. Turrentine (C. C.) 59 Fed. 554; note, 15 C. C. A. 132, 133; In re Reciprocity Bank, 22 N. Y. 9; Sayles v. Bates, 15 R. I. 342, 5 Atl. 497; Christopher v. Norvell, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740.

[12] Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; Cochran v. Wiechers, 119 N. Y. 399, 23 N. E. 803, 7 L. R. A. 553; Grew v. Breed, 10 Metc. (Mass.) 569; Mechanics' Sav. Bank v. Fidelity Ins., Trust & Safe Deposit Co. (C. C.) 87 Fed. 113; Potter v. Mortimer, 114 Ill. App. 422, affirmed 213 Ill. 178, 72 N. E. 817.

[13] Diversey v. Smith, 103 Ill. 378, 42 Am. Rep. 14; Id., 9 Ill. App. 437.

[14] Bailey v. Hollister, 26 N. Y. 112.

[15] Mills v. Stewart, 41 N. Y. 384. See ante, p. 394, as to forfeitures, and their effect.

to an estoppel on the part of the holders to deny its validity.[16] If there was no power at all to increase the stock, no estoppel can arise as against creditors, for they are chargeable with notice of the want of power.[17] Where, however, the increase was within the power of the corporation, so that it could have lawfully been made, but the corporation merely failed to take the preliminary steps required by the charter, so that the creditors were misled, the holders will be estopped to deny the validity of the stock to escape liability.[18]

SAME—WHO MAY ENFORCE STATUTORY LIABILITY

232. Unless otherwise provided, no one but a creditor can enforce the statutory liability of a stockholder. It cannot be enforced by the corporation, nor by its assignee for the benefit of creditors, nor by its trustee or assignee in bankruptcy or insolvency, nor a receiver.

233. A stockholder who is also a creditor is entitled to the benefit of the statute.

The statutory liability of stockholders for the debts of the corporation is created in favor of the creditors of the corporation, and not in any legal sense for the benefit of the corporation. It is not like the liability of stockholders for unpaid subscriptions. The liability is to the creditors, and not to the corporation. It follows that the liability can be enforced only by the creditors. In the absence of a statute authorizing it, it cannot be enforced by the corporation, nor by its assignee for the benefit of creditors, nor by its receiver or trustee in bankruptcy. Neither the corporation nor its assignee or receiver has any legal or equitable title, right, or interest therein.[19] Sometimes the right to enforce this liability is expressly given by statute to others than the creditors.[20]

[16] Sayles v. Brown (C. C.) 40 Fed. 8.

[17] Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968. Cf. Palmer v. Bank of Zambrota, 72 Minn. 266, 75 N. W. 380.

[18] Veeder v. Mudgett, 95 N. Y. 295.

[19] Dutcher v. Marine Nat. Bank, 12 Blatchf. 435, Fed. Cas. No. 4,203; Bristol v. Sanford, 12 Blatchf. 341, Fed. Cas. No. 1,893; Jacobson v. Allen

[20] See Story v. Furman, 25 N. Y. 214; Howarth v. Ellwanger (C. C.) 86 Fed. 54; Kisseberth v. Prescott (C. C.) 95 Fed. 357; Hale v. Hardon, 95 Fed. 747, 37 C. C. A. 240; Straw & Ellsworth Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co., 80 Minn. 125, 83 N. W. 36; Childs v. Cleaves, 95 Me. 498, 50 Atl. 714.

Stockholders Who are Creditors or Officers

Under a statute making stockholders liable for the debts of the corporation to the extent of their shares, in addition to the amount that may be due on their shares, stockholders who are themselves creditors are entitled to come in equally with the other creditors.[21] A creditor is not debarred from enforcing the liability because he is a director.[22] It has been held that such a statute is not intended to, and does not, include directors to whom the corporation is indebted for salaries.[23] When a stockholder who is liable severally and jointly with the other stockholders for the debts of the corporation is himself a creditor of the corporation, he cannot generally maintain an action at law against another stockholder, or seize his property on execution, where that remedy is given creditors; for that would enable him to collect from one stockholder not only all that such stockholder is ultimately bound to pay, but also all that the entire body of stockholders, including himself, is bound to pay, thus, as it was put by Judge Thomas, "collecting with his right hand what he must pay with his left." His remedy is by bill in equity for contribution.[24]

(C. C.) 12 Fed. 454; Farnsworth v. Wood, 91 N. Y. 308; Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 69 N. W. 331, 38 L. R. A. 415; Runner v. Dwiggins, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645; Hancock Nat. Bank v. Ellis, 172 Mass. 89, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232; Hirshfeld v. Fitzgerald, 157 N. Y. 166, 51 N. E. 907, 46 L. R. A. 839; Mechanics' Sav. Bank v. Fidelity Ins., Trust & Safe Deposit Co. (C. C.) 87 Fed. 113. Contra, Smathers v. Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

[21] Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Oswald v. Minneapolis Times Co., 65 Minn. 249, 68 N. W. 15.

[22] Janney v. Minneapolis Industrial Exposition, 79 Minn. 488, 82 N. W. 984, 50 L. R. A. 273.

[23] McDowall v. Sheehan, 129 N. Y. 200, 29 N. E. 209.

[24] Thayer v. Union Tool Co., 4 Gray (Mass.) 75, 78. And see Bissit v. Kentucky R. Nav. Co. (C. C.) 15 Fed. 353; Bailey v. Bancker, 3 Hill (N. Y.) 188, 38 Am. Dec. 625; Cocking v. Ward (Tenn. Ch. App.) 48 S. W. 287; Milford Sav. Bank v. Joslyn, 59 Kan. 778, 53 Pac. 756. Cf. Myers v. Sierra Val. Stock & Agricultural Ass'n, 122 Cal. 669, 55 Pac. 689. It was held in a later Massachusetts case that a creditor, who is also a member of a corporation, cannot maintain a bill in equity to enforce the personal liability of the stockholders under a statute making them liable for debts incurred before payment in full of the capital stock, and that one to whom a stockholder creditor has assigned his claim, for the sole purpose of enabling him to bring such a suit, is in no better position. Potter v. Stevens Machine Co., 127 Mass. 592, 34 Am. Rep. 423.

SAME—REMEDIES OF CREDITORS AGAINST STOCKHOLDERS

234. The liability of stockholders on account of their stock may be enforced in an action at law by a receiver or a trustee in bankruptcy or an assignee in insolvency, or an assignee under a voluntary assignment for the benefit of creditors; but only creditors can enforce the statutory liability, unless otherwise provided.

235. To enforce the common-law liability of stockholders on their subscriptions, creditors

(a) Cannot maintain an action at law, unless allowed to do so by statute.

(b) But they may maintain a bill in equity.

(c) By the weight of authority, the suit must be in the nature of a creditors' bill, on behalf of all creditors who may come in.

(d) By the weight of authority, all the stockholders need not be made parties, but the suit may be brought against a single stockholder, leaving him to seek contribution from the others.

(e) The corporation must be made a party, but its nonjoinder may be waived by the stockholder.

(f) Statutory remedies are given in some states, but they do not exclude the remedy in equity, unless by their express terms.

236. The remedy of creditors to enforce the statutory liability will depend upon the nature of the liability, unless the remedy is prescribed by the statute. Though there is confusion and conflict in the cases, by the weight of authority,

(a) If the statute prescribes a remedy it is exclusive.

(b) If the object of the statute is to provide a fund out of which all the creditors are to be paid pro rata, and to make the stockholders contribute to it in proportion to their stock, the remedy is by general creditors' bill, or suit of that nature, and an action at law by a single creditor will not lie. Nor can the creditors severally maintain a bill in equity against the stockholders.

(c) But if each stockholder is made severally liable directly to creditors, and his liability is fixed, and does not depend upon the liability of the others, any creditor who has ob-

served conditions precedent [25] may sue a single stockholder at law.

(d) In such a case each stockholder must be sued separately.

(e) In such a case some courts hold that an action at law is the only remedy, while others allow an action at law, or a suit in equity, at the option of the creditor.

236½. Statutes imposing liability upon stockholders have no extra-territorial operation. If they are penal, the liability created by them will not be enforced in another state; but if they are contractual, imposing an absolute and direct liability upon stockholders in favor of creditors, the liability may be enforced in another state, unless the statute has provided for its enforcement by a particular form of procedure which can be pursued only in the home state.

Common-Law Liability on Subscriptions, etc.—Action by Assignee for Creditors or Trustee in Bankruptcy

Unpaid subscriptions, being a part of the assets of the corporation for the payment of its debts, pass to the assignee under a general assignment for the benefit of creditors, and may be enforced by him for the creditors.[26] And they also pass to, and an action may be maintained by, a trustee in bankruptcy or a receiver of the corporation.[27] In these cases the assignee or receiver stands in the place of the corporation, and is the only party to sue for unpaid subscriptions.[28] He may maintain an action at law. He is not, like a creditor, bound to sue in equity.

Same—Action at Law by Creditors

Sometimes, by statute, creditors of a corporation are given a remedy by action at law or garnishment to subject unpaid subscriptions to stock to the satisfaction of their claims, when they have exhausted their remedies against the corporation.[29] But at common law a creditor cannot maintain an action at law against stockholders for unpaid subscriptions, for there is no privity of contract between

[25] As to necessity for judgment and execution unsatisfied against the corporation, see post, p. 740.

[26] Germantown Pass. Ry. Co. v. Fitler, 60 Pa. 124, 100 Am. Dec. 546; Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie, 115 Pa. 564, 9 Atl. 73; Chamberlain v. Bromberg, 83 Ala. 570, 3 South. 434.

[27] Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Dayton v. Borst, 31 N. Y. 435.

[28] Rankine v. Elliott, 16 N. Y. 377.

[29] See World's Fair Excursion & Transportation Boat Co. v. Gasch, 162 Ill. 402, 44 N. E. 724; Henderson v. Hall, 134 Ala. 455, 32 South. 840, 63 L. R. A. 673.

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[30] Patterson, to Use of Brower, v. Lynde, 106 U. S. 520, 1 Sup. Ct. 432, 27 L. Ed. 265; Ladd v. Cartwright, 7 Or. 329; Brundage v. Monumental G. & S. Mining Co., 12 Or. 322, 7 Pac. 314.

[31] See Burke v. Smith, 16 Wall. 390, 21 L. Ed. 361; Ogilvie v. Knox Insurance Co., 22 How. 380, 16 L. Ed. 349; Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Holmes v. Sherwood (C. C.) 16 Fed. 725; Bissit v. Kentucky R. Navigation Co. (C. C.) 15 Fed. 353; Spear v. Grant, 16 Mass. 9; Mann v. Pentz, 3 N. Y. 415; Hastings v. Drew, 76 N. Y. 9; Wetherbee v. Baker, 35 N. J. Eq. 501; Adler v. Milwaukee Patent Brick Mfg. Co., 13 Wis. 63; Barron v. Paine, 83 Me. 312, 22 Atl. 218; Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Umsted v. Buskirk, 17 Ohio St. 113; Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74; Brundage v. Monumental G. & S. Mining Co., 12 Or. 322, 7 Pac. 314; Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591.

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The corporation must be made a party to a suit by its creditor against delinquent stockholders, for otherwise it would not be bound by the judgment therein. But, if a stockholder sees fit to go to trial

v. Texas & St. L. Ry. Co. (C. C.) 27 Fed. 250; First Nat. Bank v. Peavey (C. C.) 75 Fed. 154.

[34] Rankine v. Elliott, 16 N. Y. 377; Mann v. Pentz, 3 N. Y. 415; Dayton v. Borst, 31 N. Y. 435; Brassey v. New York & N. E. R. Co. (C. C.) 19 Fed. 663. See Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Platt v. Philadelphia & R. R. Co. (C. C.) 65 Fed. 872.

[35] Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Ogilvie v. Knox Insurance Co., 22 How. 380, 16 L. Ed. 349; Marsh v. Burroughs, Fed. Cas. No. 9,112; Holmes v. Sherwood (C. C.) 16 Fed. 725; BARTLETT v. DREW, 57 N. Y. 587, Wormser Cas. Corporations, 393; Pierce v. Milwaukee Construction Co., 38 Wis. 253; Baines v. Babcock, 95 Cal. 581, 27 Pac. 675, 30 Pac. 776, 29 Am. St. Rep. 158; Brundage v. Monumental G. & S. Mining Co., 12 Or. 322, 7 Pac. 314.

[36] Lane's Appeal, 105 Pa. 49, 51 Am. Rep. 166; Bell's Appeal, 115 Pa. 88, 8 Atl. 177, 2 Am. St. Rep. 532; Wetherbee v. Baker, 35 N. J. Eq. 501.

[36] Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie, 115 Pa. 564, 9 Atl. 73.

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[illegible] ore, unpaid subscriptions cannot thus be ap- [illegible] creditor to the exclusion of the others. As wa[illegible] by Chief Justice Waite: "The liability of stockholder[illegible] creditors for unpaid subscriptions is through the corporation, [illegible] * * * The stockholder is liable to the extent that [illegible] subscription represented by his stock requires him to contribute [illegible] corporate funds, and, when sued for the money he owes, it [illegible] in a way to put what he pays directly or indirectly into the [illegible] of the corporation for distribution according to law." He [illegible] adds that "no one creditor can assume that he alone is entitled [illegible] what any stockholder owes and sue at law, so as to appropriate [illegible] exclusively to himself." The reason is because the capital [illegible] is the fund to which all the corporate creditors are entitled [illegible]

Same—General Creditor Bill in Equity—Suit for Appointment [illegible]

[illegible] the courts agree that a judgment creditor of a [illegible] at law, may maintain a suit [illegible] behalf of such other creditors [illegible] with him, against the [illegible] and have a decree that [illegible] the corporation be taken [illegible] as may be due from them [illegible] of their capital stock [illegible] as may be [illegible] and such other creditors [illegible] creditors' bill, so as to allow [illegible] all the creditors are entitled [illegible] and one cannot appropriate [illegible] A creditor, instead of [illegible]

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a suit may sue for the appointment of a receiver to collect and distribute the assets of an insolvent corporation, including unpaid subscriptions.[83]

Same—Parties

By the weight of authority, a creditor may, by a general creditors' bill, proceed against a single delinquent stockholder of an insolvent corporation, and compel him to pay the whole amount due from him to the corporation on account of his subscription, or on account of corporate property unlawfully received by him, if necessary in order to satisfy his debt, without making other stockholders parties, and without any account being taken of other indebtedness of the corporation, the stockholder proceeded against being left to pursue his remedy against the other stockholders for contribution.[84]

In Pennsylvania and in some other states, it seems, the rule is different. It is there held that a bill filed by a creditor of an alleged insolvent corporation against one or several stockholders, to compel payment of their subscriptions, is a proceeding to enforce the equitable obligations of the stockholders, and that, inasmuch as only so much of the unpaid capital as is necessary for the payment of debts can be called in, and that can be done only when all the other assets are exhausted, an account must be taken of the amount of debts, assets, and unpaid capital, and a decree be made for an assessment of the amount due by each stockholder.[85] This does not apply where an assignee for the benefit of creditors sues to recover unpaid subscriptions, and the whole of them is required to pay the debts of the company.[86]

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served conditions precedent [25] may sue a single stockholder at law.

(d) In such a case each stockholder must be sued separately.

(e) In such a case some courts hold that an action at law is the only remedy, while others allow an action at law, or a suit in equity, at the option of the creditor.

236½. Statutes imposing liability upon stockholders have no extraterritorial operation. If they are penal, the liability created by them will not be enforced in another state; but if they are contractual, imposing an absolute and direct liability upon stockholders in favor of creditors, the liability may be enforced in another state, unless the statute has provided for its enforcement by a particular form of procedure which can be pursued only in the home state.

Common-Law Liability on Subscriptions, etc.—Action by Assignee for Creditors or Trustee in Bankruptcy

Unpaid subscriptions, being a part of the assets of the corporation for the payment of its debts, pass to the assignee under a general assignment for the benefit of creditors, and may be enforced by him for the creditors.[26] And they also pass to, and an action may be maintained by, a trustee in bankruptcy or a receiver of the corporation.[27] In these cases the assignee or receiver stands in the place of the corporation, and is the only party to sue for unpaid subscriptions.[28] He may maintain an action at law. He is not, like a creditor, bound to sue in equity.

Same—Action at Law by Creditors

Sometimes, by statute, creditors of a corporation are given a remedy by action at law or garnishment to subject unpaid subscriptions to stock to the satisfaction of their claims, when they have exhausted their remedies against the corporation.[29] But at common law a creditor cannot maintain an action at law against stockholders for unpaid subscriptions, for there is no privity of contract between

[25] As to necessity for judgment and execution unsatisfied against the corporation, see post, p. 740.

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SAME—REMEDIES OF CREDITORS AGAINST STOCKHOLDERS

234. The liability of stockholders on account of their stock may be enforced in an action at law by a receiver or a trustee in bankruptcy or an assignee in insolvency, or an assignee under a voluntary assignment for the benefit of creditors; but only creditors can enforce the statutory liability, unless otherwise provided.

235. To enforce the common-law liability of stockholders on their subscriptions, creditors

(a) Cannot maintain an action at law, unless allowed to do so by statute.

(b) But they may maintain a bill in equity.

(c) By the weight of authority, the suit must be in the nature of a creditors' bill, on behalf of all creditors who may come in.

(d) By the weight of authority, all the stockholders need not be made parties, but the suit may be brought against a single stockholder, leaving him to seek contribution from the others.

(e) The corporation must be made a party, but its nonjoinder may be waived by the stockholder.

(f) Statutory remedies are given in some states, but they do not exclude the remedy in equity, unless by their express terms.

236. The remedy of creditors to enforce the statutory liability will depend upon the nature of the liability, unless the remedy is prescribed by the statute. Though there is confusion and conflict in the cases, by the weight of authority,

(a) If the statute prescribes a remedy it is exclusive.

(b) If the object of the statute is to provide a fund out of which all the creditors are to be paid pro rata, and to make the stockholders contribute to it in proportion to their stock, the remedy is by general creditors' bill, or suit of that nature, and an action at law by a single creditor will not lie. Nor can the creditors severally maintain a bill in equity against the stockholders.

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them, and, furthermore, unpaid subscriptions cannot thus be appropriated by one creditor to the exclusion of the others. As was pointed out by Chief Justice Waite: "The liability of stockholders to creditors for unpaid subscriptions is through the corporation, not direct. * * * The stockholder is liable to the extent that the subscription represented by his stock requires him to contribute to the corporate funds, and, when sued for the money he owes, it must be in a way to put what he pays directly or indirectly into the treasury of the corporation for distribution according to law." He then adds that "no one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law, so as to appropriate it exclusively to himself." [80] The reason is because the capital stock is the fund to which all the corporate creditors are entitled to look.

Same—General Creditors' Bill in Equity—Suit for Appointment of Receiver

All the courts agree that a judgment creditor of a corporation, who has exhausted his remedy at law, may maintain a suit in equity on his own behalf, and on behalf of such other creditors of the corporation as may become parties with him, against the corporation and its delinquent stockholders, and have a decree that an account of the assets and debts of the corporation be taken, and that the stockholders pay in so much as may be due from them, respectively, to the corporation on account of their capital stock, or on account of property unlawfully distributed to them, as may be sufficient to pay the debts of the complainant and such other creditors as may join.[81] The bill must be a general creditors' bill, so as to allow other creditors to come in; for all the creditors are entitled to share in the assets of the corporation, and one cannot appropriate the whole, or more than his proportion.[82] A creditor, instead of maintaining such

[80] Patterson, to Use of Brower, v. Lynde, 106 U. S. 520, 1 Sup. Ct. 432, 27 L. Ed. 265; Ladd v. Cartwright, 7 Or. 329; Brundage v. Monumental G. & S. Mining Co., 12 Or. 322, 7 Pac. 314.

[81] See Burke v. Smith, 16 Wall. 390, 21 L. Ed. 361; Ogilvie v. Knox Insurance Co., 22 How. 380, 16 L. Ed. 349; Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Holmes v. Sherwood (C. C.) 16 Fed. 725; Bissit v. Kentucky R. Navigation Co. (C. C.) 15 Fed. 353; Spear v. Grant, 16 Mass. 9; Mann v. Pentz, 3 N. Y. 415; Hastings v. Drew, 76 N. Y. 9; Wetherbee v. Baker, 35 N. J. Eq. 501; Adler v. Milwaukee Patent Brick Mfg. Co., 13 Wis. 63; Barron v. Paine, 83 Me. 312, 22 Atl. 218; Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Umsted v. Buskirk, 17 Ohio St. 113; Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74; Brundage v. Monumental G. & S. Mining Co., 12 Or. 322, 7 Pac. 314; Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591.

[82] See Patterson, to Use of Brower, v. Lynde, 106 U. S. 520, 1 Sup. Ct. 432, 27 L. Ed. 265; Wetherbee v. Baker, 35 N. J. Eq. 501; Cleveland Rolling Mill Co.

a suit may sue for the appointment of a receiver to collect and distribute the assets of an insolvent corporation, including unpaid subscriptions.[83]

Same—Parties

By the weight of authority, a creditor may, by a general creditors' bill, proceed against a single delinquent stockholder of an insolvent corporation, and compel him to pay the whole amount due from him to the corporation on account of his subscription, or on account of corporate property unlawfully received by him, if necessary in order to satisfy his debt, without making other stockholders parties, and without any account being taken of other indebtedness of the corporation, the stockholder proceeded against being left to pursue his remedy against the other stockholders for contribution.[84]

In Pennsylvania and in some other states, it seems, the rule is different. It is there held that a bill filed by a creditor of an alleged insolvent corporation against one or several stockholders, to compel payment of their subscriptions, is a proceeding to enforce the equitable obligations of the stockholders, and that, inasmuch as only so much of the unpaid capital as is necessary for the payment of debts can be called in, and that can be done only when all the other assets are exhausted, an account must be taken of the amount of debts, assets, and unpaid capital, and a decree be made for an assessment of the amount due by each stockholder.[85] This does not apply where an assignee for the benefit of creditors sues to recover unpaid subscriptions, and the whole of them is required to pay the debts of the company.[86]

The corporation must be made a party to a suit by its creditor against delinquent stockholders, for otherwise it would not be bound by the judgment therein. But, if a stockholder sees fit to go to trial

v. Texas & St. L. Ry. Co. (C. C.) 27 Fed. 250; First Nat. Bank v. Peavey (C. C.) 75 Fed. 154.

[83] Rankine v. Elliott, 16 N. Y. 377; Mann v. Pentz, 3 N. Y. 415; Dayton v. Borst, 31 N. Y. 435; Brassey v. New York & N. E. R. Co. (C. C.) 19 Fed. 663. See Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Platt v. Philadelphia & R. R. Co. (C. C.) 65 Fed. 872.

[84] Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Ogilvie v. Knox Insurance Co., 22 How. 380, 16 L. Ed. 349; Marsh v. Burroughs, Fed. Cas. No. 9,112; Holmes v. Sherwood (C. C.) 16 Fed. 725; BARTLETT v. DREW, 57 N. Y. 587, Wormser Cas. Corporations, 393; Pierce v. Milwaukee Construction Co., 38 Wis. 253; Baines v. Babcock, 95 Cal. 581, 27 Pac. 675, 30 Pac. 776, 29 Am. St. Rep. 158; Brundage v. Monumental G. & S. Mining Co., 12 Or. 322, 7 Pac. 314.

[85] Lane's Appeal, 105 Pa. 49, 51 Am. Rep. 166; Bell's Appeal, 115 Pa. 88, 8 Atl. 177, 2 Am. St. Rep. 532; Wetherbee v. Baker, 35 N. J. Eq. 501.

[86] Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie, 115 Pa. 564, 9 Atl. 73.

and judgment without objecting to the nonjoinder of the corporation, he cannot afterwards complain.[37]

Same—Necessity for Calls

Where, by the charter or by-laws, or by the terms of the subscription itself, a call is necessary to render a subscriber liable on his subscription,[38] an unpaid subscription cannot be enforced, either by an assignee for the benefit of creditors, or by a creditor, until a call has been duly made.[39] But a court of equity will compel the directors to make the calls necessary to render subscribers liable,[40] or it will, in effect, make the call itself, by a decree calling upon the subscribers to pay. Calls in such a case need not have been made by the company.[41]

Same—Statutory Remedies

In some states statutory remedies are given creditors of a corporation, against delinquent stockholders, which do not exist at common law, nor in equity without the aid of the statute. Sometimes an action at law is allowed directly against the delinquent stockholder, or the process of garnishment is allowed. Sometimes a creditor who has recovered judgment against the corporation, on which execution has been returned unsatisfied, is allowed to issue execution directly against the stockholders. Unless the statutory remedy is expressly made exclusive, it does not prevent a creditor from pursuing his equitable remedy.[42]

Same—Enforcement in Foreign Jurisdiction

The liability of a stockholder on an unpaid subscription, being contractual, may be enforced in another state, by the corporation,[43] or by its assignee, trustee, or receiver.[44] If a call or assessment has

[37] Potter v. Dear (Cal.) 27 Pac. 676; Id., 95 Cal. 578, 30 Pac. 777; Wetherbee v. Baker, 35 N. J. Eq. 501.

[38] Ante, p. 397, as to the necessity for calls.

[39] Germantown Pass. Ry. Co. v. Fitler, 60 Pa. 124, 100 Am. Dec. 546.

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[41] Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Washington Sav. Bank v. Butchers' & Drovers' Bank, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405; Dalton & M. R. Co. v. McDaniel, 56 Ga. 191; Allen v. Grant, 122 Ga. 552, 50 S. E. 494.

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[43] Sigua Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194; Giesen v. London & Northwest American Mortg. Co., 102 Fed. 584, 42 C. C. A. 515.

[44] Stoddard v. Lum, 159 N. Y. 265, 53 N. E. 1108, 45 L. R. A. 551, 70 Am. St. Rep. 541; Fish v. Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161; Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189; Shipman v. Treadwell, 200 N. Y. 472, 476, 93 N. E. 1104; Id., 208 N. Y. 404, 102 N. E. 634. And see Su-

been made by order of the court by which a receiver has been appointed, the order is conclusive as to the amount of the assessment, and the right of the receiver to sue therefor;[45] but the stockholder, when sued in another state, may interpose any personal defense.[46] If a remedy is given to creditors by statute in the state where suit is brought by action at law or garnishment, a creditor may pursue that remedy.[47] If permissible by the law of the forum, he may proceed by creditors' bill.[48]

Statutory Liability

It is impossible to reconcile the decisions in the different states as to what is the proper remedy to enforce the statutory liability of stockholders for corporate debts.

As we have seen, the statutory liability of stockholders can only be enforced by the creditors. It cannot be enforced by a trustee in bankruptcy, nor by an assignee under a voluntary assignment for the benefit of creditors.[49]

Where the Statute Gives a Remedy

It seems clear that where a liability is imposed by statute upon stockholders for the debts of the corporation, which did not exist at common law, or in equity, independently of the statute, and the statute provides a remedy by which to enforce the liability, that remedy is exclusive, and must be strictly followed.[50] Thus, it has been held that, if the statute gives a remedy by action at law against a stockholder or stockholders, a bill in equity will not lie.[51] So,

preme Council of Royal Arcanum v. Green, 237 U. S. 531, 543, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771. But see Murtey v. Allen, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779.

[45] Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; Commonwealth Mut. Fire Ins. Co. v. Hayden, 60 Neb. 636, 83 N. W. 922, 83 Am. St. Rep. 545.

[46] Great Western Tel. Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986; Shipman v. Treadwell, 208 N. Y. 404, 102 N. E. 634. Cf. Bank of China, Japan & The Straits v. Morse, 168 N. Y. 458, 61 N. E. 774, 56 L. R. A. 139, 85 Am. St. Rep. 676.

[47] Cooper v. Adel Security Co., 122 N. C. 463, 30 S. E. 348.

[48] Rule v. Omega Stove & Grate Co., 64 Minn. 326, 67 N. W. 60.

[49] Ante, p. 726.

[50] Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825; Morley v. Thayer (C. C.) 3 Fed. 737; Lowry v. Inman, 46 N. Y. 120; Dauchy v. Brown, 24 Vt. 197; Knowlton v. Ackley, 8 Cush. (Mass.) 93; Cambridge Water Works v. Somerville Dyeing & Bleaching Co., 4 Allen (Mass.) 239; Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331. This is true whether the proceedings are taken in the state creating the corporation or elsewhere, and whether in the state or federal courts. Fourth Nat. Bank v. Francklyn, supra.

[51] Morley v. Thayer, supra; Shickel v. Berryville Land & Improvement Co., 99 Va. 88, 37 S. E. 813.

where a charter only authorizes the taking of the individual property of stockholders on execution on a judgment against the corporation, and provides that the same process may be used and enforced by such stockholders against the property of the other stockholders, so as to compel a ratable contribution by all, no general individual liability is created for which a personal action will lie.[53]

Same—Where No Remedy is Prescribed

When the statute provides no remedy, there is more difficulty, and it is here that we meet with confusion and conflict in the decisions. Whether the remedy is at law or in equity, and whether suit must be brought on behalf of all the creditors, or may be brought by one creditor against a single stockholder, must depend upon the nature of the liability created. Attention, therefore, must be given to the language of the particular statute. By the weight of authority, if the object of the statute is to provide a fund out of which all the creditors are to be paid, share and share alike, and to make the stockholders contribute to it in proportion to their stock, the remedy is by a general creditors' bill, or suit of that nature, in which an account may be taken of the debts and stock, and a pro rata distribution may be made among the several shareholders, and the fund thus obtained may be paid pro rata to all the creditors. And under such a statute, an action at law by a single creditor against a single stockholder will not lie.[54] Nor can the creditors severally maintain a bill in equity against the stockholders.[54]

But if, on the other hand, each stockholder is made severally liable directly to creditors, and his liability is fixed, and does not depend upon the liability of the other stockholders, so that there is

[53] Lowry v. Inman, supra.

[54] Terry v. Little, 101 U. S. 216, 25 L. Ed. 864. In this case the statute declared that the stockholders should be "liable and held bound * * * for any sum not exceeding twice the amount of their shares," and it was held that an action at law could not be maintained by a single creditor against two of a large number of stockholders. See, also, Pollard v. Bailey, 20 Wall. 520, 22 L. Ed. 376; Terry v. Tubman, 92 U. S. 156, 23 L. Ed. 537; Crease v. Babcock, 10 Metc. (Mass.) 525, 531; Harris v. First Parish in Dorchester, 23 Pick. (Mass.) 112; Coleman v. White, 14 Wis. 700, 80 Am. Dec. 797; Cleveland v. Burnham, 55 Wis. 598, 13 N. W. 677, 680; Jones v. Jarman, 34 Ark. 340; Johnson v. Fischer, 30 Minn. 173, 14 N. W. 799; Queenan v. Palmer, 117 Ill. 619, 7 N. E. 613. See Barrick v. Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Hanson v. Davison, 73 Minn. 454, 76 N. W. 254; Maine Trust & Banking Co. v. Southern Loan & Trust Co., 92 Me. 444, 43 Atl. 24; Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176. Some decisions in New York are to the contrary, and allow an action at law. See cases cited in notes 55, 58, infra.

[54] Crease v. Babcock, 10 Metc. (Mass.) 525.

no necessity to bring in the other stockholders or creditors, any creditor who has recovered judgment against the corporation, and had execution returned unsatisfied, where this is necessary, or without this where it is unnecessary, may maintain an action at law against a single stockholder.[55] Where the liability of the stockholders is several, and an action at law is brought, each must be sued separately.[56]

Where the statute thus imposes an unconditional, original, and immediate liability on the part of a stockholder to creditors, it is held by the Supreme Court of the United States, and other courts, that the remedy must be sought at law, and not in equity, unless there are some peculiar circumstances giving rise to a claim for equitable relief but that a suit in equity will lie if there are such circumstances. In other words, "the jurisdiction may be regarded as concurrent, both at law and in equity, according to the nature of the relief made necessary by the circumstances upon which the right arises." [57] In New York and some other jurisdictions, however, even where an action at law will lie, it is held that the creditor may, at his election, go into equity.[58]

A creditors' bill in equity, or suit in the nature of a creditors' bill, will lie, where it is sought to enforce, not only the statutory liability of the stockholder, but also to compel payment of unpaid subscriptions.[59]

Same—Enforcement in Foreign Jurisdiction

A statute imposing a liability on stockholders for debts can of itself have no force beyond the jurisdiction of the state which enact-

[55] Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966. And see Hall v. Klinck, 25 S. C. 348, 60 Am. Rep. 505; Fuller v. Ledden, 87 Ill. 310; Buchanan v. Meisser, 105 Ill. 638; Thompson v. Meisser, 108 Ill. 359; Schalucky v. Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; Bank of Poughkeepsie v. Ibbotson, 24 Wend. (N. Y.) 473; Garrison v. Howe, 17 N. Y. 458; Weeks v. Love, 50 N. Y. 568; Western Nat. Bank v. Reckless (C. C.) 96 Fed. 70.

[56] Abbey v. W. B. Grimes Dry Goods Co., 44 Kan. 415, 24 Pac. 426; Perry v. Turner, 55 Mo. 418.

[57] Marine & R. Phosphate Min. & Mfg. Co. v. Bradley, 105 U. S. 175, 26 L. Ed. 1034; Wincock v. Turpin, 96 Ill. 135; Tunesma v. Schuttler, 114 Ill. 156, 28 N. E. 605; New York Life Ins. Co. v. Beard (C. C.) 80 Fed. 66.

[58] Bank of Poughkeepsie v. Ibbotson, 24 Wend. (N. Y.) 473; Garrison v. Howe, 17 N. Y. 458; Mathez v. Neidig, 72 N. Y. 100; Weeks v. Love, 50 N. Y. 568; Pfohl v. Simpson, 74 N. Y. 137; Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454.

[59] Barrick v. Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; Minneapolis Paper Co. v. Swinburne Printing Co., 66 Minn. 378, 69 N. W. 144; Parker v. Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888. So it has been held where the corporation is notoriously insolvent. Latimer v. Citizens' State Bank, 102 Iowa, 162, 71 N. W. 225.

ed it. If the statute is penal in its nature, it will not be enforced in another state.[60] As a rule, however, such statutes are not penal.[61] And, although the liability is declared by statute, it is voluntarily assumed by those who become stockholders, and is contractual, or more accurately, quasi-contractual in its nature.[62]

It follows that, if a statute imposes an absolute and direct liability upon stockholders in favor of creditors, the liability may be enforced in any state,[63] unless the statute has provided for its en-

[60] Post, p. 756. Where a Rhode Island statute, requiring a corporation to file annually a certificate setting forth the amount of assessments voted by the company and paid in and the amount of existing debts, provided that, if it should fail to do so, the stockholders should be jointly and severally liable for all the debts of the company, it was held that the statute, being penal, imposed no liability which could be enforced against stockholders in Maryland. Sayles v. Brown (C. C.) 40 Fed. 8.

[61] Cuykendall v. Miles (C. C.) 10 Fed. 342.

[62] Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; Whitman v. National Bank of Oxford, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587. Cf. McClaine v. Rankin, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500. California stockholders in a Colorado corporation whose charter specified that one purpose of the incorporation was the transaction of business by the corporation in California must be deemed to have contracted with reference to the provisions of the California statute, imposing the same personal liability upon stockholders of foreign corporations doing business within the state as upon stockholders in domestic corporations, and are bound thereby, so far at least as such liability arises from the corporate business carried on in California. Pinney v. Nelson, 183 U. S. 144, 22 Sup. Ct. 52, 46 L. Ed. 125. On very similar facts, an English court held contra. Risdon Iron & Locomotive Works v. Furness, [1906] 1 K. B. 49. See articles by W. N. Hohfeld, 9 Columbia Law Rev. 285, 492, 10 Columbia Law Rev. 283, 520.

[63] Flash v. Conn, supra; Whitman v. National Bank of Oxford, supra; Cushing v. Perot, 175 Pa. 66, 34 Atl. 447, 34 L. R. A. 737, 52 Am. St. Rep. 835; Ferguson v. Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; Bell v. Farwell, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 804, 68 Am. St. Rep. 194; Hancock Nat. Bank v. Ellis, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232; Broadway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603; Western Nat. Bank of New York v. Lawrence, 117 Mich. 669, 76 N. W. 105; Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; Shipman v. Treadwell, 200 N. Y. 472, 93 N. E. 1104; Id., 208 N. Y. 404, 102 N. E. 634; Kulp v. Fleming, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611; Blair v. Newbegin, 65 Ohio St. 425, 62 N. E. 1040, 58 L. R. A. 644; Childs v. Cleaves, 95 Me. 498, 50 Atl. 714; Lanigan v. North, 69 Ark. 62, 63 S. W. 62. A special receiver appointed by a court of Minnesota in a suit in equity brought under the statutes of that state by creditors of an insolvent corporation to determine the individual liability of stockholders, and charged with the duty of enforcing such liability for the benefit of all the creditors, may maintain an action at law in a federal court in another state against a stockholder residing therein. Hale v. Hardon, 95 Fed. 747, 37 C. C. A. 240; Kirtley v. Holmes, 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738; Hale v. Hilliker (C. C.) 109 Fed. 273. See, also, King v. Cochran, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922. Contra, Converse v. Stewart, 105 App. Div. 478, 94 N. Y. Supp. 310. Cf. Hale v. Coffin

forcement by a particular form of procedure which can be pursued only in the home state.[64] Thus, where a corporation was organized under a statute which provided that stockholders should be severally individually liable to creditors, to an amount equal to the stock held by them, respectively, for all debts and contracts made by the company until the whole amount of capital stock should be paid in and a certificate thereof recorded, it was held by the Supreme Court of the United States that the liability might be enforced against a stockholder in another state.[65] "The liability," said the court, "is fixed, and does not depend on the liability of other stockholders. There is no necessity of bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other can." So, under the Constitution and statutes of Kansas, allowing a judgment creditor of a corporation after a return of nulla bona to enforce judgment against any stockholder by separate suit, and providing that a stockholder who pays more than his proportion of a corporate debt may compel contribution from the other stockholders, and that no stockholder shall be liable to pay debts of the corporation beyond the amount due on his stock and an additional amount equal to the stock owned by him, it was held by the same court that an action to enforce the liability of a stockholder can be maintained in any court of competent jurisdiction.[66] "Whatever else may be said about the remedy," said the court, "it is direct, certain, and available to every creditor of a corporation, and leaves to the stockholders the adjustment between themselves of their respective individual shares of the corporate obligations." The same decision has been reached by many of the state courts in suits based upon the provisions of the Kansas Constitution and statutes.[67] It has also been held by the Supreme Court of the United States that the action of the Rhode Island court in refusing to recognize the right of a creditor, after recovery of a judgment against a Kansas corporation in the Circuit Court of the United States sitting within that state, and return of execution unsatisfied, to maintain an action in the Rhode Island court against a stockholder to recover in satisfaction of his judgment, was a failure to

(C. C.) 114 Fed. 568; Hilliker v. Hale, 117 Fed. 220, 54 C. C. A. 252; Evans v. Nellis, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. Ed. 173.

[64] Post, p. 739.

[65] Flash v. Conn, supra.

[66] Whitman v. National Bank of Oxford, supra.

[67] See many of the cases cited in note 68, supra.

give the judgment full faith and credit as required by the federal Constitution.[68] The judgment against the corporation is conclusive upon the stockholder, unless impeached for want of jurisdiction or fraud.[69]

The Supreme Court of the United States has recently held broadly that when a corporation is organized in a state having no statutory liability attached to the ownership of stock, and is expressly authorized to do business in a second state having such statutory liability, the stockholders become liable to said statutory responsibility for business carried on in the second state.[70]

On the other hand, where the statute imposing the liability prescribes a particular remedy for its enforcement, that remedy, as we have seen, is exclusive;[71] and the liability cannot be enforced in another state, at least unless the result sought to be secured by the remedy prescribed can be effected by an appropriate procedure in the foreign state.[72] Thus, if the remedy prescribed is by cred-

[68] Hancock Nat. Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619, reversing 20 R. I. 466, 40 Atl. 341. See, also, Tompkins v. Blakey, 70 N. H. 584, 49 Atl. 111.

[69] Hancock Nat. Bank v. Farnum, supra; Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Straw & Ellsworth Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co., 80 Minn. 125, 83 N. W. 36; American Nat. Bank v. Supplee, 115 Fed. 657, 52 C. C. A. 293. The judgment is not so conclusive as to prevent the stockholder from showing that because the corporate obligation was ultra vires he was not liable under the constitution and laws of the home state. Ward v. Joslin, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093.

[70] THOMAS v. MATTHIESSEN, 232 U. S. 221, 34 Sup. Ct. 312, 58 L. Ed. 577, Wormser Cas. Corporations, 390. See, also, Thomas v. Wentworth Hotel Co., 158 Cal. 275, 110 Pac. 942, 139 Am. St. Rep. 120.

[71] Ante, p. 733. A stockholder's liability in an Ohio corporation cannot be enforced outside of the jurisdiction of that state, on the theory that the Ohio constitution is, for that purpose, self-executing, when it provides for the individual liability of the stockholders, where an action in the Ohio courts alone is contemplated by a statute which was enacted in pursuance of this constitutional provision, and itself provides for the procedure and states the remedy. Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co., 197 U. S. 394, 25 Sup. Ct. 462, 49 L. Ed. 803.

[72] Lowry v. Inman, 46 N. Y. 119; Bank of North America v. Rindge, 154 Mass. 203, 27 N. E. 1015, 13 L. R. A. 56, 26 Am. St. Rep. 240; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654; Coffing v. Dodge, 167 Mass. 231, 45 N. E. 928; Russell v. Pacific Ry. Co., 113 Cal. 258, 45 Pac. 323, 34 L. R. A. 747; Tuttle v. National Bank of Republic, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750; Finney v. Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486; Id., 111 Wis. 296, 87 N. W. 255, affirmed 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839; Crippen v. Laighton, 69 N. H. 540, 44 Atl. 538, 46 L. R. A. 467, 76 Am. St. Rep. 192; Evans v. Nellis, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. Ed. 173; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co., 197 U.

itors' bill, or like procedure, in which all the creditors may join, and all the stockholders must be made defendants, the object being to provide a fund for the creditors to which all the stockholders are to contribute proportionally, the liability cannot be enforced in another state by action at law by a single creditor against a single stockholder,[73] nor by creditors' bill, since the procedure prescribed is available only in the home state, where the corporation and the stockholders can be reached and the court can adjust all conflicting questions as to the indebtedness of the corporation, who were stockholders, and what are the equities between them.[74]

The existence and character of the liability is to be determined by the statutes of the state creating it and by their judicial interpretation by its courts, which must, of course be pleaded and proved as facts.[75] A defense, as, for example, a right of set-off, which is open to the stockholder under the laws of the home state, is available to him when sued in another state.[76]

S. 394, 25 Sup. Ct. 462, 49 L. Ed. 803; Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 77 N. E. 877, 113 Am. St. Rep. 863; Marsh v. Kaye, 168 N. Y. 196, 61 N. E. 177; Shipman v. Treadwell, 200 N. Y. 472, 93 N. E. 1104.

[73] Erickson v. Nesmith, 15 Gray (Mass.) 221.

[74] Erickson v. Nesmith, 4 Allen (Mass.) 233; McLaughlin v. O'Neill, 7 Wyo. 187, 51 Pac. 243; Bates v. Day, 198 Pa. 513, 48 Atl. 407, 82 Am. St. Rep. 811; Miller v. Smith, 26 R. I. 146, 58 Atl. 634, 66 L. R. A. 473, 106 Am. St. Rep. 699; Clark v. Knowles, 187 Mass. 35, 72 N. E. 352, 105 Am. St. Rep. 376, 2 Ann. Cas. 26; Abbott v. Goodall, 100 Me. 231, 60 Atl. 1030.

[75] Hancock Nat. Bank v. Ellis, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232; Ball v. Anderson, 196 Pa. 86, 46 Atl. 366, 79 Am. St. Rep. 693; Farr v. Briggs' Estate, 72 Vt. 225, 47 Atl. 793, 82 Am. St. Rep. 930; Tompkins v. Blakey, 70 N. H. 584, 49 Atl. 111. And see Nashua Sav. Bank v. Anglo-American Land Mortgage & Agency Co., 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782. A state court is not concluded as to the proper construction of the statutes of another state and the decision of its courts construing them, on the theory that defendant, by demurring to the complaint, which contained an allegation in the form of an averment of fact as to the meaning of such laws and decisions set forth therein, admitted that such was the correct conclusion to be drawn from them. Finney v. Guy, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839. See, also, Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 77 N. E. 877, 113 Am. St. Rep. 863.

[76] Broadway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603; Sargent v. Stetson, 181 Mass. 371, 63 N. E. 929; Fidelity Insurance, Trust & Safe Deposit Co. v. Mechanics' Sav. Bank, 97 Fed. 297, 38 C. C. A. 193, 56 L. R. A. 228. But see Anglo-American Land, Mortgage & Agency Co. v. Lombard, 132 Fed. 721, 68 C. C. A. 89, where it was held that in an action at law in a federal court to enforce the constitutional and statutory liability of a stockholder in a Kansas corporation to its creditors, the defendant cannot set off an indebtedness from the corporation to him; such defense being only cognizable in equity, and the distinction between legal and equitable causes of action and defenses being carefully preserved in courts of the United States.

SAME—NECESSITY FOR JUDGMENT AGAINST CORPORATION

237. Ordinarily recovery of a judgment against the corporation, and return of execution unsatisfied, is a condition precedent to a suit by creditors against stockholders. There is, however, some conflict in the decisions. Compliance with the condition is unnecessary when it appears that this would be impossible.

It is well settled that, unless otherwise provided by statute,[77] a creditor cannot maintain a suit in equity against stockholders to compel payment of a balance due on their subscriptions, or repayment of funds paid out to them, until he has exhausted his legal remedy against the corporation. As a general rule, therefore, to maintain such a suit he must show a judgment against the corporation and a return of execution thereon unsatisfied.[78] Such a return is sufficient proof that he has exhausted his legal remedy against the corporation.[79]

It is expressly provided in most statutes that the personal statutory liability of stockholders for debts of the corporation shall arise only after a recovery by the creditor of a judgment against the corporation, and an exhaustion of his legal remedy by execution, and a return of no property found, unless the corporation has been dissolved, or put in process of winding up, so that no judgment can be obtained against it. Under such a statute unless the case comes within the exceptions recovery of judgment against the corporation, and a return of execution unsatisfied, is a condition

[77] Parmelee v. Price, 208 Ill. 544, 70 N. E. 725.

[78] National Tube Works Co. v. Ballou, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070; Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577; Remington & Sons v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292; Sturges v. Vanderbilt, 73 N. Y. 384.

[79] Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, and 30 Pac. 776, 29 Am. St. Rep. 158; Thompson v. Pfeiffer, 60 Kan. 409, 56 Pac. 763. It has been held that he should, if possible, obtain a judgment against the corporation in the jurisdiction in which he proposes to sue in equity, and issue execution thereon. This is the rule in the federal courts. Therefore, in National Tube Works Co. v. Ballou, supra, it was held that a creditors' bill, founded on a judgment recovered in Connecticut against a corporation of that state, could not be maintained in a United States Circuit Court in New York, against a citizen of that state, to enforce his liability on an unpaid subscription to the stock of the corporation, where no judgment had been obtained or execution issued against the corporation within the latter state, and no allegations were made showing that it was impossible to obtain such a judgment.

precedent to any liability on the part of the stockholders.[80] Failure to proceed to judgment and execution against the corporation cannot be excused, except when the performance of the condition becomes impossible.[81] In a leading New York case, Chief Judge Andrews declared that "the decisions thus far have dispensed with the condition precedent (1) where the corporation has been dissolved by judicial decree; (2) where by final judgment in an action for sequestration a perpetual injunction has been issued restraining suits by creditors; and (3) where, by statute, such suits are prohibited. In these cases there intervenes an impossibility within the meaning of the law, which excuses the performance of the condition precedent." [82] So, also, the discharge in bankruptcy of a corporation is a sufficient legal excuse for non-compliance with the statutory condition.[83]

Some courts hold that, where there is no such provision, the remedy inures to all creditors whether they have recovered judgments against the corporation or not, and that, upon default of the corporation, any creditor may sue any stockholder.[84] Other courts hold that, even in the absence of such a provision, the creditor must exhaust his remedy against the corporation before proceeding against stockholders, by recovery of judgment and issue of execution, for the liability of the stockholders is not to be regarded as a primary resource of the creditors.[85] It has been held, however, that where the corporation has become insolvent and made an assignment for the benefit of its creditors, or has been adjudicated a bankrupt, etc., the right of the creditors then accrues to commence suit against the stockholders, without any prior proceedings against the company.[86]

[80] Morley v. Thayer (C. C.) 3 Fed. 737; Rocky Mountain Nat. Bank of Central City v. Bliss, 89 N. Y. 338. And see Cambridge Waterworks v. Somerville Dyeing & Bleaching Co., 4 Allen (Mass.) 239; Train v. Marshall Paper Co., 180 Mass. 513, 62 N. E. 967; W. E. A. Legg & Co. v. Dewing, 27 R. I. 126, 60 Atl. 1066; Hardman v. Sage, 124 N. Y. 25, 26 N. E. 354.

[81] United Glass Co. v. Vary, 152 N. Y. 121, 46 N. E. 312; Hardman v. Sage, 124 N. Y. 25, 26 N. E. 354.

[82] United Glass Co. v. Vary, supra.

[83] Firestone Tire & Rubber Co. v. Agnew, 194 N. Y. 165, 86 N. E. 1116, 24 L. R. A. (N. S.) 628, 16 Ann. Cas. 1150, reversing 128 App. Div. 518, 112 N. Y. Supp. 907.

[84] McDonnell v. Alabama Gold Life Insurance Co., 85 Ala. 401, 5 South. 120; Schalucky v. Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399.

[85] Barrick v. Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; Wright v. McCormack, 17 Ohio St. 86. And see Rocky Mountain Nat. Bank Central City v. Bliss, 89 N. Y. 338; Bronson v. Schneider, 49 Ohio St. 438, 33 N. E. 233; Younglove v. Lime Co., 49 Ohio St. 663, 33 N. E. 234.

[86] Barrick v. Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798;

SAME—EFFECT OF JUDGMENT AGAINST CORPORATION

238. There is a difference of opinion as to the effect of a judgment against the corporation as evidence of its indebtedness as against a stockholder. The decisions are thus:

(a) Where it is sought to enforce a statutory liability, it is prima facie evidence of indebtedness, except where the liability is penal.

(b) Some courts hold it conclusive, in the absence of fraud or want of jurisdiction.

(c) Where it is sought to enforce the common-law liability on account of stock, it is conclusive, in the absence of fraud or want of jurisdiction.

In some jurisdictions it is held that a judgment recovered against a corporation is prima facie, but not conclusive, evidence of indebtedness against the company, in an action against a stockholder to enforce his individual statutory liability.[87] But by its great weight of authority the judgment against the corporation is held to be conclusive evidence of the debt in the absence of fraud or want of jurisdiction.[88] It is not even prima facie evidence where the liability which it is sought to impose upon the stockholder is original and penal in its character.[89]

Shellington v. Howland, 53 N. Y. 371; Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; Bronson v. Schnelder, 49 Ohio St. 438, 33 N. E. 233; Younglove v. Lime Co., 49 Ohio St. 663, 33 N. E. 234; United Glass Co. v. Vary, 152 N. Y. 121, 46 N. E. 312. And see Train v. Marshall Paper Co., 180 Mass. 513, 62 N. E. 967. Contra, Morley v. Thayer (C. C.) 3 Fed. 737.

[87] Belmont v. Coleman, 21 N. Y. 96; Moss v. McCullough, 5 Hill (N. Y.) 131; Terry v. Tubman, 92 U. S. 156, 23 L. Ed. 537; Hastings v. Drew, 76 N. Y. 9; Stephens v. Fox, 83 N. Y. 313.

[88] Slee v. Bloom, 20 Johns. (N. Y.) 669; Miller v. White, 59 Barb. (N. Y.) 434 (reversed in 50 N. Y. 137); Farnum v. Ballard Vale Machine Shop, 12 Cush. (Mass.) 507; Holland v. Duluth Iron Mining & Development Co., 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480; Ball v. Reese, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638; Steffins v. Gurney, 61 Kan. 292, 59 Pac. 725; Hale v. Hardon, 95 Fed. 747, 37 C. C. A. 240; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619; Town of Hinckley v. Kettle River R. Co., 80 Minn. 32, 82 N. W. 1088. Cf. Ward v. Joslin, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093. See 15 Fed. 360, note. So under the Massachusetts statute by which a summons in the action against the corporation was required to be served on stockholders, and they were permitted to defend in such action, etc. Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. (Mass.) 576.

[89] Miller v. White, 50 N. Y. 137; McMahon v. Macy, 51 N. Y. 155. See ex-

A judgment regularly obtained against a corporation is conclusive against a stockholder, in the absence of fraud, where the suit against him is to compel payment of his subscription to the stock of the corporation, or to compel him to refund property of the corporation unlawfully received by him.[90] In such a case, however, it may be attacked for collusion and fraud.[91]

SAME—STATUTE OF LIMITATIONS

239. The statute of limitations runs against an action by creditors to enforce against stockholders liability on account of their stock from the time an action can be maintained, which is generally when a valid call is made by the corporation or by a court of equity in a suit by creditors.

The statute runs against an action to enforce the statutory liability of stockholders from the time when a cause of action accrues, which is generally from the return of execution against the corporation. The rule will vary, however, according to the terms of the statute.

Liability on Subscription

Some of the courts have held that the liability of stockholders to pay their subscriptions is a direct trust, and that the statute of limitations, therefore, does not run against it, at least until a call is made by the corporation or other proper authority. "If the corporation," it has been said, "does not compel payment of the stock, the subscribers must be deemed to hold it for the corporation, subject to its call. It is a continuing, subsisting trust and confidence, to which the statute of limitations has no application."[92] The true relation, however, between a stockholder and the corporation, with respect to his unpaid subscription, is that of debtor and creditor. There is really no trust at all, either as to the corporation or its creditors.[93] There is simply a debt, a contract; and, in reason, the statute of limitations begins to run when a cause of action

planation of these cases in Hastings v. Drew, 76 N. Y. 9, and Stephens v. Fox, 83 N. Y. 313.

[90] Barron v. Paine, 83 Me. 312, 22 Atl. 218; Bissit v. Kentucky R. Navigation Co. (C. C.) 15 Fed. 353; Tatum v. Rosenthal, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97.

[91] Bissit v. Kentucky R. Navigation Co. (C. C.) 15 Fed. 353; Saylor v. Commonwealth Investment & Banking Co., 38 Or. 204, 62 Pac. 652.

[92] Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74. And see Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Mack's Appeal (Pa.) 7 Atl. 481.

[93] Ante, p. 677 et seq.

thereon accrues.[94] If the subscription is payable on demand, or on call, the statute begins to run when a call is duly made, and not before then.[95] If a corporation becomes insolvent and suspends business, no call by the corporation is necessary to render stockholders liable, but there must be some authorized demand or call by a receiver, assignee, or decree of the court, and the statute does not begin to run until then.[96] Where, by statute, a creditor who has recovered a judgment against the corporation, and had execution returned unsatisfied, is allowed to have execution against a stockholder, the cause of action accrues against stockholders when an execution on a judgment against the corporation has been returned unsatisfied, and the statute runs from that time.[97] Some courts have held that the statute runs against an action against a stockholder to subject the balance due by him on his shares to the satisfaction of a judgment obtained against the corporation, from the time when the cause of action accrued against the corporation.[98]

Statutory Liability

Sometimes the statute creating the liability of stockholders specifies the time within which an action must be brought by creditors to enforce the same. Where this is not the case the limitation de-

[94] See Lake Ontario, A. & N. Y. R. Co. v. Mason, 16 N. Y. 451; Hawkins v. Donnerberg, 40 Or. 97, 66 Pac. 691, 908; Williams v. Taylor, 99 Md. 306, 57 Atl. 641; Parmelee v. Price, 208 Ill. 544, 70 N. E. 725.

[95] Great Western Tel. Co. v. Gray, 122 Ill. 630, 14 N. E. 214; Williams v. Taylor, 120 N. Y. 244, 24 N. E. 288; Otter View Land Co.'s Receiver v. Bolling's Ex'x, 70 S. W. 834, 24 Ky. Law Rep. 1157; New England Fire Ins. Co. v. Haynes, 71 Vt. 306, 45 Atl. 221, 76 Am. St. Rep. 771; Gold v. Paynter, 101 Va. 714, 44 S. E. 920; Williams v. Matthews, 103 Va. 180, 48 S. E. 861; Williams v. Taylor, 99 Md. 306, 57 Atl. 641; Union Sav. Bank of San Jose v. Leiter, 145 Cal. 696, 79 Pac. 441. Cf. Harris v. Gateway Land Co., 128 Ala. 652, 29 South. 611. And see cases in the following note.

[96] Glenn v. Marbury, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Glenn v. Semple, 80 Ala. 159, 60 Am. Rep. 92; Lehman, Durr & Co. v. Glenn, 87 Ala. 618, 6 South. 44; Glenn v. Williams, 60 Md. 93; Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; Washington Sav. Bank v. Butchers' & Drovers' Bank, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405; Great Western Tel. Co. v. Gray, supra; Vanderwerken v. Glenn, 85 Va. 9, 6 S. E. 806; Glenn v. Howard, 81 Ga. 383, 8 S. E. 636, 12 Am. St. Rep. 318. In Pennsylvania it is held that where a corporation becomes insolvent, and makes an assignment, the statute begins to run from the date of the assignment. Franklin Sav. Bank v. Bridges (Pa.) 8 Atl. 611.

[97] Washington Sav. Bank v. Butchers' & Drovers' Bank, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405. See, also, West v. Topeka Sav. Bank, 66 Kan. 524, 72 Pac. 252, 63 L. R. A. 137, 97 Am. St. Rep. 385.

[98] First Nat. Bank v. Greene, 64 Iowa, 445, 17 N. W. 86, 20 N. W. 754. See, also, Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189.

pends upon the nature of the liability. If it is contractual, the clause of the statute relating to actions on contract is generally held to govern.[99] If the liability is penal, the case is governed by the clause relating to actions upon a statute for a penalty or forfeiture.[1]

The statute of limitations begins to run as soon as creditors acquire a right to sue the stockholders. Where the statute requires recovery of judgment against the corporation, and issue of execution, and return of no property found it does not begin to run until then; that is, until the return of the execution.[2] If a right of action accrues on the insolvency or dissolution of the corporation, or an assignment for creditors, and no judgment against the corporation is necessary, the statute runs from that time.[3] If the statute makes the stockholders liable as principal debtors, the liability accrues against the corporation and the stockholders at the same time, and suspension of the remedy against the corporation, as by a renewal of the debt, does not suspend the remedy against or affect the liability of, the stockholders.[4] A suit commenced by one creditor on behalf of himself and all others—that is, a general creditors' bill—is in the nature of a demand for all, and stops the running of the statute as against all creditors who may come in and assert their claims.[5]

[99] The clause applicable to an action upon a liability created by statute, other than a penalty or forfeiture, governs. Jones v. Goldtree Bros. Co., 142 Cal. 383, 77 Pac. 939.

[1] Wiles v. Suydam, 64 N. Y. 173; Merchants' Bank of New Haven v. Bliss, 35 N. Y. 412; Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287; post, p. 756.

[2] Taylor v. Bowker, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. Ed. 368; Handy v. Draper, 89 N. Y. 334; Younglove v. Lime Co., 49 Ohio St. 663, 33 N. E. 234; Kilton v. Providence Tool Co., 22 R. I. 605, 48 Atl. 1039.

[3] McDonnell v. Alabama Gold Life Insurance Co., 85 Ala. 401, 5 South. 120; Barrick v. Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; Bronson v. Schneider, 49 Ohio St. 438, 33 N. E. 233; Younglove v. Lime Co., 49 Ohio St. 663, 33 N. E. 234; Terry v. Tubman, 92 U. S. 156, 23 L. Ed. 537; First Nat. Bank of Atchison v. King, 60 Kan. 733, 57 Pac. 952; Pacific Elevator Co. v. Whitbeck, 63 Kan. 102, 64 Pac. 984, 88 Am. St. Rep. 229; Seattle Nat. Bank v. Pratt (C. C.) 103 Fed. 62. Where the law creating the liability is silent as to the time when the right of action accrues, it accrues immediately on the insolvency or like default. Bennett v. Thorne, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113.

[4] Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; Parrott v. Colby, 6 Hun (N. Y.) 57; Id., 71 N. Y. 597; Jagger Iron Co. v. Walker, 76 N. Y. 521; Schalucky v. Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; Coleman v. White, 14 Wis. 700, 80 Am. Dec. 797; Goodall v. Jack, 127 Cal. 258, 59 Pac. 575; Brigham v. Nathan, 62 Kan. 243, 62 Pac. 319.

[5] Barrick v. Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798;

Enforcement in Foreign Jurisdiction

Ordinary statutes of limitation are treated as laws of procedure, and as belonging to the lex fori, as affecting the remedy only, and not the right. But if a statute which creates a right of action also limits it, as is commonly the case with statutes imposing upon stockholders liability to creditors, the right will be enforced subject to the limitation even in a foreign state or jurisdiction.[6] On the other hand a state has the right to enact a statute of limitations applicable to actions to enforce the liability of stockholders in foreign as well as in domestic corporations, and such a statute of limitations will be enforced in action against a stockholder in a foreign corporation, both by the courts of the state and by the federal courts sitting in the state in cases brought therein.[7]

As we have seen, the statutory liability of stockholders is generally regarded as contractual,[8] so that the right of action is barred by the statute limiting the right of recovery on contracts.[9] It has been held by the Supreme Court of the United States, however, that the liability of stockholders in a national bank to creditors is not to be regarded as contractual, so as to make applicable the limitation prescribed by a statute of Washington for an "action upon a contract or liability express or implied, which is not in writing and does not arise out of any written instrument." [10]

Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. Cf. Hirshfeld v. Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839.

[6] Brunswick Terminal Co. v. National Bank, 99 Fed. 635, 40 C. C. A. 22, 48 L. R. A. 625; Broadway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603; Davis v. Mills, 194 U. S. 451, 24 Sup. Ct. 692, 48 L. Ed. 1067.

[7] Platt v. Wilmot, 193 U. S. 602, 24 Sup. Ct. 542, 48 L. Ed. 809; Dexter v. Edmands (C. C.) 89 Fed. 467; Hutchings v. Lamson, 96 Fed. 720, 37 C. C. A. 564; Hobbs v. National Bank of Commerce, 96 Fed. 396, 37 C. C. A. 513.

[8] Ante, p. 736.

[9] Carrol v. Green, 92 U. S. 509, 23 L. Ed. 738.

[10] McClaine v. Rankin, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500. The court distinguishes the case from Carrol v. Green, supra, on the ground that in that case the right to recover was direct and immediate, while in the case at bar, in consequence of the provisions of the National Banking Act, which makes the right to sue dependent upon an assessment by the Comptroller, the right to recover was secondary and contingent. It is difficult to reconcile the decision with the earlier cases holding the liability contractual. See dissenting opinion of White, J. Cf. Platt v. Wilmot, 193 U. S. 602, 24 Sup. Ct. 542, 48 L. Ed. 809.

SAME—SET-OFF BY STOCKHOLDERS

240. A stockholder who is also a creditor of the corporation cannot set off his claim, either against his liability on his subscription, or his liability for corporate funds unlawfully received by him, or against his statutory liability, if it is only sought to make him contribute a proportionate sum for the payment of all creditors pro rata. But under some statutes he can do so where an action is brought by a single creditor for his sole benefit.

Where a stockholder of an insolvent corporation, who is also a creditor, is indebted to the corporation on his subscription, or for property of the corporation unlawfully paid to him, as by way of unauthorized dividends, or on any other cause, the proper thing for him to do is to pay what he owes, and then come in and share ratably with the other creditors in all the assets of the corporation. He cannot, when sued upon his indebtedness by or for the benefit of all the creditors, set off the debt due him from the corporation, for to allow this would be to permit him to appropriate this asset of the company to payment of his own claim to the exclusion of the other creditors.[11] The same rule applies where suit is brought against stockholders to enforce their statutory liability. If it is sought to compel them each to contribute a proportionate sum to a fund for the payment of all creditors pro rata, a set-off cannot be

[11] Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Osgood v. Ogden, *43 N. Y. 70; Lawrence v. Nelson, 21 N. Y. 158; Shickle v. Watts, 94 Mo. 410, 7 S. W. 274; Boulton Carbon Co. v. Mills, 78 Iowa, 460, 43 N. W. 290, 5 L. R. A. 649; Hillier v. Allegheny County Mut. Insurance Co., 3 Pa. 470, 45 Am. Dec. 656; Williams v. Traphagen, 38 N. J. Eq. 57; Thebus v. Smiley, 110 Ill. 316; Thompson v. Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797; Bausman v. Kinnear, 79 Fed. 172, 24 C. C. A. 473; Richardson v. Merritt, 74 Minn. 354, 77 N. W. 234, 407, 968; Colorado Fuel & Iron Co. v. Sedalia Smelting Co., 13 Colo. App. 474, 59 Pac. 222; Efird v. Piedmont Land Imp. & Inv. Co., 55 S. C. 78, 32 S. E. 758, 897; Wilkinson v. Bertock, 111 Ga. 187, 36 S. E. 623. Contra, by statute, Appleton v. Turnbull, 84 Me. 72, 24 Atl. 592. In Lawrence v. Nelson, supra, the defendants, members of a mutual marine insurance company, sustained a loss upon an insured vessel, which loss was adjusted before commencement of proceedings to dissolve the company as insolvent. In an action brought by the receiver of the company to recover on the premium notes given by the defendants for the policies issued to them, it was held that they could not set off the company's indebtedness for the loss. Hillier v. Allegheny County Mut. Insurance Co., supra, was to the same effect. In most of the other cases cited above, the action was for unpaid subscriptions, or to recover dividends unlawfully paid.

allowed.[12] Where, however, an action is brought by a single creditor, as may be done under some statutes, to enforce a several and original liability, for the sole benefit of the creditor suing, it is held, anomalously, by the weight of authority, that upon equitable grounds the stockholder may set off a debt owing to him from the corporation.[13]

[12] Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Ball Electric Light Co. v. Child, 68 Conn. 522, 37 Atl. 391; Parker v. Carolina Sav. Bank, 58 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888; Barnes v. Arnold, 45 App. Div. 314, 61 N. Y. Supp. 85, affirmed 169 N. Y. 611, 62 N. E. 1093; Robinson v. Brown (C. C.) 126 Fed. 430. Cf. U. S. Trust Co. v. U. S. Fire Ins. Co. (In re Empire City Bank) 18 N. Y. 199.

[13] U. S. Trust Co. v. U. S. Fire Ins. Co. (In re Empire City Bank) 18 N. Y. 199, 227; Garrison v. Howe, 17 N. Y. 458; Mathez v. Neidig, 72 N. Y. 100; Agate v. Sands, 73 N. Y. 620; Wheeler v. Millar, 90 N. Y. 353; Pierce v. Topeka Commercial Security Co., 60 Kan. 164, 55 Pac. 853; Fidelity Insurance, Trust & Safe-Deposit Co. v. Mechanics' Sav. Bank, 97 Fed. 297, 38 C. C. A. 193, 56 L. R. A. 228; Ball v. Anderson, 196 Pa. 86, 46 Atl. 366, 79 Am. St. Rep. 693; Broadway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603; Cahill v. Original Big Gun Beneficial & Pleasure Ass'n, 94 Md. 353, 50 Atl. 1044, 89 Am. St. Rep. 434; Strauss v. Denny, 95 Md. 690, 53 Atl. 571. Contra, Lauraglenn Mills v. Ruff, 57 S. C. 53, 35 S. E. 387, 49 L. R. A. 448; ante, p. 736. To entitle him to a set-off, he must be really a creditor of the corporation. He cannot set off a debt due him from the corporation if he owes the company, on his subscription, more than the amount of his claim against it. Wheeler v. Millar, supra. But where a stockholder had purchased judgments against the corporation, while he was a director, and after he knew the company was insolvent, it was held that the judgments could avail him as a defense or set-off only to the amount actually paid for them. Bulkley v. Whitcomb, 121 N. Y. 107, 24 N. E. 13. And see Abbey v. Long, 44 Kan. 688, 24 Pac. 1111, where it was held that a stockholder, though not a director, cannot buy up claims against the corporation, and then set them off against his liability at their face value. And see Thompson v. Meisser, 108 Ill. 359; Manville v. Karst (C. C.) 16 Fed. 175; Kunkelman v. Rentchler, 15 Ill. App. 271; Gauch v. Harrison, 12 Ill. App. 459; Smith v. Mosby, 9 Heisk. (Tenn.) 501; Balch v. Wilson, 25 Minn. 299, 33 Am. Rep. 467. In Manville v. Karst (C. C.) 16 Fed. 173, the defendant, a stockholder in an insolvent bank, became liable to creditors of the bank in the sum of $1,200, under a double liability law, and was sued for that amount by a creditor. Before judgment could be had, he agreed with a friend that, if the latter would buy up claims against the bank to the amount of his liability, he would confess judgment in his favor, and the friend bought up claims at a large discount, from a stockholder in the bank, and the defendant confessed judgment in his favor for the full amount of the claims, and paid the same. It was held that the judgment and satisfaction could not avail him as a defense.

SAME—CONTRIBUTION AMONG STOCKHOLDERS

241. A stockholder is entitled to contribution from the other stockholders where he has paid more than his share of corporate debts, either

(a) On account of a liability on his subscription, the other stockholders being also liable on their subscriptions,

(b) Or on account of his statutory liability, where it is contractual, all the stockholders being jointly and severally liable.

(c) But not where the payment was on account of a penal statutory liability.

If the liability imposed by the statute for the debts of the company is penal, and not contractual, stockholders against whom creditors have enforced the liability cannot maintain a suit against other stockholders for contribution.[14] It is otherwise, however, if the statute imposes a contractual liability upon the stockholders jointly and severally, and one of them is compelled to pay more than his share. In such a case he may file a bill in equity to enforce contribution from the other stockholders who were also liable;[15] or, if he is made defendant with other stockholders in a suit for the benefit of the creditors generally, his right to contribution may be enforced in that suit.[16] So, where stockholders are liable on their subscriptions, and one of them is compelled to pay the amount due from him to satisfy a corporate debt, he may sue for contribution.[17] Ordinarily contribution may be enforced by a suit in equity, but, if the statute prescribes a remedy, it must be followed.[18] A suit for contribution may be maintained against nonresident stockholders.[19] Liability to contribute survives the death of a stockholder.[20]

[14] Sayles v. Brown (C. C.) 40 Fed. 8.

[15] 1 Cook, Stock, Stockh. & Corp. Law, § 211; Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40; Wincock v. Turpin, 96 Ill. 135; Allen v. Fairbanks (C. C.) 40 Fed. 188; Id. (C. C.) 45 Fed. 445; Koons v. Martin, 66 Hun, 554, 21 N. Y. Supp. 657; Bennison v. McConnell, 56 Neb. 46, 76 N. W. 412. And see Wolters v. Henningsan, 114 Cal. 433, 46 Pac. 277.

[16] Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

[17] Wincock v. Turpin, 96 Ill. 135; 1 Cook, Stock, Stockh. & Corp. Law, § 227.

[18] O'Reilly v. Bard, 105 Pa. 569.

[19] Allen v. Fairbanks (C. C.) 45 Fed. 445.

[20] Allen v. Fairbanks (C. C.) 40 Fed. 188.

RELATION BETWEEN CREDITORS AND OFFICERS

242. There is no privity between the creditors of a corporation and its directors or officers. And, strictly speaking, there is no trust relation.

243. The creditors of a corporation cannot maintain an action at law against its officers for fraud, negligence, or other breach of duty to the corporation. But if the officers are liable to the corporation for fraud, negligence or other wrongs, the liability constitutes an equitable asset of the corporation, and may be reached by its judgment creditors in equity.

The creditors of an insolvent corporation, according to all of the authorities, may, in order to procure satisfaction of their claims, enforce the liability of directors and other officers of the corporation for losses resulting from their mismanagement of the corporate affairs. Most of the courts have based the right of action in such cases upon the ground that the assets of a corporation are a trust fund for the benefit of creditors, and that the officers are trustees for their benefit.[21] The trust-fund doctrine, however, has been virtually exploded, and it is perhaps safe to say that no court would now hold directly that any trust relation exists between the officers and the creditors of a corporation.[22] The true basis of the right of creditors to proceed against the officers of a corporation is in their right to reach equitable assets of the corporation and apply them to the satisfaction of their claims. The officers of a corporation, as we have seen, are liable to the corporation for losses caused by their fraud, gross negligence, or willful breach of duty, and this liability may be enforced by or for the benefit of creditors when the corporation becomes insolvent. It is the enforcement of their claims by creditors against equitable assets of the corporation.[23]

Whatever may be the grounds upon which the right of action is based by the different courts, it is well settled that where the officers of a corporation willfully misappropriate or misapply its as-

[21] 1 Mor. Priv. Corp. § 568.

[22] Ante, p. 677 et seq. And see Bath v. Standard Land Co., Limited, [1911] 1 Ch. Div. 618.

[23] See 2 Mor. Priv. Corp. §§ 795, 796. Mere creditors of a corporation have no interest in a proceeding charging its directors with wasting assets until their claims are established either at law or in equity, and other assets of the company for the satisfaction of claims have been exhausted. Edwards v. National Window Glass Jobbers' Ass'n (N. J. Ch.) 58 Atl. 527.

sets, and the corporation becomes insolvent, the creditors in equity may hold them liable to the extent of the misappropriation.[24] So if the officers of an insolvent corporation have been grossly negligent in the performance of their duties, and the assets of the company have been thus allowed to be wasted, they may be held liable to creditors to the extent of the loss.[25] Thus, if the assets of a bank are wasted through the mismanagement or gross negligence of the directors, the depositors may hold them liable.[26]

It is well settled, however, that the officers of a corporation, if they act in good faith within the limits of the powers conferred upon the corporation by its charter, and within their authority, and use a proper degree of prudence and diligence, are not responsible either to the corporation or to its creditors for losses resulting from mere mistakes or errors of judgment.[27] Thus they are not liable for declaring or paying a dividend which diminishes the capital, in violation of a statute or the common law, where they are not guilty of bad faith or negligence.[28] Nor are they liable for losses from accident, theft, etc., where they have not been negligent.[29] The directors of a corporation cannot be held liable to creditors of the corporation for the acts or omissions of other agents, unless they have been guilty of neglect in supervising or appointing

[24] Gratz v. Redd, 4 B. Mon. (Ky.) 178, 195; Ellis v. Ward, 137 Ill. 509, 25 N. E. 531; Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; Moses v. Ocoee Bank, 1 Lea (Tenn.) 398; Bank of St. Marys v. St. John, 25 Ala. 506; In re Brockway Mfg. Co., 89 Me. 121, 35 Atl. 1012, 56 Am. St. Rep. 401; Michelson v. Pierce, 107 Wis. 85, 82 N. W. 707; Nix v. Miller, 26 Colo. 203, 57 Pac. 1084; Campbell v. Watson, 62 N. J. Eq. 306, 50 Atl. 120; ante, p. 646 et seq.

[25] Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; Brinckerhoff v. Bostwick, 88 N. Y. 52; Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Delano v. Case, 17 Ill. App. 531; Id., 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; United Society of Shakers v. Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731; Gratz v. Redd, 4 B. Mon. (Ky.) 178, 195; Gores v. Day, 90 Wis. 276, 74 N. W. 787; Foster v. Bank of Abingdon (C. C.) 88 Fed. 604; New Haven Trust Co. v. Doherty, 74 Conn. 353, 50 Atl. 887; Killen v. Barnes, 106 Wis. 546, 82 N. W. 536; Winchester v. Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153. Contra, Deaderick v. Bank of Commerce, 100 Tenn. 457, 45 S. W. 786; Union Nat. Bank v. Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; Stone v. Rottman, 183 Mo. 552, 82 S. W. 76; Wilson v. Stevens, 129 Ala. 630, 29 South. 678, 87 Am. St. Rep. 86. Ante, p. 647.

[26] See cases cited in the preceding note.

[27] Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684; Watt's Appeal, 78 Pa. 370; Williams v. McDonald, 37 N. J. Eq. 409; ante, p. 649.

[28] Excelsior Petroleum Co. v. Lacey, 63 N. Y. 422; Van Dyck v. McQuade, 86 N. Y. 38; Lexington & O. R. Co. v. Bridges, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528; ante, p. 646.

[29] Mowbray v. Antrim, 123 Ind. 24, 23 N. E. 858.

them.[80] What constitutes such negligence as will render officers of a corporation liable has been considered on a former page.[81]

A creditor of a corporation cannot sue its officers at law for fraud, negligence, or mismanagement in conducting the affairs of the corporation.[82] The remedy is in equity, by creditors' bill.[83] All the guilty officers need not be joined as parties, for their liability is several, but the corporation must be made a party.[84]

SAME—PREFERENCES TO OFFICERS WHO ARE CREDITORS

244. When a corporation becomes insolvent and ceases to do business, it is very generally held that the directors or other officers in charge of its assets cannot, by mortgage or otherwise, secure to themselves any preference or advantage over other creditors; but in many jurisdictions such preferences are sustained.

So long as a corporation is doing business, there is no privity whatever between the directors or other officers and its creditors. It has often been said that, when a corporation becomes insolvent and ceases to do business, a quasi trust relation arises between the officers and its creditors; that they hold the property of the corporation as a trust fund for the equal benefit of all the creditors; and that, if they are themselves creditors while the corporation is under their management, they cannot, by mortgage or otherwise, secure to themselves any preference or advantage over other creditors.[85] It is undoubtedly the law in many jurisdictions in this country that officers of a corporation cannot prefer themselves over other creditors, under such circumstances, but it is not true that there is any real trust relation between them and the creditors; and to say that

[80] Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662. And see Savings Bank of Louisville's Assignee v. Caperton, 87 Ky. 306, 8 S. W. 885, 12 Am. St. Rep. 488.

[81] Ante, p. 646.

[82] Zinn v. Mendel, 9 W. Va. 580; Smith v. Poor, 40 Me. 415, 63 Am. Dec. 672; Branch v. Roberts, 50 Barb. (N. Y.) 435; Fusz v. Spaunhorst, 67 Mo. 256. But see Solomon v. Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Tate v. Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719.

[83] Schley v. Dixon, 24 Ga. 273, 71 Am. Dec. 121.

[84] Cunningham v. Pell, 5 Paige (N. Y.) 607.

[85] Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; Olney v. Conanicut Land Co., 16 R. I. 597, 18 Atl. 181, 5 L. R. A. 361, 27 Am. St. Rep. 767; Haywood v. Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184; Richards v. Halliday (C. C.) 92 Fed. 798; and cases hereafter cited.

there is, and base the invalidity of the transaction on that ground, will tend to confuse. As a matter of fact, such a transaction is invalid as against the other creditors, because it is fraudulent as to them, and it is not necessary to look for any other reason.[86] The authorities, however, are by no means uniform on the question, and in many jurisdictions such preferences are sustained,[87] on the ground that the director of an insolvent corporation "is not a trustee for its creditors and owes them no duty."[88] In England it has been expressly held that the directors of an insolvent corporation are not trustees for creditors; and it has further been held that in paying corporate debts, before proceedings to wind up the com-

[86] That such preferences are void as against creditors, whatever may be the ground of invalidity. See Roseboom v. Whittaker, 132 Ill. 81, 23 N. E. 339; Sicardi v. Keystone Oil Co., 149 Pa. 148, 24 Atl. 163; Adams v. Kehlor Milling Co. (C. C.) 35 Fed. 433; Hays v. Citizens' Bank, 51 Kan. 535, 33 Pac. 318; Ingwersen v. Edgecombe, 42 Neb. 740, 60 N. W. 1032; Love Mfg. Co. v. Queen City Mfg. Co., 74 Miss. 290, 20 South. 146; Slack v. Northwestern Nat. Bank, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841; James Clark Co. v. Colton, 91 Md. 195, 46 Atl. 386, 49 L. R. A. 698; National Wall Paper Co. v. Columbia Nat. Bank, 63 Neb. 234, 88 N. W. 481, 56 L. R. A. 121; Symonds v. Lewis, 94 Me. 501, 48 Atl. 121; Taylor v. Fanning, 87 Minn. 52, 91 N. W. 269; Pangburn v. American Vault, Safe & Lock Co., 205 Pa. 83, 54 Atl. 504; Portland Consol. Min. Co. v. Rossiter, 16 S. D. 633, 94 N. W. 702, 102 Am. St. Rep. 726. Cf. Hill v. Standard Telephone Mfg. Co., 209 Pa. 281, 58 Atl. 147. Thus, where a majority of the directors of a corporation, knowing it to be insolvent, vote for the execution to them of the corporation's judgment note, which is executed by one of their number as treasurer, and a judgment is immediately entered, the judgment is fraudulent and void as to other creditors, though the note was given in payment of a bona fide debt. Roseboom v. Whittaker, supra. This rule has been extended to include preferences given by officers to their relatives. Adams v. Kehlor Milling Co., supra. And it has been applied to conveyances by officers in payment of a debt on which they were liable as guarantors or sureties. Richards v. New Hampshire Insurance Co., 43 N. H. 263.

[87] Corey v. Wadsworth, 118 Ala. 488, 25 South. 503, 44 L. R. A. 766; Anderson v. Bullock County Bank, 122 Ala. 275, 25 South. 523; National Bank of the Republic v. George M. Scott & Co., 18 Utah, 400, 55 Pac. 374; American Exch. Nat. Bank of New York City v. Ward, 111 Fed. 782, 49 C. C. A. 611, 55 L. R. A. 356; Nappanee Canning Co. v. Reid, Murdoch & Co., 159 Ind. 614, 64 N. E. 870, 1115, 59 L. R. A. 199; Wilson v. Stevens, 129 Ala. 630, 29 South. 678, 87 Am. St. Rep. 86; Heidbreder v. Superior Ice & Cold Storage Co., 184 Mo. 446, 83 S. W. 466; Pitman v. Chicago-Joplin Lead & Zinc Co., 113 Mo. App. 513, 87 S. W. 10. Cf. Shields v. Hobart, 172 Mo. 491, 72 S. W. 669, 95 Am. St. Rep. 529. An insolvent manufacturing corporation may lawfully prefer a claim due to a director though his vote is required to pass the resolution authorizing the preference. City Nat. Bank v. Goshen Woolen Mills Co., 163 Ind. 214, 71 N. E. 652, reversing 35 Ind. App. 562, 69 N. E. 206.

[88] Nappanee Canning Co v. Reid, Murdoch & Co., 159 Ind. 614, 64 N. E. 870, 1115, 59 L. R. A. 199.

pany have been instituted, they may prefer debts upon which they are themselves liable as guarantors.[39]

SAME—STATUTORY LIABILITY OF OFFICERS

245. In most states it is provided by statute that the directors or other officers of a corporation shall be liable for its debts, where they are guilty of certain official neglect or misconduct. These statutes, being penal, are strictly construed.

In most of the states, statutes have been enacted making the directors or other officers of a corporation liable for its debts where they are guilty of certain official neglect or misconduct, as of failure to make and file a report of the condition of the corporation required by law;[40] making false reports;[41] allowing the debts of the corporation to exceed the capital or a certain proportion of the capital;[42] paying a dividend which diminishes the amount of the

[39] Poole, Jackson & Whyte's Case (In re Wincham Ship Building, Boiler & Salt Co.) 9 Ch. Div. 322. And see Atlas Tack Co. v. Macon Hardware Co., 101 Ga. 391, 29 S. E. 27; Rockford Wholesale Grocery Co. v. Standard Grocery & Meat Co., 175 Ill. 89, 51 N. E. 642, 67 Am. St. Rep. 205.

[40] Bruce v. Platt, 80 N. Y. 379; Halsey v. McLean, 12 Allen (Mass.) 438, 90 Am. Dec. 157; Gans v. Switzer, 9 Mont. 408, 24 Pac. 18; Bank of Saginaw v. Pierson, 112 Mich. 410, 70 N. W. 901; Staten Island M. R. Co. v. Hinchliffe, 170 N. Y. 473, 63 N. E. 545; Ginsburg v. Von Seggern, 59 App. Div. 595, 69 N. Y. Supp. 758, affirmed 172 N. Y. 662, 65 N. E. 1116; Stafford v. St. John, 104 Ind. 277; 73 N. E. 596; Beekman Lumber Co. v. Ahern, 75 Ark. 107, 86 S. W. 843. That the New York statute does not require a report after the corporation has ceased to own property or do business, and has been practically dissolved, see Bruce v. Platt, 80 N. Y. 379, and cases there cited. See, also, Kirkland v. Kille, 99 N. Y. 395, 2 N. E. 36. But the mere fact that the company has ceased to do business, and is winding up its affairs, is no excuse for failure to file a report. Sanborn v. Lefferts, 58 N. Y. 179. And see Gans v. Switzer, 9 Mont. 408, 24 Pac. 18. As to sufficiency of report, see Bonnell v. Griswold, 80 N. Y. 128; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Whitaker v. Masterton, 106 N. Y. 277, 12 N. E. 604. Under a statute making directors liable for failure to file a report, the liability does not attach if a report is filed, though it may be false. Bonnell v. Griswold, 80 N. Y. 128; Pier v. Hanmore, 86 N. Y. 95; Matthews v. Patterson, 16 Colo. 215, 26 Pac. 812.

[41] As to the liability under such a provision, see Pier v. Hanmore, 86 N. Y. 95; Matthews v. Patterson, 16 Colo. 215, 26 Pac. 812; Clow v. Brown, 150 Ind. 185, 48 N. E. 1034, 49 N. E. 1057; Flanders v. Roberts, 182 Mass. 530, 65 N. E. 902. And see, Hutchinson v. Young, 80 App. Div. 246, 80 N. Y. Supp. 259; Id., 93 App. Div. 407, 87 N. Y. Supp. 678.

[42] National Bank of Auburn v. Dillingham, 147 N. Y. 603, 42 N. E. 338, 49 Am. St. Rep. 692; Thacher v. King, 156 Mass. 490, 31 N. E. 648. An indebtedness of a corporation to one of its directors constitutes a debt due within the statute. Id.

capital stock;[43] failure to publish or file the articles of association;[44] violating any of the provisions of the act under which the corporation is formed, whereby it shall become insolvent, etc.[45] Most of these statutes are highly penal, and are to be strictly construed. The liability cannot be extended beyond the strict terms of the statute, and a clear case must be established to render an officer liable.[46]

One of the directors or trustees, who is also a creditor of the corporation, cannot maintain an action under the statutes against his cotrustees or codirectors for breach of duty, and his assignee stands in the same position. To allow such an action would enable him to profit by his own wrong or negligence,[47] except where the director or trustee is wholly innocent and free from fault or culpability. But the liability may be enforced by a creditor who is a stockholder.[48]

Where an action is brought against a director under a statute making directors liable for the debts of the company if they fail to file a report, the plaintiff must establish the fact that he is a creditor of the company; and, by the weight of authority, proof of the recovery of a judgment against the company is not conclusive, nor even prima facie evidence of the debt.[49]

An action against a director by a creditor of the corporation under these statutes is within the statute of limitations relating to actions to recover a penalty. It is an action "upon a statute for a penalty or forfeiture." [50] The statute begins to run from the time the

[43] See Rorke v. Thomas, 56 N. Y. 559; Patterson v. Thompson (C. C.) 86 Fed. 85.

[44] See Cady v. Sanford, 53 Vt. 632.

[45] Patterson v. Minnesota Mfg. Co., 41 Minn. 84, 42 N. W. 926, 4 L. R. A. 745, 16 Am. St. Rep. 671; Edwards v. Armour Packing Co., 190 Ill. 467, 60 N. E. 807.

[46] Garrison v. Howe, 17 N. Y. 458; Rorke v. Thomas, 56 N. Y. 559; Bruce v. Platt, 80 N. Y. 381; Cameron v. Seaman, 69 N. Y. 396, 25 Am. Rep. 212; President, etc., of Manhattan Co. v. Kaldenberg, 165 N. Y. 1, 58 N. E. 700; International Paper Co. v. Gazette Co., 182 Mass. 578, 66 N. E. 636; Williams v. Brewster, 117 Wis. 370, 93 N. W. 479.

[47] Knox v. Baldwin, 80 N. Y. 610.

[48] Sanborn v. Lefferts, 58 N. Y. 179.

[49] Miller v. White, 50 N. Y. 137; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038. See, also, Audenried v. East Coast Milling Co., 68 N. J. Eq. 450, 59 Atl. 577. Cf. Cady v. Sanford, 53 Vt. 632; Allen v. Clark, 108 N. Y. 269, 15 N. E. 387; Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co., 183 Mass. 557, 67 N. E. 870.

[50] Merchants' Bank v. Bliss, 35 N. Y. 412; Wiles v. Suydam, 64 N. Y. 173; Knox v. Baldwin, 80 N. Y. 610; Merchants' Nat. Bank of Chicago v. Northwestern Mfg. & Car Co., 48 Minn. 349, 51 N. W. 117; Patterson v. Thompson (C. C.) 86 Fed. 85. Contra, Nebraska Nat. Bank v. Walsh, 68 Ark. 433, 59 S. W. 952, 82 Am. St. Rep. 301. And see Flowers v. Bartlett, 66 Minn. 213,

cause of action accrues in favor of the creditor, and not from the time of default on the part of the directors, as the failure to file a report.[51]

It also follows, from the penal character of such statutes, that there is no vested right in a cause of action arising under them until it has been reduced to judgment, and not only may the statutes be repealed before action has been commenced, but they may be repealed at any time before judgment, and an action previously commenced cannot be further prosecuted.[52]

Where a statute imposes a certain duty upon a director or an officer, and prescribes a penalty for its nonperformance, the test prescribed in the statute is the only test, both of liability and of the standard of conduct required.[53]

Same—Enforcement in Foreign Jurisdiction

Whether the statutory liability of a director can be enforced against him in a foreign state is generally held to depend upon whether the liability is to be regarded as contractual or as penal. If the purpose of the statute is to furnish a remedy to creditors who have been injured by the directors' violation of the requirements of the statute, their liability is contractual, and an action upon the statute is transitory and can be brought in any state. Statutes making the directors liable for debts contracted in excess of the capital or of a certain proportion of the capital are of this character.[54] If, however, the liability is in the nature of a penalty imposed for the neglect of a duty, such as a failure to make and file a report, or for making a false report, it has very generally been held that the liability is penal in its nature, and cannot be enforced in a foreign state.[55] A different view, however, has been taken by the Supreme

68 N. W. 976. But see, Hutchinson v. Young, 80 App. Div. 246, 80 N. Y. Supp. 259.

[51] Jones v. Barlow, 62 N. Y. 202; Morgan v. Hedstrom, 164 N. Y. 224, 58 N. E. 26; Continental Nat. Bank of Memphis, Tenn., v. Buford, 114 Fed. 290, 53 C. C. A. 14. Where a trustee of a corporation has become liable for a debt of the company because of failure to file an annual report, the right of action is barred after lapse of the statutory period (in New York, three years), though the default is continued during successive years. Losee v. Bullard, 79 N. Y. 404.

[52] Union Iron Co. v. Pierce, 4 Biss. 327, Fed. Cas. No. 14,367; Breitung v. Lindauer, 37 Mich. 217; Knox v. Baldwin, 80 N. Y. 610; Gregory v. German Bank of Denver, 3 Colo. 332, 25 Am. Rep. 760.

[53] Yates v. Jones Nat. Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002.

[54] Mitchell v. Hotchkiss, 48 Conn. 9, 40 Am. Rep. 146. See, also, First Nat. Bank of Plymouth v. Price, 33 Md. 487, 3 Am. Rep. 204.

[55] Halsey v. McLean, 12 Allen (Mass.) 438, 90 Am. Dec. 157; Derrickson v. Smith, 27 N. J. Law, 166; Bird v. Hayden, 2 Abb. Prac. N. S. (N. Y.) 61; Price v. Wilson, 67 Barb. (N. Y.) 9; Neal v. Moultrie, 12 Ga. 104; Field v. Haines (C. C.) 28 Fed. 919; Farr v. Briggs' Estate, 72 Vt. 225, 47 Atl. 793, 82

Court of the United States in a case in which it was held that the liability created by a New York statute, which made the officers of a corporation liable for its debts in case they made a false certificate or report that the stock was fully paid in, was not penal in an international sense, but might be enforced by a creditor in another state.[56]

Am. St. Rep. 930. "Where a liability is declared for some act or neglect in no way connected with the contracting of the debt, as for neglecting to file reports, it is undoubtedly penal; but where, as here, the liability for the debt arises out of the assent to the contract creating the debt, it would seem to be that of a contracting debtor, and no case to the contrary has been noticed." Per Wheeler, J., in Field v. Haines, supra.

[56] Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, reversing Attrill v. Huntington, 70 Md. 191, 16 Atl. 651, 2 L. R. A. 779, 14 Am. St. Rep. 344. To the same effect, see Huntington v. Attrill (1893) A. C. 150; First Nat. Bank v. Weidenbeck, 97 Fed. 896, 38 C. C. A. 131; Davis v. Mills (C. C.) 99 Fed. 39. And see Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976. In Huntington v. Attrill, in the United States supreme court, Mr. Justice Gray said: "Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. * * * The provision of the statute of New York now in question, making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no sense a criminal or quasi criminal law. The statute, while it enables persons complying with its provisions to do business as a corporation, without being subject to the liability of general partners, takes pains to secure and maintain a proper corporate fund for the payment of the corporate debts. With this aim, it makes the stockholders individually liable for the debts of the corporation until the capital stock is paid in and a certificate of the payment made by the officers, and makes the officers liable for any false and material representation in that certificate. The individual liability of the stockholders takes the place of a corporate fund, until that fund has been duly created; and the individual liability of the officers takes the place of the fund, in case their statement that it has been duly created is false. If the officers do not truly state and record the facts which exempt them from liability, they are made liable directly to every creditor of the company, who by reason of their wrongful acts has not the security for the payment of his debt out of the corporate property on which he had a right to rely. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country." See also, Darcey v. Brooklyn & N. Y. Ferry Co., 196 N. Y. 99, 89 N. E. 461, 26 L. R. A. (N. S.) 267, 134 Am. St. Rep. 827.

CHAPTER XV

FOREIGN CORPORATIONS

246. Foreign Corporations Defined.
247-249. Status of a Foreign Corporation.
250-253. Actions by and Against.
254. Visitorial Power over Foreign Corporations.

FOREIGN CORPORATIONS DEFINED

246. A foreign corporation is a corporation created by or under the laws of another state or country.

Foreign corporations have been defined in a former chapter, in treating of the creation and citizenship of corporations.[1]

STATUS OF A FOREIGN CORPORATION

247. A corporation has the capacity to act and contract, by its agents, in a state or country other than that by which it was created, with the express or implied consent of that country or state, under the rules of comity.

248. And by rules of comity binding upon the courts of a state, a foreign corporation has a right to do business therein, the consent of the state being presumed, except

(a) Where it is prohibited by express statutory or constitutional enactment.

(b) Where it is seeking to perform acts which are contrary to the public policy of the state.

(c) Where it is seeking to exercise extraordinary and special franchises.

(d) Where it is seeking to perform acts which are unauthorized by its corporate charter.

249. A state, if it sees fit, may, by legislation exclude a foreign corporation altogether or it may, subject to constitutional limitations, prescribe any conditions it may deem fit as a prerequisite to its right to do business within its limits. It cannot, however, impose conditions in violation of the federal Constitution.

[1] Ante, p. 82 et seq.

Power to Act in Another Jurisdiction

In Bank of Augusta v. Earle,[2] it was contended that, notwithstanding the powers conferred by the terms of its charter, "a corporation, from the very nature of its being, can have no authority to contract out of the limits of the state; that the laws of a state can have no extraterritorial operation, and that, as a corporation is the mere creature of a law of the state, it can have no existence beyond the limits in which that law operates; and that it must necessarily be incapable of making a contract in another place." The court, however, overruled this contention, and held that it could act out of the state, through its agents, with the consent of the foreign state. "It is very true," it was said, "that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places, and its residence in one state creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible and intangible; yet it is a person, for certain purposes, in contemplation of law, and has been recognized as such by the decisions of this court. * * * Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made, and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers in a sovereignty in which it does not reside, provided such contracts are permitted to be made by them by the laws of the place?"

The question has been raised whether it is proper, as a matter of public policy, under any circumstances, for a state to recognize a corporation created by another state or a foreign government. The prosecution of a claim to property by an Alabama corporation in Louisiana was resisted in the latter state, in Williamson v. Smoot,[3] on the ground that it was a violation of the sovereignty of a state, and prejudicial to the rights of its citizens, to recognize a corporation created by the Legislature of another state. It was held, how-

[2] 13 Pet. (U. S.) 519, 585, 10 L. Ed. 274.
[3] 7 Mart. O. S. (La.) 34, 12 Am. Dec. 494.

ever, that though attempts directly opposed to the sovereign power of a state, or the rights of its citizens, made by a corporation deriving its existence from another state, ought to be repelled, yet where a corporation comes into the courts of a state other than that by which it was created, and there seeks to assert its rights, it ought to be recognized, and its rights ought to be enforced, where to do so would not prejudice the state or its citizens.[4]

It is well settled, according to the principle of comity established by these leading cases, that a corporation can by its agents, go into another state than that by which it was created, and make any contract, or take any conveyance, that is within the powers conferred upon it by its charter, provided the state in which the contract or conveyance is made has not prohibited such a transaction, and the transaction is not contrary to the policy of its laws.[5] And it is equally well settled, subject to the same limitations, that a corporation may maintain actions and enforce its rights in another state or country, if it does not seek to enforce claims contrary to its laws.[6] It may not, however, exercise any extraordinary or special franchises therein, unless expressly permitted to do so.[7]

Though the rules of comity by which foreign corporations are recognized and their rights enforced are subject to local modifica-

[4] And see Blackstone Mfg. Co. v. Inhabitants of Blackstone, 13 Gray (Mass.) 488.

[5] Kennebec Co. v. Augusta Ins. & Banking Co., 6 Gray (Mass.) 204; Hutchins v. New England Coal Mining Co., 4 Allen (Mass.) 580; Wright v. Lee, 2 S. D. 596, 51 N. W. 706; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Santa Clara Female Academy v. Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776 (where it was held that a Wisconsin corporation could take lands by devise in Illinois); Alpena Portland Cement Co. v. Jenkins & Reynolds Co., 244 Ill. 354, 91 N. E. 480; Bard v. Poole, 12 N. Y. 495 (where it was held that a Maryland corporation could make loans secured by mortgage on real estate in New York); Merrick v. Van Santvoord, 34 N. Y. 208; Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322 (where it was held that there was nothing in the laws of New York, or their general policy, to prohibit foreign corporations from acquiring land in the state); Less v. Ghio, 92 Tex. 651, 51 S. W. 502; Floyd v. National Loan & Investment Co., 49 W. Va. 327, 38 S. E. 653, 54 L. R. A. 536, 87 Am. St. Rep. 805; Chicago Title & Trust Co. v. Bashford, 120 Wis. 281, 97 N. W. 940. Where a Massachusetts statute prohibited any foreign corporation from engaging in any business the transaction of which by domestic corporations was not permitted, although corporations could not be there organized to manufacture intoxicating liquors, but corporations might be organized to sell them; a foreign corporation chartered to manufacture and sell intoxicating liquors could sell them within the state. Enterprise Brewing Co. v. Grime, 173 Mass. 252, 53 N. E. 855.

[6] Post, p. 787.

[7] Lancaster v. Amsterdam Improvement Co., supra. And see, Taylor, Corp. (5th Ed.) §§ 384–9.

tion by the lawmaking power, until so modified they have the force of legal obligation. It is the duty of the courts to respect them until the Legislature sees fit to modify them.[8] This principle of comity is a part of our common law.[9]

Right to Exclude or to Impose Conditions

A corporation created by one state or by a foreign government can exercise none of the functions or privileges conferred by its charter in any other state or country, except by the comity and consent of the latter.[10] Any other state or country than that of its creation may exclude it altogether, if it sees fit, or it may impose such terms as it chooses as a condition of allowing it to do business.[11] This general principle is subject to certain constitutional limitations which will be considered later.[12] A corporation, as it has been expressed, "cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place." [13] As was said in Paul v. Commonwealth of Virginia,[14] a "corporation, being the mere creature of a local law, can have no legal existence beyond the limits of the sovereignty where created. * * * The recognition of its existence, even by

[8] Merrick v. Van Santvoord, 34 N. Y. 208, 217.

[9] Elston v. Piggott, 94 Ind. 17.

[10] It cannot exercise the extraordinary right of eminent domain without such consent. Saunders v. Bluefield Waterworks & Imp. Co. (C. C.) 58 Fed. 133; Dodge v. City of Council Bluffs, 57 Iowa, 560, 10 N. W. 886; St. Louis & S. F. R. Co. v. Southwestern Tel. & T. Co., 121 Fed. 276, 58 C. C. A. 198.

[11] Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; Liverpool & L. Life & F. Ins. Co. v. Oliver, 10 Wall. 566, 19 L. Ed. 1029; Bank of Augusta v. Earle, 13 Pet. 519, 585, 10 L. Ed. 274; New York, L. E. & W. R. Co. v. Com., 129 Pa. 463, 18 Atl. 412, 15 Am. St. Rep. 724; Phenix Ins. Co. v. Burdett, 112 Ind. 204, 13 N. E. 705; Goldsmith v. Home Insurance Co., 62 Ga. 379; People v. Fire Ass'n of Philadelphia, 92 N. Y. 311, 44 Am. Rep. 380; Phœnix Ins. Co. of New York v. Welch, 29 Kan. 672; State v. Phœnix Fire Ins. Co., 92 Tenn. 420, 21 S. W. 893; Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485, 38 N. W. 474; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; Woodson v. State, 69 Ark. 521, 65 S. W. 465; Com. v. Read Phosphate Co., 113 Ky. 32, 67 S. W. 45; Attorney General v. Electric Storage Battery Co., 188 Mass. 239, 74 N. E. 467, 3 Ann. Cas. 631; State v. Virginia-Carolina C. Co., 71 S. C. 544, 51 S. E. 455; New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332; Phœnix Mut. Life Ins. Co. v. McMaster, 237 U. S. 63, 35 Sup. Ct. 504, 59 L. Ed. 839; German-American Coffee Co. v. Diehl, 216 N. Y. 57, 109 N. E. 875.

[12] Infra, pp. 764, 767.

[13] Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. Ed. 354.

[14] 8 Wall. 168, 19 L. Ed. 357. See, also, Ducat v. City of Chicago, 48 Ill. 172, 95 Am. Dec. 529; Id., 77 U. S. (10 Wall.) 410, 19 L. Ed. 972.

other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

The provision of the federal Constitution (article 4, § 2), that the citizens of each state of the Union shall be entitled to all the privileges and immunities of citizens in the several states does not require one state to recognize corporations created by another; for, though a corporation is to be regarded as a citizen for some purposes,[15] for example, for purposes of the jurisdiction of the federal courts, it is not a citizen within the meaning of the above provision. "The privileges and immunities secured to citizens of each state in the several states by the provision in question are those privileges and immunities which are common to the citizens in the latter states, under their Constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation except by the permission, express or implied, of those states. The special privileges which they confer must therefore be enjoyed at home, unless the assent of other states to their enjoyment therein be given." [16] A corporation is a person

[15] Ante, p. 26.

[16] Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357. And see Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 585, 10 L. Ed. 274; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Pembina Con. Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; Ducat v. City of Chicago, 48 Ill. 172, 95 Am. Dec. 529; Tatem v. Wright, 23 N. J. Law, 429; Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; Attorney General v. Electric Storage Battery Co., 188 Mass. 239, 74 N. E. 467, 3 Ann. Cas. 631.

within the constitutional provision that "no state shall deny to any person within its jurisdiction the equal protection of its laws." [17] But a corporation is not within the jurisdiction of a state until it has granted the corporation permission to do business within its limits; and consequently the prohibition does not prevent a state from imposing conditions upon allowing a foreign corporation to do business.[18] Once admitted, however, a foreign corporation is entitled to "the equal protection of the laws," and to as favorable treatment as a domestic corporation.[19] Any attempt to substantially discriminate between domestic corporations and foreign corporations admitted to do business in a state, prejudicial to the latter, is invalid, whether it be by unequal taxation or other substantial inequality. Under such circumstances, the cancellation of the foreign corporation license by a state officer will be restrained, as unconstitutional.[20] The point is that, once the corporation has been admitted into the foreign state, it is entitled to the benefit of the constitutional safeguard of equality before the law; but the foreign jurisdiction is not bound to admit it, and may, subject to certain limitations hereafter to be considered, even exclude it absolutely.

According to this principle, it is well settled that a state may impose a tax or license fee upon a foreign corporation, as a condition of allowing it to do business within its limits; and it can make no difference that a less tax, or no tax at all, is imposed upon domestic corporations engaged in the same business.[21] Foreign corporations

[17] Pembina Con. Silver Mining & Milling Co. v. Pennsylvania, supra; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 396, 6 Sup. Ct. 1132, 30 L. Ed. 118; Hammond Beef & P. Co. v. Best, 91 Me. 431, 40 Atl. 338, 42 L. R. A. 528; Southern Ry. Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247.

[18] Pembina Con. Silver Mining & Milling Co. v. Pennsylvania, supra; Norfolk & W. R. Co. v. Pennsylvania, supra; Manchester Fire Ins. Co. v. Herriott (C. C.) 91 Fed. 711; ante, p. 26.

[19] See Pembina Con. Silver Mining & Milling Co., supra; Southern Ry. Co. v. Greene, supra; New York v. Roberts, 171 U. S. 658, 19 Sup. Ct. 58, 43 L. Ed. 323.

[20] Herndon v. Chicago, Rock Island & P. R. Co., 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970; Roach v. Atchison, T. & S. F. R. Co., 218 U. S. 159, 30 Sup. Ct. 639, 54 L. Ed. 978.

[21] Liverpool & L. Life & F. Ins. Co. v. Oliver, 10 Wall. (U. S.) 566, 19 L. Ed. 1029; Pembina Con. Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Blackstone Manuf'g Co. v. Inhabitants of Blackstone, 13 Gray (Mass.) 488; Attorney General v. Bay State Mining Co., 99 Mass. 148, 96 Am. Dec. 717; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; Ducat v. Chicago, 10 Wall. (U. S.) 410, 19 L. Ed. 972; Slaughter

are thus put at a disadvantage in competing with domestic corporations, but of this they cannot complain, since no constitutional right belonging to them has been violated.

A foreign corporation may also be required to make a deposit with an officer of the state for the purpose of securing persons who contract with it.[22] This is often required of foreign insurance companies. So, a state may require the agent of a foreign insurance company to retain money of the company until a loss of which he has notice is paid.[23] So, also, a state may levy a tax upon the excess of the receipts over the disbursements within the state of a foreign insurance corporation.[24]

A state may, and most states do, impose the condition that foreign corporations, in order to do business within the state, shall consent to be sued in its courts, and shall have a known place of business and appoint a resident agent within the state, upon whom process may be served in actions that may be brought against them.[25] Indeed, as we shall see, if a corporation of one state does business in another, no express consent on its part to be sued in the latter need be shown, for its consent will be presumed.[26]

Constitutional Limitations

If a corporation created by one state is engaged in interstate commerce into or through another state, the latter cannot exclude it;

v. Com., 13 Grat. (Va.) 767; Com. v. Milton, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522; Tatem v. Wright, 23 N. J. Law, 429; People v. Equitable Trust Co. of New London, Conn., 96 N. Y. 387; People ex rel. Southern Cotton-Oil Co. v. Wemple, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542; People of State of New York v. Roberts, 171 U. S. 658, 19 Sup. Ct. 58, 70, 43 L. Ed. 323; Manchester Fire Ins. Co. v. Herriott (C. C.) 91 Fed. 711; Blue Jacket Consol. Copper Min. Co. v. Scherr, 50 W. Va. 533, 40 S. E. 514, 523; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564; State v. Hammond Packing Co., 110 La. 180, 34 South. 368, 98 Am. St. Rep. 459. See, also, People ex rel. Wall & H. St. Realty Co. v. Miller, 181 N. Y. 328, 73 N. E. 1102.

[22] Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357.

[23] Phenix Ins. Co. v. Burdett, 112 Ind. 204, 13 N. E. 705.

[24] New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332. See note, 14 Col. Law Rev. 149.

[25] The agent need not be invested with any of the contractual powers which the corporation is permitted to exercise by its charter, but it is sufficient if he has authority to accept and receive service of process. Nelms v. Edinburg-American Land Mortgage Co., 92 Ala. 157, 9 South. 141; McCall v. American Freehold Land Mortgage Co., 99 Ala. 427, 12 South. 806. See, also, New England Mortg. Security Co. v. Ingram, 91 Ala. 337, 9 South. 140; McLeod v. American Freehold Land Mortgage Co., 100 Ala. 496, 14 South. 409; BAGDON v. PHILADELPHIA & READING COAL & IRON CO., 217 N. Y. 432, 111 N. E. 1075, Wormser Cas. Corporations, 424; Smolik v. Philadelphia & Reading Coal & Iron Co. (D. C.) 222 Fed. 148.

[26] Post, p. 787.

for this would be an interference with interstate commerce, in violation of the constitutional grant to Congress of the exclusive power to regulate commerce, and of the acts of Congress on the subject.[27] For instance, a state statute requiring a foreign corporation to file a certificate, or observe any other condition, before bringing an action for goods sold and delivered in the state, but made at its place of business in another state, or before otherwise making contracts in the state for carrying on commerce between the states, would be void as an interference with interstate commerce.[28] The same is true of a statute imposing a tax upon foreign corporations as a condition of their being allowed to transport goods or passengers into or through the state.[29] This provision of the Constitu-

[27] Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; Phœnix Mut. Life Ins. Co. v. McMaster, 237 U. S. 63, 35 Sup. Ct. 504, 59 L. Ed. 839.

[28] Ante, p. 287; Cooper Manuf'g Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; Kindel v. Beck & Pauli Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; Ware v. Hamilton Brown Shoe Co., 92 Ala. 145, 9 South. 136; Cook v. Rome Brick Co., 98 Ala. 409, 12 South. 918; Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Bateman v. Western Star Milling Co., 1 Tex. Civ. App. 90, 20 S. W. 931; Pickard v. Pullman Southern Car Co., 117 U. S. 34, 6 Sup. Ct. 635, 29 L. Ed. 785; International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 34 Sup. Ct. 493, 58 L. Ed. 974; SAULT STE. MARIE v. INTERNATIONAL TRANSIT CO., 234 U. S. 333, 34 Sup. Ct. 826, 58 L. Ed. 1337, 52 L. R. A. (N. S.) 574, Wormser Cas. Corporations, 403. A state law imposing a tax on foreign corporations doing business in the state, based on the amount of capital used by the corporation in such state, is not an interference with commerce. People ex rel. Southern Cotton-Oil Co. v. Wemple, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542. A foreign corporation may sue where the transaction is one of interstate commerce, although it has not complied with statutory conditions. Texas & P. Ry. Co. v. Davis, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562; Lane & Bodley Co. v. City Electric L. & W. W. Co., 31 Tex. Civ. App. 449, 72 S. W. 425; Zion Co-op. Merc. Ass'n v. Mayo, 22 Mont. 100, 55 Pac. 915. An ordinance under which a license fee may be required from an agent of a nonresident portrait company, who receives from such company pictures and frames manufactured by it to fill orders previously obtained, and, after breaking bulk and placing each picture in the frame designed for it, delivers them to the respective purchasers, is invalid as an attempt to interfere with and regulate interstate commerce. Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336. The last cited case was recently distinguished and limited in Browning v. Waycross, 233 U. S. 16, 34 Sup. Ct. 578, 58 L. Ed. 828. Cf. Dozier v. Alabama, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264.

[29] See Indiana v. American Exp. Co., 7 Biss. 227, Fed. Cas. No. 7,021. In Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, a Kentucky statute requiring the agent of a foreign express company doing business in the state to pay a license fee of $5, and deposit with the auditor a statement of the company's assets and liabilities, showing that it has an actual capital

tion includes telegraph corporations engaged in transmitting messages from a point in one state to a point in another.[80] The business of life insurance, it has been said, is not commerce, and therefore a state statute regulating the business of foreign insurance corporations is not invalid as a regulation of commerce.[81] In a recent case, an action was brought by the New York Life Insurance Company to recover the amount of a tax laid by the state of Montana upon the excess of its receipts over disbursements in defendant, Deer Lodge county, Mont. The company showed that the insurance contracts were uniformly effected at its home office in New York and the policies sent direct to the insured in Montana, that the loans and payments on the policies were made from the New York office, and premiums remitted there or paid to the company's cashier in Montana for deposit subject to withdrawal by the company. The Supreme Court of the United States gave judgment for the defendant and upheld the validity of the tax, declaring that since the insurance company was not engaged in interstate commerce, it could not object to the payment of the tax.[82]

of at least $150,000, was held unconstitutional, as an interference with interstate commerce, in so far as it applied to companies transporting goods between points in the state and points in other states, although they also transported between points in the state. And see Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 392; Osborne v. Florida, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586; Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; Pullman's Palace Car Co. v. Adams, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877; Atlantic & P. Tel. Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995 (full citation of cases); Allen v. Pullman's Palace Car Co., 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254; Armour Packing Co. v. Lacy, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451; Browning v. Waycross, 233 U. S. 16, 34 Sup. Ct. 578, 58 L. Ed. 828.

[80] Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 24 L. Ed. 708; Western Union Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; Ratterman v. Western Union Telegraph Co., 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; Western Union Tel. Co. v. Kansas ex rel. Coleman, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355. As to telephones with the ordinary connections, see Pomona v. Sunset Telephone & Telegraph Co., 224 U. S. 330, 345, 32 Sup. Ct. 477, 56 L. Ed. 788.

[81] Paul v. Virginia, supra; Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148; Philadelphia Fire Ass'n v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297 (marine insurance); New York Life Ins. Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116 (life insurance); Nutting v. Massachusetts, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324; New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332.

[82] New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332.

Justices Hughes and Van Devanter dissented without opinion. The decision follows the earlier cases to the same effect, but is open to the criticism that it adopts a very narrow interpretation of what is embraced within the term "interstate commerce." A correspondence instruction school has been held to be engaged in interstate commerce, so as to be immune from state regulation, and this seems sound, since instruction papers, books, and criticisms are transported over state lines.[33] Where orders are taken in one state for goods to be supplied from another state, which orders are transmitted to the latter state for acceptance or rejection, and filled from stock in that state, the business is interstate commerce and is not subject to a state license tax.[34]

Besides corporations engaged in interstate commerce, corporations also cannot be excluded or burdened when engaged in foreign commerce.[35] A state may not make commercial intercourse with a foreign country, any more than with another state, a matter of local privilege, and require that it cannot be carried on without its consent, and exact a license fee as the price of that consent. Thus an ordinance enacted by the city of Sault Ste. Marie, under authority from the state of Michigan, requiring a license fee for the operation of ferries to the Canadian shore opposite, was recently held unconstitutional, as sought to be applied to the owners of a ferryboat plying from the Canadian shore, as an illegal burden on interstate and foreign commerce.[36] Justice Hughes said: "It must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce." [37]

[33] International Text Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

[34] Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 34 Sup. Ct. 493, 58 L. Ed. 974. And see Crenshaw v. Arkansas, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565.

[35] SAULT STE. MARIE v. INTERNATIONAL TRANSIT CO., 234 U. S. 333, 34 Sup. Ct. 826, 58 L. Ed. 1337, 52 L. R. A. (N. S.) 574, Wormser Cas. Corporations, 403; Philadelphia & S. M. Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200.

[36] SAULT STE. MARIE v. INTERNATIONAL TRANSIT CO., supra.

[37] See, also, Western Union Tel. Co. v. Kansas ex rel. Coleman, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; Pullman Co. v. Kansas ex rel. Coleman, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 260, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 33 Sup. Ct. 41, 57 L. Ed. 189; Crenshaw v. Arkansas, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565; Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48

Corporations are also protected from state exclusion or regulation when employed by the federal government for its purposes, and when protected under a treaty.[38]

A state has the absolute right to entirely exclude a foreign corporation from its territory, or, having given it a license to do business within the state, to revoke it, in its discretion, for good cause, or without any cause at all.[39] And its motive in so doing is not open to inquiry. The corporation has no constitutional right to transact its business in any other state than that of its creation, and hence its exclusion therefrom violates no constitutional right. In Doyle v. Continental Ins. Co.[40] the Legislature of Wisconsin had enacted that, if any foreign insurance company should transfer a suit brought against it from the state courts to the federal courts, it should thereupon become the duty of the secretary of state to cancel its license to do business within the state. It was held that an injunction could not be granted to restrain the revocation of a license for violation of the provision, though a state has no power to prohibit resort to the federal courts where they have jurisdiction, since the right to exclude foreign corporations belongs to the state, and its motive, or the means by which it accomplishes that result, are not the subject of judicial inquiry.

Such a statute, however, cannot prevent the corporation from removing a suit into the federal courts.[41] If it does so, however, its license may be revoked by the state. And, if a statute requiring a permit as a condition precedent to a foreign corporation doing business in the state requires such a stipulation before the permit shall be granted, the statute is void, and the agent of a foreign

L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Adams Express Co. v. New York, 232 U. S. 14, 31, 34 Sup. Ct. 203, 58 L. Ed. 483.

[38] SAULT STE. MARIE v. INTERNATIONAL TRANSIT CO., supra; Western Union Tel. Co. v. Kansas ex rel. Coleman, supra; Stockton v. Baltimore & N. Y. R. R. Co. (C. C.) 32 Fed. 9; Horn Silver Min. Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164.

[39] Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936, affirmed 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; State v. Standard Oil Co., 61 Neb. 28, 84 N. W. 413, 87 Am. St. Rep. 449; Phœnix Mut. Life Ins. Co. v. McMaster, 237 U. S. 63, 35 Sup. Ct. 504, 59 L. Ed. 839.

[40] 94 U. S. 535, 24 L. Ed. 148. See comments on this by Mr. Justice Peckham in Cable v. United States Life Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188. And see, Security Mut. Life Ins. Co. v. Prewitt, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317; Pullman Co. v. Kansas ex rel. Coleman, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; Ludwig v. Western Union Tel. Co., 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423; Herndon v. Chicago, Rock Island & P. R. Co., 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970.

[41] Home Insurance Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365. See, also, Cable v. United States Life Ins. Co., supra.

corporation could not be prosecuted for violating it.[42] In a recent federal case[43] a state statute requiring a foreign corporation, as a condition of being permitted to enter or remain in the state, to stipulate expressly or impliedly that it would not exercise its constitutional right to remove suits to the federal courts or prosecute suits therein, was held invalid as requiring a corporation to forego a constitutional right; and the attempted revocation of its license to do local business, for a violation of the state statute, was restrained. The distinction must be carefully noted, however elusive it may sometimes seem, between such a statute, on the one hand, and the admittedly constitutional statute considered in the Doyle Case.

A state, of course, has a perfect right to admit foreign corporations of a particular class, and exclude other classes, or it may, if it sees fit, discriminate between corporations of the same class.

It seems to have been held, in effect, that, if a statute provides for the admission of corporations organized for a particular kind of business, it impliedly excludes corporations organized for any other business; and it has been held that a statute authorizing foreign corporations organized for a particular purpose to do business in the state does not admit a foreign corporation organized for the purpose specified, and also for other purposes.[44]

With the question of the expediency or policy of the statutes imposing conditions upon foreign corporations the courts have nothing to do. It is purely a legislative question. The statute must stand, unless it is plainly in conflict with some constitutional provision;[45] and, if there is doubt as to its constitutionality, the doubt

[42] Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915. See, also, Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; Dayton Coal & Iron Co. v. Barton, 183 U. S. 23, 22 Sup. Ct. 5, 46 L. Ed. 61.

[43] Western Union Tel. Co. v. Frear (D. C.) 216 Fed. 199, 202. And see, Harrison v. St. Louis & S. F. R. Co., 232 U. S. 318, 332, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187. Cf. Security Mut. Life Ins. Co. v. Prewitt, supra.

[44] Isle Royale Land Corp. v. Secretary of State, 76 Mich. 162, 43 N. W. 14.

[45] The power to exclude and to impose conditions cannot be exercised in violation of the provision against the passage by a state of a law impairing the obligation of contracts. New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 14 Sup. Ct. 952, 38 L. Ed. 854; Bedford v. Eastern B. & L. Ass'n, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834. Foreign insurance companies can enter a state to do business only by permission of the state, and subject to such regulations and conditions as it may see fit to impose; where they have complied with all such conditions, and under license from the state have expended money in establishing agencies and in advertising and building up a business, nevertheless they have no right to challenge the validity of statutes subsequently enacted which affect their business and interests equally with those of domestic companies. Hartford Fire Ins. Co. v. Perkins (C. C.) 125 Fed. 502, appeal dismissed 196 U. S. 643, 25 Sup. Ct. 795, 49 L. Ed.

must be resolved in favor of the Legislature.[46] "It has repeatedly been held—and there seems to be no conflict of authority—that corporations of one state have no right to exercise their franchises in another state, except upon the assent of such other state, and upon such terms as may be imposed by the state where their business is to be done. The conditions imposed may be reasonable or unreasonable. They are absolutely within the discretion of the Legislature." [47]

Foreign Corporations in Fraud of the Laws of a State, or Contrary to its Policy

The courts of a state will not recognize as valid a corporation organized in fraud of its laws in another state, or a corporation of another state which is contrary to the policy of its laws.[48] In some states the laws for the formation of corporations are more favorable than in others, and, for this reason, residents of a state sometimes go into another state and form a corporation under its laws for the purpose of doing business in the state of their residence. Whether such corporations will be recognized as valid in the state of the corporators' residence depends upon whether the incorporation is to be regarded as an evasion of and fraud upon its laws. Some courts seem to have held that the mere fact that residents of a state go into another state and form a corporation for the purpose of doing business in the state of their residence is an evasion of the laws of the state in which they are incorporated, and a fraud upon such laws.[49] But, by the better opinion, there must be something more than this to make out a case of fraud upon the laws of either state. There must be some express prohibition against such an incorporation, or else the general policy of the laws must be against it. The question arose in New York in Demarest v. Flack.[50] In

632. Greenwich Ins. Co. v. Carroll (C. C.) 125 Fed. 121, contra, was reversed by the United States Supreme Court. Carroll v. Greenwich Ins. Co. of New York, 199 U. S. 401, 26 Sup. Ct. 66, 50 L. Ed. 246.

[46] Phenix Ins. Co. v. Burdett, 112 Ind. 204, 13 N. E. 705; State ex rel. Dakota Hail Ass'n v. Carey, 2 N. D. 36, 49 N. W. 164; State v. Phœnix Ins. Co., 92 Tenn. 420, 21 S. W. 893.

[47] Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485, 38 N. W. 474, 482.

[48] Hill v. Beach, 12 N. J. Eq. 31; Land Grant Railway & Trust Co. v. Board Co. Com'rs Coffey County, 6 Kan. 245; Carroll v. City of East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; Van Steuben v. Central R. Co., 178 Pa. 367, 35 Atl. 992, 34 L. R. A. 577.

[49] Hill v. Beach, 12 N. J. Eq. 31.

[50] 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854. And see, to the same effect, Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322, where a corporation was formed under the laws of New Jersey to do business in New York. And see Oakdale Mfg. Co. v. Garst, 18 R. I. 484,

this case the defendants, residents of New York, had formed a corporation under the laws of West Virginia for the purpose of doing business in New York, and were doing business there as a foreign corporation. The plaintiff, a resident of New York, seeking to hold them liable as if unincorporated, contended (1) that these facts conclusively proved that the incorporation was invalid, so far, at least, as the state of New York and its citizens were concerned; or, (2) if this was not so, that the facts rendered it a question for the determination of the jury whether the incorporation was attempted to be made in good faith, or as a mere evasion and in fraud of the laws of West Virginia or of New York, and that, if the jury should find the latter to be the case, the incorporation would be void. The court, after pointing out that the laws of both states permitted incorporation for the purposes for which this corporation had been formed; that the freedom of the members from personal liability would be as great and as easily attained, and the security of creditors would not be substantially greater, in case of incorporation under the laws of New York; that the policy of West Virginia plainly favored the formation under its laws of corporations composed of nonresidents, the principal business of which was to be done outside the state; and that the policy of New York was to recognize foreign corporations formed for the purpose of doing business there—held that the incorporation was valid, both in West Virginia and in New York. The court also held that whether there was an attempted evasion of the laws of New York was a question of law, for the court, and should not be submitted to a jury as a matter of fact.[51] Peckham, J., said: "The truth is, foreign corporations are not properly to be regarded with suspicion, nor should unnecessary restraints be imposed upon their doing business in our midst. They carry no black flag, and the policy of all civilized na-

28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784; United States Vinegar Co. v. Schlegel, 143 N. Y. 537, 38 N. E. 729; State v. Topeka Water Co., 61 Kan. 547, 60 Pac. 337; Cumberland Tel. & T. Co. v. Louisville Home Tel. Co., 114 Ky. 892, 72 S. W. 4; State ex rel. Brown Contracting & Building Co. v. Cook, 181 Mo. 596, 80 S. W. 929. Cf. Gow v. Collin & Parker Lumber Co., 109 Mich. 45, 66 N. W. 676.

[51] In regard to the latter point, it was said that, if the question were submitted to the jury, "we might find different juries coming to different conclusions upon the same facts, and we should have a corporation or no corporation, according to the view a jury might take of such facts. One plaintiff might prove the evasion to the satisfaction of one jury, and another plaintiff fail on precisely the same facts; and thus we should have a corporation as to A., and no corporation as to B., and the same question constantly arising as often as the corporation or its members were sued. This would be intolerable. It must be a corporation as to all persons with whom it has business dealings, or as to none. In other words, it must be a question of law, instead of fact."

tions is to grant them recognition in their courts. It seems to me that every reason which urges upon us the recognition of foreign corporations organized with power to do business in our state, and composed of citizens of the foreign state, is equally potent when the foreign corporation is composed of our own citizens."

A foreign corporation will not be recognized in a state if it is contrary to the policy of its laws, as where the laws expressly or impliedly prohibit corporations of its character, or a corporation for such purposes.[52] It was held by the Illinois court that a corporation created by the laws of Connecticut for the sole purpose of buying and selling lands had no power to purchase and hold lands in Illinois, as it was against the general policy of the laws of that state on the subject of domestic corporations, denying such power to a corporation on the ground that it would tend to create perpetuities.[53]

It is for the Legislature to determine what shall be the public policy of the state, and in the absence of legislation prohibiting an act the case must be a very clear one to justify the courts in declaring it against public policy.[54] Accordingly it is generally held that the mere fact that the Legislature has not created or authorized the organization of corporations with power to do a certain act is not enough to show that it is against public policy to permit a foreign corporation to do such an act.[55]

Retaliatory Statutes

In some of the states what are known as "retaliatory statutes" have been enacted, the object being to prevent other states from imposing greater burdens and restrictions upon corporations of the state by which the statute is enacted than are imposed by that state

[52] Land Grant Railway & Trust Co. v. Board Co. Com'rs Coffey County, 6 Kan. 245; Carroll v. City of East St. Louis, 67 Ill. 568, 16 Am. Rep. 632. A foreign corporation, with right under its charter not sanctioned by the laws of Louisiana, will not be prevented from doing a legitimate business under that portion of its charter which conforms to her laws. State v. New Orleans Warehouse Co., 109 La. 64, 33 South. 81. See, also, Enterprise Brewing Co. v. Grime, 173 Mass. 252, 53 N. E. 855.

[53] Carroll v. City of East St. Louis, supra. See Santa Clara Female Academy v. Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776.

[54] Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; Stevens v. Pratt, 101 Ill. 206; Cowell v. Colorado Springs Co., 100 U. S. 55, 25 L. Ed. 547.

[55] Cowell v. Colorado Springs Co., supra; Stevens v. Pratt, supra; Deringer's Adm'r v. Deringer's Adm'r, 5 Houst. (Del.) 416, 1 Am. St. Rep. 150. But see Empire Mills v. Alston Grocery Co., 4 Willson, Civ. Cas. Ct. App. (Tex.) § 221, 15 S. W. 200, 505, 12 L. R. A. 366; Van Steuben v. Central R. Co., 178 Pa. 367, 35 Atl. 992, 34 L. R. A. 577; State ex rel. St. Louis, K. C. & C. R. Co. v. Cook, 171 Mo. 348, 71 S. W. 829.

upon corporations of such other states. Thus, in Illinois it is provided that whenever the existing or future laws of any state shall require of insurance companies incorporated under the laws of Illinois, and having agencies in such other state, any deposit, or the payment of any tax, license fee, etc., greater than the amount required for such purposes for similar companies by the then existing laws of Illinois, then all companies of such state establishing or having an established agency in Illinois shall be required to pay to the auditor for taxes, license fees, etc., an amount equal to the amount required by the laws of such other state.[56] And in many states there are statutes in effect providing generally that foreign corporations shall not exercise any privileges in the state which are not accorded by the state by which they are created to similar foreign corporations.[57] Such statutes as these are valid, unless they violate some particular provision of the state Constitution.[58]

A foreign corporation which has complied with the local laws should not, as a measure of retaliation, under a retaliatory statute, be excluded from doing business in the state upon the ground that the laws of the state by which it was created would exclude foreign corporations from doing business there under like conditions, unless it is clear that such is the effect of the law. Rules of comity require that doubt in such a case should be resolved in favor of the corporation.[59]

What Constitutes "Doing Business" in the State

Questions frequently arise as to what constitutes "doing business" in the state, within the meaning of the statutes relating to

[56] This law becomes operative upon the enactment by the other state of the law with the additional requirements, and it is immaterial that there are no Illinois corporations doing business in such state. Germania Ins. Co. v. Swigert, 128 Ill. 237, 21 N. E. 530, 4 L. R. A. 473; State ex rel. Philips v. Fidelity & Casualty Co., 77 Iowa, 648, 42 N. W. 509. But see State v. Insurance Co., 49 Ohio St. 440, 31 N. E. 658, 16 L. R. A. 611, 34 Am. St. Rep. 573; State v. Insurance Co. of North America, 71 Neb. 320, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767.

[57] See State v. Western Union Mut. Life Ins. Co., 47 Ohio St. 167, 24 N. E. 392, 8 L. R. A. 129; Wolf v. Lancaster, 70 N. J. Law, 201, 56 Atl. 172, and other cases cited in the preceding and following notes.

[58] People v. Fire Ass'n of Philadelphia, 92 N. Y. 311, 44 Am. Rep. 380; Home Ins. Co. v. Swigert, 104 Ill. 666; State ex rel. Baldwin v. Insurance Co. of North America, 115 Ind. 257, 17 N. E. 574; Talbott v. Fidelity & Casualty Co. of New York, 74 Md. 536, 22 Atl. 395, 13 L. R. A. 584; State v. Insurance Co. of North America, 71 Neb. 320, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767.

[59] State v. Fidelity & Casualty Ins. Co., 39 Minn. 538, 41 N. W. 108; State v. Insurance Co., 49 Ohio St. 440, 31 N. E. 658, 16 L. R. A. 611, 34 Am. St. Rep. 573.

foreign corporations, and the answer is not always clear. If a foreign corporation continuously does any substantial part of its business in the state, however little, it is within the statute.[60] Clearly, it does business in the state if it has an office and sells some of its goods there,[61] or enters into a contract by which it is to have the management of the manufacturing in a factory and keep it supplied with a superintendent,[62] or has a resident agent to conduct a part of its business;[63] or has outstanding insurance policies therein on which it collects premiums and adjusts losses.[64] But a corporation is not doing business in the state because a transaction is partly effected there, if it is consummated outside the state;[65] as where

[60] Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; People ex rel. Badische, Anilin & Soda Fabrik v. Roberts, 152 N. Y. 59, 46 N. E. 161, 36 L. R. A. 756; Penn Collieries Co. v. McKeever, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127; Huntington v. Sheehan, 206 N. Y. 486, 100 N. E. 41; Farmers' Loan & Trust Co. v. Lake St. El. R. Co., 173 Ill. 439, 51 N. E. 55; Texas & P. Ry. Co. v. Davis, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562; Buie v. Chicago, R. I. & P. Ry. Co., 95 Tex. 51, 65 S. W. 27, 55 L. R. A. 861; International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; Nickerson v. Warren City Tank & Boiler Co. (D. C.) 223 Fed. 843. A foreign insurance company is doing business within the state, so far as the question of the power of a federal court, sitting in that state, to obtain jurisdiction over such corporation, is concerned, where, under the terms of its policies covering property in that state, it sends its agents there to adjust losses. Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810. See, also, Elliott v. Parlin & Orendorff Co., 71 Kan. 665, 81 Pac. 500.

[61] People ex rel. Southern Cotton-Oil Co. v. Wemple, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542; People v. Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155. See, also, Copland v. American De Forest Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501. A corporation was held to be doing business in a state where it erected a tank. Nickerson v. Warren City Tank & Boiler Co. (D. C.) 223 Fed. 843.

[62] Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328.

[63] Cone v. Tuscaloosa Mfg. Co. (C. C.) 76 Fed. 891; United States Saving & Loan Co. v. Miller (Tenn. Ch. App.) 47 S. W. 17; Fay Fruit Co. v. McKinney Bros. & Co., 103 Mo. App. 304, 77 S. W. 160; Board of Trade of Chicago v. Hammond Elevator Co., 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1111. Cf. Honeyman v. Colorado Fuel & Iron Co. (C. C.) 133 Fed. 96. Where a foreign corporation came into New Jersey and organized and controlled a corporation, causing it to issue its bonds and stock, and took them and purchased stocks held in various New Jersey corporations, and also took from such stockholders sums of money as further consideration, and gave a guaranty that another corporation would pay the interest on its bonds, such transactions amounted to a doing of business. Groel v. United Electric Co. of New Jersey, 69 N. J. Eq. 397, 60 Atl. 822.

[64] COMMERCIAL MUTUAL ACCIDENT CO. v. DAVIS, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782, Wormser Cas. Corporations, 407.

[65] Holder v. Aultman, Miller & Co., 169 U. S. 81, 18 Sup. Ct. 269, 42 L. Ed.

an agent solicits orders in the state, but the sale is consummated outside the state;[66] or where an application for insurance is made in the state, but the acceptance and issue of a policy thereon is at the home office in another state.[67] Nor does the statute apply to a loan, although on the security of land within the state, made outside the state;[68] or to a contract made outside the state by which the title to land in the state is acquired.[69] Nor does a foreign corporation do business in the state by a mere consignment of goods for sale to a factor therein, since in such case the factor and not the consignor does the business of selling and collecting.[70] The prosecution or defense of an action is not doing business in the state.[71]

669; Payson v. Withers, 5 Biss. 269, Fed. Cas. No. 10,864; Boardman v. S. S. McClure Co. (C. C.) 123 Fed. 614.

[66] Toledo Commercial Co. v. Glass Mfg. Co., 55 Ohio St. 217, 45 N. E. 197; Droege v. Ahrens & Ott Mfg. Co., 163 N. Y. 466, 57 N. E. 747; Cummer Lumber Co. v. Associated Mfrs.' Mut. Fire Ins. Corp., 67 App. Div. 151, 73 N. Y. Supp. 668, affirmed 173 N. Y. 633, 66 N. E. 1106; Harvard Co. v. Wicht, 99 App. Div. 507, 91 N. Y. Supp. 48; Wolff Dryer Co. v. Bigler, 192 Pa. 466, 43 Atl. 1092; Rock Island Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616; Belle City Mfg. Co. v. Frizzell, 11 Idaho, 1, 81 Pac. 58.

[67] Hazeltine v. Mississippi Valley Fire Ins. Co. (C. C.) 55 Fed. 743; Fulton v. Commercial Travelers' Mut. Acc. Ass'n, 172 Pa. 117, 33 Atl. 324; State Mut. Fire Ins. Co. v. Brinkley Stave & Heading Co., 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191.

[68] Scruggs v. Scottish Mortgage Co., 54 Ark. 566, 16 S. W. 563; Reeves v. Harper, 43 La. Ann. 516, 9 South. 104; Caeser v. Capell (C. C.) 83 Fed. 403; Sullivan v. Sheehan (C. C.) 89 Fed. 247; Neal v. New Orleans Loan, Building & Savings Ass'n, 100 Tenn. 607, 46 S. W. 755; People's Building, Loan & Savings Ass'n v. Berlin, 201 Pa. 1, 50 Atl. 308, 88 Am. St. Rep. 764.

[69] Goldsberry v. Carter, 100 Va. 438, 41 S. E. 858. The mere ownership of lands in New Mexico by a railroad company organized and existing under the act of Congress of March 3, 1897, c. 374, 29 Stat. 622, none of whose offices are located in the territory, or the bringing of suits in that territory to protect its lands against trespasses, is not sufficient, under Comp. Laws N. M. 1897, § 450, to authorize the service of summons upon its president while passing through the territory on a railroad train, in a personal action in which an attachment may be levied upon the lands to satisfy any judgment that may be obtained, even assuming that the provisions of this statute could be made applicable to a corporation created by an act of Congress. New Mexico ex rel. Caledonian Coal Co. v. Baker, 196 U. S. 432, 25 Sup. Ct. 375, 49 L. Ed. 540.

[70] Bertha Zinc & Mineral Co. v. Clute, 7 Misc. Rep. 123, 27 N. Y. Supp. 342; Allen v. Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393, 714. And see Hovey's Estate, 198 Pa. 385, 48 Atl. 311.

[71] Utley v. Clark-Gardner Lode Mining Co., 4 Colo. 369; Powder River Cattle Co. v. Commissioners of Custer County, 9 Mont. 145, 22 Pac. 383; Christian v. American Freehold Land & Mortgage Co., 89 Ala. 198, 7 South. 427; McCall v. American Freehold Land Mortgage Co., 99 Ala. 427, 12 South. 806; Reed v. Walker, 2 Tex. Civ. App. 92, 21 S. W. 687; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43; Fuller & Johnson Mfg. Co. v. Foster, 4 Dak.

In a recent federal case, a corporation, chartered in Minnesota, conducted mining operations in Alaska. It maintained a purchasing agent in Seattle, Wash., paying his salary, office rental and expenses. The names both of the agent and the corporation appeared in the Seattle directories. The agent could, however, make no purchases not approved by the corporation. The court held that the corporation was not doing business in the state of Washington.[72]

It is generally held that doing a single act of business does not bring a corporation within the statute.[73] The Supreme Court of the United States has held that a statute or constitutional provision prohibiting a foreign corporation from doing "any business" in the state until it has complied with the conditions imposed contemplates carrying on a continuous business in the state, and does not apply to a single act of business when there was no purpose to do any other act of business or have a place of business in the state.[74] And the New York Court of Appeals has said: "To bring into operation the statutory provision, the facts should show more than a solitary, if not accidental, transaction as was the one before us. They should establish that the corporation was conducting a continuous business." [75] Thus these statutes are not to be construed as preventing a corporation from doing isolated and independent acts incidental to its business, such as making a contract,[76]

829, 30 N. W. 166; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87; Chicago Title & Trust Co. v. Bashford, 120 Wis. 281, 97 N. W. 940; Alley v. Bowen-Merrill Co., 76 Ark. 4, 88 S. W. 838, 113 Am. St. Rep. 73, 6 Ann. Cas. 127.

[72] Johanson v. Alaska Treadwell Gold Min. Co. (D. C.) 225 Fed. 270. See, also, Green v. Chicago, B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916.

[73] Farrior v. New England Mortgage Security Co., 88 Ala. 275, 7 South. 200; Ginn v. New England Mortgage Security Co., 92 Ala. 135, 8 South. 388; Ammons v. Brunswick-Balke Collender Co., 5 Ind. T. 636, 82 S. W. 937; Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co. (C. C.) 124 Fed. 259 (full citation); Penn Collieries Co. v. McKeever, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127; Delaware & Hudson Canal Co. v. Mahlenbrock, 63 N. J. Law, 281, 43 Atl. 978, 45 L. R. A. 538; and cases in following notes.

[74] Lamb v. Lamb, 6 Biss. 420, Fed. Cas. No. 8,018. A single transaction may be a doing of business, where it is part of the ordinary business of the corporation and indicates a purpose to carry on a substantial part of its dealings in the state. John Deere Plow Co. v. Wyland, 69 Kan. 255, 76 Pac. 863, 2 Ann. Cas. 304. And see New Haven Pulp & Board Co. v. Downingtown Mfg. Co. (C. C.) 130 Fed. 605.

[75] Penn Collieries Co. v. McKeever, supra.

[76] Empire Milling & Mining Co. v. Tombstone Milling & Mining Co. (C. C.) 100 Fed. 910; Babbitt v. Field, 6 Ariz. 6, 52 Pac. 775; Davis & Rankin Bldg. & Mfg. Co. v. Caigle (Tenn. Ch. App.) 53 S. W. 240; Henry v. Simanton, 64 N. J. Eq. 572, 54 Atl. 153; Hogan v. City of St. Louis, 176 Mo. 149, 75 S. W. 604;

a sale,[77] a purchase,[78] an insurance policy,[79] or as taking a mortgage,[80] or accepting a note.[81] In some jurisdictions, however, a stricter construction prevails, and it is held that a single act of ordinary business is within the statute. Thus it has been held in Alabama that a corporation organized for the purpose of lending money on real estate security does business by making a single loan and taking a mortgage to secure it.[82]

The United States Supreme Court has held that whether a corporation is doing business within a state and district so as to have submitted itself to the jurisdiction, and is present therein so as to warrant service of process upon it, depends in each case upon the facts proved.[83]

Effect of Noncompliance with Conditions

The statutes imposing conditions upon foreign corporations vary in the different states, and even where they are similar the courts do not agree in construing them, and as to the effect of contracts and transactions in violation of their terms. In all cases the object is to ascertain the intention of the Legislature, and when the intention is acertained it must be given effect.

Many courts hold that such a statute does not render void contracts or transactions by foreign corporations before compliance

Sigel-Campion Live Stock Commission Co. v. Haston, 68 Kan. 749, 75 Pac. 1028; New York Architectural Terra-Cotta Co. v. Williams, 102 App. Div. 1, 92 N. Y. Supp. 808.

[77] Gates Iron Works v. Cohen, 7 Colo. App. 341, 43 Pac. 667; Penn Collieries Co. v. McKeever, supra (a single sale of a cargo of coal); Delaware & Hudson Canal Co. v. Mahlenbrock, 63 N. J. Law, 281, 43 Atl. 978, 45 L. R. A. 538.

[78] Colorado Iron Works v. Sierra Grande Min. Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433; Crook v. Girard Iron & Metal Co., 87 Md. 138, 39 Atl. 94, 67 Am. St. Rep. 325.

[79] Tabor v. Goss & Phillips Manufacturing Co., 11 Colo. 419, 18 Pac. 537.

[80] Gilchrist v. Helena, H. S. & S. Railroad Co. (C. C.) 47 Fed. 593; Keene Guar. Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680; New York & S. Const. Co. v. Winton, 208 Pa. 467, 57 Atl. 955. See Com. v. Standard Oil Co., 101 Pa. 119; Fuller & Johnson Mfg. Co. v. Foster, 4 Dak. 329, 30 N. W. 166.

[81] Creteau v. Foote & Thorne Glass Co., 40 App. Div. 215, 57 N. Y. Supp. 1103; Security Co. v. Panhandle Nat. Bank, 93 Tex. 575, 57 S. W. 22.

[82] See, also, Denson v. Chattanooga Nat. Bldg. & Loan Ass'n, 107 Fed. 777, 46 C. C. A. 634, affirmed 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870 (under Alabama statute); Nelson, Morris & Co. v. E. K. Rehkopf & Sons, 75 S. W. 203, 25 Ky. Law Rep. 352.

[83] Washington-Virginia Ry. Co. v. Real Estate Trust Co. of Philadelphia, 238 U. S. 185, 35 Sup. Ct. 818, 59 L. Ed. 1262. No all-embracing rule has been laid down as to what constitutes the manner of doing business by a foreign corporation so as to subject it to process. Each case must be determined by its own facts. St. Louis Southwestern Ry. Co. of Texas v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77.

with the conditions, but that the corporation merely renders itself subject to exclusion at the instance of the proper authorities, and to suspension of its civil remedies until compliance if compliance be made a condition of the right to sue.[84] Where this rule prevails, notwithstanding noncompliance, suit may be brought on such a contract in a federal court,[85] or in the court of another state.[86] This is perhaps the prevailing view. Thus in New York the statute [87] does not make contracts of a foreign corporation which has not complied with its provisions void, but merely disables the noncomplying corporation from suing thereon in the state courts.[88] The corporation can maintain its action, however, if jurisdiction otherwise exists, in the federal courts or in other state courts.[89] Other courts hold, however, that all contracts entered into in violation of the statute are void, on the ground that where no other pen-

[84] Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; Wright v. Lee, 4 S. D. 237, 55 N. W. 931; Jarvis-Conklin Mortgage Trust Co. v. Willhoit (C. C.) 84 Fed. 514; Neuchatel Asphalte Co. v. Mayor, etc., of New York, 155 N. Y. 373, 49 N. E. 1043; Rockford Ins. Co. v. Rogers, 9 Colo. App. 121, 47 Pac. 848; Security Savings & Loan Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753; North Mercer Natural Gas Co. v. Smith, 27 Ind. App. 472, 61 N. E. 10; C. B. Rogers & Co. v. Simmons, 155 Mass. 259, 29 N. E. 580; Enterprise Brewing Co. v. Grime, 173 Mass. 252, 53 N. E. 855 (cf. Reliance Mut. Ins. Co. v. Sawyer, 160 Mass. 413, 36 N. E. 59); Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; Chicago Mill & Lumber Co. v. Sims, 101 Mo. App. 569, 74 S. W. 128; State v. American Book Co., 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56; Thompson v. National Mut. Bldg. & Loan Ass'n, 57 W. Va. 551, 50 S. E. 756; LUPTON'S SONS CO. v. AUTOMOBILE CLUB OF AMERICA, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699, Wormser Cas. Corporations, 400 (construing New York statute); MAHAR v. HARRINGTON PARK VILLA SITES, 204 N. Y. 231, 97 N. E. 587, 38 L. R. A. (N. S.) 210, Wormser Cas. Corporations, 396.

[85] Sullivan v. Beck (C. C.) 79 Fed. 200; LUPTON'S SONS CO. v. AUTOMOBILE CLUB OF AMERICA, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699, Wormser Cas. Corporations, 400; Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 151 Fed. 871; Boatmen's Bank of St. Louis, Mo., v. Fritzlen, 221 Fed. 154, 160, 137 C. C. A. 54. See, also, BAGDON v. PHILADELPHIA & READING COAL & IRON CO., 217 N. Y. 432, 111 N. E. 1075, Wormser Cas. Corporations, 424.

[86] Alleghany Co. v. Allen, 69 N. J. Law, 270, 55 Atl. 724, appeal dismissed 196 U. S. 458, 25 Sup. Ct. 311, 49 L. Ed. 551 (construing New York statute). And see LUPTON'S SONS CO. v. AUTOMOBILE CLUB OF AMERICA, supra.

[87] General Corporation Law (Consol. Laws, c. 23) § 15.

[88] MAHAR v. HARRINGTON PARK VILLA SITES, 204 N. Y. 231, 97 N. E. 587, 38 L. R. A. (N. S.) 210, Wormser Cas. Corporations, 396; BAGDON v. PHILADELPHIA & READING COAL & IRON CO., 217 N. Y. 432, 111 N. E. 1075, Wormser Cas. Corporations, 424.

[89] Alleghany County v. Allen, supra; LUPTON'S SONS CO. v. AUTOMOBILE CLUB OF AMERICA, supra; Groton Bridge & Mfg. Co. v. American Bridge Co., supra.

alty is attached this is the only effective way of enforcing the prohibition.[90] And, where the state statute declares the contract is void, or where such an interpretation is placed upon the statute by the courts of the state, the contract is also regarded as void and suit cannot be maintained thereon, in the federal courts.[91]

Some of the statutes not only prohibit doing business before compliance with their terms, but also impose a penalty for their violation, and others impose a penalty without express prohibition. Some courts hold that the legislature, by annexing a specific penalty, manifests an intention that the penalty shall be exclusive, and that contracts made before compliance with the statute are valid.[92] Other of the courts, however, hold that the annexation of a pen-

[90] In re Comstock, 3 Sawy. 218, Fed. Cas. No. 3,078; Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526; Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520; Hoffman v. Banks, 41 Ind. 1; Farmers' & Merchants' Ins. Co. v. Harrah, 47 Ind. 236; Union Cent. Life Ins. Co. v. Thomas, 46 Ind. 44; Bank of British Columbia v. Page, 6 Or. 435; Ætna Ins. Co. v. Harvey, 11 Wis. 395; Reliance Mut. Ins. Co. v. Sawyer, 160 Mass. 413, 36 N. E. 59; National Mut. Fire Ins. Co. v. Pursell, 10 Allen (Mass.) 232; Jones v. Smith, 3 Gray (Mass.) 500; Barbor v. Boehm, 21 Neb. 450, 32 N. W. 221; Northwestern Mut. Life Ins. Co. v. Elliott (C. C.) 5 Fed. 225; Myers Mfg. Co. v. Wetzel (Tenn. Ch. App.) 35 S. W. 896; Henni v. Fidelity Bldg. & Loan Ass'n, 61 Neb. 744, 86 N. W. 475, 87 Am. St. Rep. 519; Tri-State Amusement Co. v. Forest Park Highlands Amusement Co., 192 Mo. 404, 90 S. W. 1020, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808; A. Booth & Co. v. Weigand, 28 Utah, 372, 79 Pac. 570; United States Rubber Co. v. Butler Bros. Shoe Co. (C. C.) 132 Fed. 398. "When the Legislature prohibits an act," said the Illinois court, "or declares that it shall be unlawful to perform it, every rule of interpretation must say that the Legislature intended to interpose its power to prevent the act, and, as one of the means of prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give to the person or corporation or individual the same rights in enforcing prohibited contracts as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so places the person who violates the law on an equal footing with those who strictly observe its requirements." Cincinnati Mut. Health Assur. Co. v. Rosenthal, supra.

[91] Loomis v. People's Const. Co., 211 Fed. 453, 128 C. C. A. 125.

[92] Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925; Columbus Ins. Co. v. Walsh, 18 Mo. 229; Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67; Harris v. Runnels, 12 How. (U. S.) 79, 13 L. Ed. 901; Edison General Electric Co. v. Canadian Pac. Nav. Co., 8 Wash. 370, 36 Pac. 260, 24 L. R. A. 315, 40 Am. St. Rep. 910; La France Fire Engine Co. v. Town of Mt. Vernon, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827; Garratt Ford Co. v. Vermont Mfg. Co., 20 R. I. 189, 37 Atl. 948, 38 L. R. A. 545, 78 Am. St. Rep. 852; Jarvis-Conklin Mortg. Trust Co. v. Willhoit (C. C.) 84 Fed. 514.

alty renders all acts which subject the party to the penalty unlawful, and therefore unenforceable, under the generally accepted rules [93] that, where a statute prohibits an act and attaches a penalty, it renders the act unlawful, and that attaching a penalty without express prohibition is an implied prohibition.[94] If the statute is not in terms prohibitory, and the penalty is imposed as a tax, and for purposes of revenue, and not by way of punishment, it does not prohibit contracts before compliance with its terms.[95] Where a statute, as is sometimes the case, merely requires foreign corporations to file a copy of their charter, or observe other requirements, within a certain time after commencing business in the state, and imposes a penalty upon their officers or agents if they fail to do so, it has been held that it is not to be construed as prohibiting continuance of business after such failure, so as to avoid their contracts, the only penalty incurred being the penalty imposed by the statute.[96]

A statute making it unlawful for foreign corporations to do business without first complying with the requirements has no application to contracts entered into before its enactment.[97]

It is held that a statute forbidding any foreign corporation to do business in the state until it has complied with the conditions prescribed, and imposing a penalty for its violation, but which imposes no duty or prohibition upon persons dealing with a corporation which has not complied with the law, does not render its contracts void as to such persons, so as to prevent them from maintaining an action thereon. For instance, it is held that a policy of insurance issued by a foreign insurance company, which has not complied with the law so as to be entitled to do business in the state, though it cannot be enforced in the state by the foreign insurance

[93] Clark, Cont. (2d Ed.) 260.

[94] Dudley v. Collier, 87 Ala. 431, 6 South. 304, 13 Am. St. Rep. 55; Buxton v. Hamblen, 32 Me. 448; Thorne v. Travelers' Insurance Co., 80 Pa. 15, 21 Am. Rep. 89; Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743; McCanna & Fraser Co. v. Citizens' Trust & Surety Co., 76 Fed. 420, 24 C. C. A. 11, 35 L. R. A. 236; Chattanooga Nat. Bldg. & Loan Ass'n v. Denson, 189 U. S. 410, 23 Sup. Ct. 630, 47 L. Ed. 870 (Alabama statute); Hanchey v. Southern Home Building & Loan Ass'n, 140 Ala. 245, 37 South. 272.

[95] See Larned v. Andrews, 106 Mass. 435, 8 Am. Rep. 346.

[96] Northwestern Mut. Life Ins. Co. v. Overholt, 4 Dill. 287, Fed. Cas. No. 10,338; Kindel v. Beck & Pauli Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; Slauson v. Schwabacher, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948; Whitman Agricultural Co. v. Strand, 8 Wash. 647, 36 Pac. 682.

[97] Security Savings & Loan Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753; Standard Sewing Mach. Co. v. Frame, 2 Pennewill (Del.) 430, 48 Atl. 188; Richardson v. United States Mortgage & Trust Co., 194 Ill. 259, 62 N. E. 606; Keystone Mfg. Co. v. Howe, 89 Minn. 256, 94 N. W. 723.

company, may nevertheless be enforced by the assured. Some courts base this rule on the ground that the corporation is estopped to set up its noncompliance with the law to escape liability on its contracts.[98] Others base it upon the ground that the statute is intended for the protection of persons dealing with the corporation, and that the Legislature did not intend to avoid its contracts to their prejudice.[99] The New York Court of Appeals has said: "It is also contended by the defendant that as it is a foreign corporation and it does not appear affirmatively by the record that it had obtained a license to do business in this state pursuant to section 15 of the General Corporation Law, the contract should be held to be illegal and unenforceable. It is enough to say in answer to this proposition that the statute in question was not enacted for the benefit of foreign corporations. If the defendant has not obtained a license pursuant to such statute it cannot now take advantage of its failure to obey such statute to defeat an action brought against it in this state." [1]

Estoppel

If a corporation does business in another state without complying with the conditions precedent imposed by the state, it cannot escape liability on contracts made by it on the ground that it was not qualified to do business in the state. It is estopped to set up such a defense. It was so held by Judge Caldwell where a life insurance company set up such a defense to defeat an action on a policy issued by it. "By the fact of doing business in the state," he said, "it asserted a compliance with the laws of the state, and after enjoying all the benefits of that business, and receiving the money of the assured, it will not be heard to say that it never submitted 'to the jurisdiction of the state.' It can reap no advantage from its own wrong." [2] And the estoppel extends to agents and members of the corporation who participate in the unauthorized transactions.[3]

[98] See following paragraph.

[99] Pennypacker v. Capital Insurance Co., 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395; Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67; The Manistee, 5 Biss. 381, Fed. Cas. No. 9,027; Ehrman v. Teutonia Insurance Co. (D. C.) 1 Fed. 471. And see Gaul v. Kiel & Arthe Co., 199 N. Y. 472, 92 N. E. 1069; MAHAR v. HARRINGTON PARK VILLA SITES, 204 N. Y. 231, 97 N. E. 587, 38 L. R. A. (N. S.) 210, Wormser Cas. Corporations, 396.

[1] Gaul v. Kiel & Arthe Co., supra.

[2] Berry v. Knights Templars & Masons' Life Indemnity Co. (C. C.) 46 Fed. 439. And see Ehrman v. Teutonia Insurance Co. (D. C.) 1 Fed. 471; Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943; Watertown Fire Ins. Co. v. Rust, 141 Ill. 85, 30 N. E. 772; Sparks v. National Masonic Acc. Ass'n, 100

[3] Kilgore v Smith, 122 Pa. 48, 15 Atl. 698.

Some of the courts hold that, if a foreign corporation makes a contract which is within the powers conferred upon it by its charter, the other party cannot escape the obligations imposed upon him by the contract, nor dispute the rights of the corporation under it, on the ground that it had not complied with the law imposing conditions upon its right to do business in the state; the corporation being regarded as in the position of a de facto corporation, whose contracts are valid, the state only having the right to object, or else the other party being held to be estopped to dispute the validity of the contract.[4] Other courts take the position that the statute is based upon grounds of public policy, and the contract, being prohibited, is illegal and void, and that the doctrine of estoppel does not extend so far as to enable a person or corporation to do in effect what is forbidden by law. And they therefore hold that in such a case the other party to the contract is not estopped to show the illegality of the contract for the purpose of preventing a recovery upon it.[5] This would seem clearly to be the preferable view, since the public policy of the state is concerned.

Powers of Foreign Corporation—Limitation of Charter

The rule of comity by which a corporation is permitted to do business in another state than that by which it was created does not change its nature as a foreign corporation, or give it any powers which are not given by its charter. Nor does it exempt persons who deal with it from the effect of legislation by the state or country of its creation under power reserved under its law. "Though

Iowa, 466, 69 N. W. 678; Fisher v. Traders' Mut. Ins. Co., 136 N. C. 217, 48 S. E. 667. In re Naylor Mfg. Co. (D. C.) 135 Fed. 206.

[4] See ante, p. 97, as to de facto corporations. Sherwood v. Alvis, 83 Ala. 115, 3 South. 307, 3 Am. St. Rep. 695. In this case the defendant had obtained a loan from a foreign corporation engaged in lending money in Alabama, and had given a mortgage to secure the same. In an action by the purchaser at a sale under the mortgage for possession, the defendant contended that the mortgage was void because the corporation had no known place of business, or authorized agent, within the state, as required by law. It was held that he was estopped to set up such a defense. For other decisions in support of the test, see Wright v. Lee, 2 S. D. 596, 51 N. W. 706; Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544. And see American Loan & Trust Co. v. East & West R. Co. (C. C.) 37 Fed. 242; La France Fire Engine Co. v. Town of Mt. Vernon, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827; Rathbone, Sard & Co. v. Frost, 9 Wash. 162, 37 Pac. 298.

[5] In re Comstock, Fed. Cas. No. 3,078; Williams v. Cheney, 3 Gray (Mass.) 222; National Mut. Fire Ins. Co. v. Pursell, 10 Allen (Mass.) 232; Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520; Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 90, 8 Am. Rep. 626; Ætna Ins. Co. v. Harvey, 11 Wis. 395; Delaware River Quarry & Construction Co. v. Bethlehem & N. Pass. Ry. Co., 204 Pa. 22, 53 Atl. 533.

permitted to come into the local jurisdiction, and there exercise its powers, for the accomplishment of the purposes of its creation, it remains essentially a foreign corporation. It derives its vitality, its corporate capacity, its very life, from the law of its origin. Comity adds to it no new function, or greater powers than are bestowed upon it by its charter. That, being the instrument of the company's creation, and prescribing the limits of its legal existence, must exert the most obvious influence upon all its transactions; and, whether abroad or at home, it can do nothing which does not fairly fall within the scope and purpose of that instrument." [6] And persons dealing with a foreign corporation must take notice of the limitations in its charter, and also of the power over it reserved to the state or country to which it owes its being, and they are bound accordingly.[7] "Wherever a corporation goes for business, it carries its charter, as that is the law of its existence, and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere." [8]

The charter alone of the foreign corporation is recognized under the rule of comity, and not the general legislation of the state in which the corporation is formed. Such legislation has no extraterritorial force. Thus the New York statute law prohibiting preferential treatment of certain creditors in contemplation of insolvency has no force or application in Illinois.[9]

If a foreign corporation whose existence and legal organization are not disputed has made a contract in a state through agents employed by it, and a suit is brought against it thereon in such state, in such a manner that it is made amenable to the jurisdiction of the court, it is not necessary for the plaintiff, at the outset, to prove that it had the power under its charter to make the contract.[10]

[6] Wm. L. Murfree, Esq., in note to Republican Mountain Silver Mines v. Brown, 58 Fed. 644, 7 C. C. A. 419, 24 L. R. A. 776.

[7] Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527, 537, 3 Sup. Ct. 363, 369, 27 L. Ed. 1020; Hoyt v. Thompson's Ex'r, 19 N. Y. 207; Metropolitan Bank v. Godfrey, 23 Ill. 579, 609; Manhattan Life Ins. Co. v. Fields (Tex. Civ. App.) 26 S. W. 280. If the charter of a corporation, or the general laws of the state of its creation, prohibit certain contracts, as contracts between it and its officers or employés, the prohibition applies to contracts in another state. Rue v. Missouri Pac. Railway Co., 74 Tex. 474, 8 S. W. 533, 15 Am. St. Rep. 852.

[8] Canada Southern Ry. Co. v. Gebhard, supra.

[9] Warren v. First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746.

[10] McCluer v. Manchester & L. Railroad, 13 Gray (Mass.) 124, 74 Am. Dec. 624.

The rules recognized in some states, that one who contracts with a corporation cannot plead ultra vires to defeat an action on the contract, and that the corporation is estopped to set up such a defense in an action brought against it, where the contract has been executed on the side of the party suing, apply to foreign corporations. Thus a borrower from a foreign corporation, under this doctrine, cannot defeat an action by the corporation on a note or mortgage given by him, on the ground that the corporation had no authority under its charter to make the loan.[11] As we have seen, there is much conflict as to the effect of ultra vires contracts.[12]

Same—Limitations of the Local Laws

It does not follow, even when a corporation is recognized in another state, that it can exercise all the powers that are conferred upon it by its charter. Its powers also depend upon the law of the state in which they are exercised. In other words, its powers are limited, not only by its charter and the laws of the state of its creation, but also by the laws of the state in which it exercises them.[13] Thus, the laws of a state prohibiting corporations from holding real estate, or limiting their power in this respect, apply to foreign as well as to domestic corporations. And generally, in the absence of legislation changing the rule, a foreign corporation cannot exercise greater powers than the local laws allow to similar domestic corporations.[14]

[11] Pancoast v. Travelers' Insurance Co., 79 Ind. 172; Steam Nav. Co. v. Weed, 17 Barb. (N. Y.) 378.

[12] Ante, p. 210.

[13] Fowler v. Bell, 90 Tex. 150, 37 S. W. 1058, 39 L. R. A. 254, 59 Am. St. Rep. 788; Interstate Sav. & Loan Ass'n v. Strine, 58 Neb. 133, 78 N. W. 377; Id., 59 Neb. 27, 80 N. W. 45; Sokoloski v. New South Building & Loan Ass'n., 77 Miss. 155, 26 South. 361; Rio Grande & W. Ry. v. Telluride Power Transmission Co., 23 Utah, 22, 63 Pac. 995; State ex rel. St. Louis, K. C. & C. R. Co. v. Cook, 171 Mo. 348, 71 S. W. 829. The statute of New Jersey, declaring that the annual franchise or license fee imposed on corporations chartered by that state should be a preferred debt in case of insolvency, can have no extraterritorial effect, and such claim is not entitled to preference in insolvency proceedings against such corporations in another state. J. A. Holshouser Co. v. Gold Hill Copper Co., 138 N. C. 248, 50 S. E. 650, 70 L. R. A. 183. And see German-American Coffee Co. v. Diehl, 216 N. Y. 57, 109 N. E. 875.

[14] Runyan v. Coster's Lessee, 14 Pet. (U. S.) 122, 10 L. Ed. 382; Carroll v. City of East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; White v. Howard, 46 N. Y. 144; Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189; People v. Shedd, 241 Ill. 155, 89 N. E. 332; Walker v. Taylor, 252 Ill. 424, 96 N. E. 1055. A foreign corporation which has assumed the name of an older domestic corporation, which it could not obtain if incorporated in the state, will be enjoined from the use thereof, though it has complied with the registration laws, and thereby received a certificate to

If the charter of a corporation prohibits it from taking by devise, it cannot take in another state, though there may be no prohibitory statute in the latter state, for a prohibitory clause in the charter of a corporation cleaves to it everywhere.[15] It has been held, however, that a statute of wills of one state, since it has no extraterritorial effect, cannot prevent a corporation of that state from taking by devise in another state, where there is no such prohibition.[16] This decision would seem to be a sound one, but the contrary has been held in Illinois.[17] Where the laws of a state prohibit a corporation from taking land by devise, a devise in that state to a foreign corporation is void, though by its charter, and by laws of the state of its creation, it is authorized to take by devise.[18]

Same—Power to Acquire Real Estate

A foreign corporation may acquire and hold land, provided the transaction is not prohibited by the law of the state where the land lies or not contrary to its public policy.[19] As we have seen, if a corporation takes a conveyance of land for a purchase not authorized, or takes more land than it is authorized to take, the conveyance is not void, and only the state can object.[20] And some cases so hold even if the charter of the corporation contains an express provision against holding land.[21] In the case of a foreign corporation, the same rule is applied, and a conveyance to it will not be void because the transaction is not authorized by its charter, and its title is not to be open to collateral attack on that ground.[22] If the power of foreign corporations to acquire land is restricted by the law of the state where the land lies, a different question is presented; but here again the rule prevails that it is for the state to

do business in the state. American Clay Mfg. Co. v. American Clay Mfg. Co. of New Jersey, 198 Pa. 189, 47 Atl. 936. And see Philadelphia Trust, etc., Co. v. Philadelphia Trust Co. (C. C.) 123 Fed. 534; ante, p. 769.

[15] White v. Howard, 38 Conn. 342.

[16] Id.

[17] Starkweather v. American Bible Society, 72 Ill. 50, 22 Am. Rep. 133. See, also, Eaton v. Woman's Home Missionary Society of M. E. Church, 264 Ill. 88, 105 N. E. 746.

[18] White v. Howard, 46 N. Y. 144.

[19] Cowell v. Colorado Springs Co., 100 U. S. 55, 25 L. Ed. 547; American & F. Christian Union v. Yount, 101 U. S. 352, 25 L. Ed. 888; Lakeview Land Co. v. San Antonio Traction Co., 95 Tex. 252, 66 S. W. 766; Blodgett v. Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79; ante, p. 163.

[20] Ante, p. 206.

[21] Ante, p. 207.

[22] Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; Watts v. Gantt, 42 Neb. 869, 61 N. W. 104.

object, and that the title of the corporation is not open to collateral attack.[23] Under statutes imposing upon foreign corporations conditions precedent to doing business in the state, the question whether failure to comply with the conditions renders a conveyance to the corporation void must of course depend upon the terms and construction of the statute. In the absence of a clear intention on the part of the Legislature to declare the transaction void, however, it would seem that the same rule should apply, and that in such case the corporations acquire good title subject only to the right of the state to attack it.[24]

Corporations de Facto

A foreign corporation will be accorded the status of a corporation de facto, if it is a corporation de facto in the state by which it was created, and if it has complied with the law relating to foreign corporations. In such a case, persons who deal with it cannot attack its corporate existence on the ground of irregularity in organization. Any question affecting its right to transact business because of such irregularity is a matter of inquiry only for the state of its creation.[25]

Rights and Immunities of Members

The rights and immunities of members of foreign corporations are within the rule of comity, and must be respected. They cannot be held individually liable, for instance, for the debts or torts of the corporation, unless they are made so by its charter, or by some statute.[26]

Quo Warranto and Mandamus

Quo warranto is a proper remedy, unless excluded by statute; to try the right of a foreign corporation to carry on business in the state, and to oust it if it is without right.[27] The executive officers

[23] Seymour v. Slide & Spur Gold Mines, 153 U. S. 523, 14 Sup. Ct. 847, 38 L. Ed. 807; Carlow v. C. Aultman & Co., 28 Neb. 672, 44 N. W. 873; Galveston Land & Imp. Co. v. Perkins (Tex. Civ. App.) 26 S. W. 256; Myers v. McGavock, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627; McKinley-Lanning Loan & Trust Co. v. Gordon, 113 Iowa, 481, 85 N. W. 816. Cf. Myatt v. Ponca City Land & Imp. Co., 14 Okl. 220, 78 Pac. 185, 68 L. R. A. 810.

[24] Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; Carlow v. C. Aultman & Co., 28 Neb. 672, 44 N. W. 873; Louisville Property Co. v. City of Nashville, 114 Tenn. 213, 84 S. W. 810. And, see Hamilton v. Reeves & Co., 69 Kan. 844, 76 Pac. 418.

[25] Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; Bank of Toledo v. International Bank, 21 N. Y. 542.

[26] Merrick v. Van Santvoord, 34 N. Y. 208.

[27] State v. Fidelity & Casualty Ins. Co., 39 Minn. 538, 41 N. W. 108; State v. Insurance Co., 49 Ohio St. 440, 31 N. E. 658, 16 L. R. A. 611, 34 Am. St. Rep. 573; State v. Western Union Mut. Life Ins. Co., 47 Ohio St. 167, 24 N. E. 392, 8 L. R. A. 129; State ex rel. Philips v. Fidelity & Casualty Co.,

of the state, in issuing certificates to foreign corporations under the statutes, act in a ministerial capacity, and their determination is not judicial and final, but may be reviewed by the courts.[28]

Where the executive officer of the state charged with the duty of granting and revoking permits for foreign insurance companies to do business in the state is required to grant permits when certain conditions exist, and is not vested with discretionary power, mandamus will lie to compel him to grant a permit in a proper case.[29] But if he is invested with discretionary power, as where he is required to grant a permit when he "is satisfied with the capital, securities, investments," etc., of the corporation applying for it, or where he is given the power to revoke or refuse a permit, where, after an examination he "has reason to believe" that a statement made by a foreign corporation is false, his action cannot be controlled by mandamus.[30]

ACTIONS BY AND AGAINST

250. By the comity of states, a corporation created under the laws of one state or country may sue in the courts of another state or country unless otherwise provided by statute.

251. A foreign corporation cannot be sued in the courts of a state, unless jurisdiction can be obtained by service within the state upon an authorized agent. Provision is very generally made by statute for service upon particular officers of foreign corporations doing business in the state, and a corporation which does business within a state having such a statute impliedly submits to its jurisdiction.

252. A judgment recovered against a foreign corporation after due service of process on an authorized agent in the state is entitled, under the Constitution and laws of the United States, to the same faith and credit in all other states as in the state in which it was rendered.

77 Iowa, 648, 42 N. W. 509; State v. Standard Oil Co., 61 Neb. 28, 84 N. W. 413, 87 Am. St. Rep. 449; State v. American Book Co., 65 Kan. 847, 69 Pac. 563. And see MacGinniss v. Boston & M. Con. Copper & Silver Min. Co., 29 Mont. 428, 75 Pac. 89; Attorney General v. Electric Storage Battery Co., 188 Mass. 239, 74 N. E. 467, 3 Ann. Cas. 631.

[28] State v. Fidelity & Casualty Ins. Co., 39 Minn. 538, 41 N. W. 108; State v. Ins. Co., 49 Ohio St. 440, 31 N. E. 658, 16 L. R. A. 611, 34 Am. St. Rep. 573.

[29] Kansas Home Ins. Co. v. Wilder, 43 Kan. 731, 23 Pac. 1061.

[30] State ex rel. Dakota Hail Ass'n v. Carey, 2 N. D. 36, 49 N. W. 164; Dwelling-House Ins. Co. v. Wilder, 40 Kan. 561, 20 Pac. 265.

253. For the purposes of jurisdiction of actions in the federal courts, a corporation is a "citizen" or "inhabitant" of the state of its creation, and of that state only.

Actions by Foreign Corporations

It is well settled that, by the law of comity among nations, a corporation created by one sovereignty may assert its rights by suit in the courts of another sovereignty. The same law of comity prevails among the states of this Union, and it is the rule that, unless otherwise provided by statute, a foreign corporation may sue.[31]

Same—Statutes Imposing Conditions

Under some statutes imposing on foreign corporations conditions which they must comply with before doing business in the state, contracts entered into in violation of the statute are void, and in such case, of course, no action upon the contract, either in the state or the federal courts, can be maintained even if the conditions have been afterwards complied with.[32] If, however, the effect of the statute is not to render the contract void, an action may be maintained on the contract unless the statute otherwise provides.[33]

In some states by express provision of the statute a foreign corporation doing business in the state without complying with prescribed conditions cannot maintain an action in its courts on a contract growing out of such business. If the effect of the statute is to render such contracts void, no subsequent compliance can validate the contract or enable the corporation to maintain an action

[31] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; British American Land Co. v. Ames, 6 Metc. (Mass.) 391; Portsmouth Livery Co. v. Watson, 10 Mass. 91; Cone Export & Commission Co. v. Poole, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289; Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43; Emerson v. McCormick Machine Co., 51 Mich. 5, 16 N. W. 182; Henriques v. Dutch West India Co., 2 Ld. Raym. 1532; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; National Cash-Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285. The fact that the incorporators were residents of the state and that the object of the incorporation was to obtain the benefit of less rigorous laws could not defeat the right to sue. Cumberland Telegraph & Telephone Co. v. Louisville Home Telephone Co., 114 Ky. 892, 72 S. W. 4.

[32] Delaware River Quarry & Construction Co. v. Bethlehem & N. Pass. Ry. Co., 204 Pa. 22, 53 Atl. 533; Loomis v. People's Const. Co., 211 Fed. 453, 128 C. C. A. 125; ante, p. 777.

[33] C. B. Rogers & Co. v. Simmons, 155 Mass. 259, 29 N. E. 580; Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; National Cash-Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285; Garratt-Ford Co. v. Vermont Mfg. Co., 20 R. I. 187, 37 Atl. 948, 38 L. R. A. 545, 78 Am. St. Rep. 852.

thereon.[34] Where such is not the effect of the statute, it is generally held that a subsequent compliance is sufficient to enable the corporation to maintain a suit.[35] Because the corporation has not complied, it is not prevented from recovering on a counterclaim in an action brought by another,[36] or from appealing from a judgment in such an action.[37] In a few states it is enacted that a foreign corporation which has not complied with the statutory conditions cannot maintain a suit even on a contract made outside the state;[38] but generally the prohibition of the statutes is confined to doing business in the state, and the right to maintain an action on a contract made elsewhere is not affected.[39]

The prohibition against the maintenance of actions unless the corporation has complied with the statutory conditions is confined, expressly or by implication, to actions on contracts, and does not

[34] Delaware River Quarry & Construction Co. v. Bethlehem & N. Pass. Ry. Co., supra.

[35] Simplex Dairy Co. v. Cole (C. C.) 86 Fed. 739; Neuchatel Asphalte Co. v. Mayor, etc., of New York, 155 N. Y. 373, 49 N. E. 1043; Security Savings & Loan Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753; Chicago Mill & Lumber Co. v. Sims, 101 Mo. App. 569, 74 S. W. 128; State v. American Book Co., 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56. And see Sutherland-Innes Co. v. Chaney, 72 Ark. 327, 80 S. W. 152; Iowa Falls Mfg. Co. v. Farrar, 19 S. D. 632, 104 N. W. 449; MAHAR v. HARRINGTON PARK VILLA SITES, 204 N. Y. 231, 97 N. E. 587, 38 L. R. A. (N. S.) 210, Wormser Cas. Corporations, 396. Contra, G. Heileman Brewing Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441; Sherman Nursery Co. v. Aughenbaugh, 93 Minn. 201, 100 N. W. 1101. Compliance after commencement of suit is enough. Carson-Rand Co. v. Stern, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420; Hamilton v. Reeves & Co., 69 Kan. 844, 76 Pac. 418. And see Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87. If the corporation cannot sue, an assignee has no better right to sue. Texas & P. Ry. Co. v. Davis, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562; Kinney v. Reid Ice Cream Co., 57 App. Div. 206, 68 N. Y. Supp. 325. The prohibition by a state of the maintenance of an action by a foreign corporation does not prohibit or limit the right of such corporation to sue in the federal courts. Blodgett v. Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79; LUPTON'S SONS CO. v. AUTOMOBILE CLUB OF AMERICA, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699, Wormser Cas. Corporations, 400.

[36] J. R. Alsing Co. v. New England Quartz & Spar Co., 66 App. Div. 473, 73 N. Y. Supp. 347.

[37] Swift & Co. v. Platte, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635.

[38] See J. Walter Thompson Co. v. Whitehed, 185 Ill. 454, 56 N. E. 1106.

[39] White River Lumber Co. v. Southwestern Imp. Ass'n, 55 Ark. 625, 18 S. W. 1055; Ware Cattle Co. v. Anderson, 107 Iowa, 231, 77 N. W. 1026; Slaytor-Jennings Co. v. Specialty Paper Box Co., 69 N. J. Law, 214, 54 Atl. 247; Mason v. Edward Thompson Co., 94 Minn. 472, 103 N. W. 507. But see Seamans v. Temple Co., 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457.

extend to actions for torts committed in the state, or to other actions growing out of the invasion of rights of property.[40]

Actions against Foreign Corporations

Formerly it was held that a foreign corporation could not be sued for the recovery of a personal demand outside of the state by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves the state, so as to render service of process upon him service upon the corporation, prevented personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction.[41] With the growth of corporations, the doctrine of the exemption of foreign corporations from suit caused much inconvenience and injustice, and to obviate this the Legislatures of the several states interposed, and provided for service of process upon officers and agents of foreign corporations doing business therein. These statutes, which usually provide that before doing business in the state the corporation shall appoint an agent for service of process upon it, are valid, as we have seen; for a state has a right to impose conditions upon allowing a foreign corporation to do business.[42] If a foreign

[40] American Typefounders' Co. v. Conner, 6 Misc. Rep. 391, 26 N. Y. Supp. 742; Joseph Schlitz Brewing Co. v. Ester, 86 Hun, 22, 33 N. Y. Supp. 143; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83; Delaware & A. Telegraph & Telephone Co. v. Pensauken Tp. (C. C.) 116 Fed. 910. Cf. St. Louis Expanded Metal Fireproofing Co. v. Beilharz (Tex. Civ. App.) 88 S. W. 512. Cf. Bischoff v. Automobile Touring Co., 97 App. Div. 17, 89 N. Y. Supp. 594; Parmele Co. v. Haas, 171 N. Y. 579, 64 N. E. 440.

[41] Per Mr. Justice Field, in ST. CLAIR v. COX, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, 357, Wormser Cas. Corporations, 412. See McQueen v. Middletown Manufacturing Co., 16 Johns. (N. Y.) 5; Peckham v. Inhabitants of North Parish in Haverhill, 16 Pick. (Mass.) 274, 286.

[42] Milwaukee Trust Co. v. Germania Ins. Co., 106 La. 669, 31 South. 298. Where the Tennessee statute provided for service of process on a particular person in behalf of a foreign corporation, and pursuant thereto a nonresident company appointed such person as its agent to receive process, and a later act provided that service might be made on any other agent, by thereafter continuing to do business in the state the company assented to the terms of the later act, at least to the extent of consenting to service of process on an agent so far representative in character that the law would imply authority in him to receive such service within the state. Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569. A provision in a contract between a foreign building and loan association and a resident of the state requiring all actions against the association to be brought in the state of the company's incorporation was void, as opposed to the settled policy of the state, as indicated by an act subsequently passed, requiring foreign building and loan associations to consent that legal notice of suit against

corporation comes into a state in which there is such a law, and transacts business there, it impliedly submits to the jurisdiction of the state, and will be bound when served with process in the manner provided.[43] "The state may," said Mr. Justice Field in St. Clair v. Cox,[44] "impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that, in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated, and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of process." [45]

them might be served upon the auditor. Field v. Eastern Building & Loan Ass'n, 117 Iowa, 185, 90 N. W. 717.

[43] Smith v. Empire State-Idaho Mining & Development Co. (C. C.) 127 Fed. 462; J. B. Watkins Land-Mortg. Co. v. Elliott, 62 Kan. 291, 62 Pac. 1004, 84 Am. St. Rep. 385. And see Henrietta Mining & Milling Co. v. Johnson, 173 U. S. 221, 19 Sup. Ct. 402, 43 L. Ed. 675; Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492. If the corporation transacts business without appointing an agent, service may be had on a resident agent. Moch v. Virginia F. & M. Ins. Co. (C. C.) 10 Fed. 696; Funk v. Anglo-Am. Ins. Co. (C. C.) 27 Fed. 336. If the statute requires the corporation to file a stipulation that process may be served on a designated state officer, and the corporation transacts business without filing the stipulation, service may nevertheless be made upon such officer. Ehrman v. Teutonia Ins. Co. (D. C.) 1 Fed. 471; Masons' Fraternal Acc. Ass'n v. Riley, 60 Ark. 578, 31 S. W. 148. Contra, Rothrock v. Dwelling House Ins. Co., 161 Mass. 423, 37 N. E. 206, 23 L. R. A. 863, 42 Am. St. Rep. 418. "The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there." Per Mr. Justice Gray, in Barrow S. S. Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964.

[44] 106 U. S. 350, 1 Sup. Ct. 354, 360, 22 L. Ed. 222, Wormser Cas. Corporations, 412.

[45] And see Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451; Colorado Iron Works v. Sierra Grande Min. Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433; Baltimore & O. R. Co. v. Gallahue's Adm'r, 12 Grat. (Va.) 655, 65 Am. Dec. 254; Baltimore & O. Railroad Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354; Moulin v. Trenton Mut. Life & Fire Insurance Co., 24 N. J. Law, 222; Id., 25 N. J. Law, 57; Wilson v. Martin-Wilson Automatic Fire-Alarm Co., 149 Mass. 24, 20 N. E. 318; Day v. Essex County Bank, 13 Vt. 97, 101; Gibbs v. Queen Insurance Co., 63 N. Y. 114, 20 Am. Rep. 513; Emerson v. Mc-

The power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law.[46] The doctrine might be extended to any cause of action where the corporation has designated expressly a person upon whom process may be served.[47]

To hold a corporation liable in a foreign jurisdiction it must appear that the corporation was doing business therein to such an extent as to subject itself to the jurisdiction, and further that process was duly served upon one of its authorized agents.[48]

By the weight of authority, statutes to the contrary notwithstanding, service upon a person as the agent of a foreign corporation will be binding upon the corporation only when such person represents the corporation. The mere fact that the person upon whom service is made is an officer of the corporation does not render the service equivalent to service upon the corporation, so as to give the court jurisdiction over it. He must be in the state as the representative of the corporation. Furthermore he must sustain such a relation to his corporation that notice to him may be deemed notice to his principal, without a violation of the ordinary concepts of justice. If a corporation should send an agent into another state to make contracts there on its behalf, service on him in an action on a contract so made, in accordance with the laws of the state, would bind the corporation.[49] But if an officer of the corporation

Cormick Machine Co., 51 Mich. 5, 16 N. W. 182; Green v. Equitable Mut. Life Ins. & Endowment Ass'n, 105 Iowa, 628, 75 N. W. 635; State ex rel. Watkins v. North American Land & Timber Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309; Doctor v. Desmond, 80 N. J. Eq. 77, 82 Atl. 522; St. Louis Southwestern Ry. Co. of Texas v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77.

[46] Old Wayne Mut. Life Ass'n of Indianapolis, Ind., v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345; Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492.

[47] Smolik v. Philadelphia & Reading Coal & Iron Co. (D. C.) 222 Fed. 148; BAGDON v. PHILADELPHIA & READING COAL & IRON CO., 217 N. Y. 432, 111 N. E. 1075, Wormser Cas. Corporations, 424. In the last case cited, in an action by a resident of New York against a foreign corporation doing business in the state on a cause of action arising without the state, the court held that service of process upon the agent designated by the corporation for accepting service, was proper.

[48] St. Louis Southwestern Ry. Co. of Texas v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77; Doctor v. Desmond, 80 N. J. Eq. 77, 82 Atl. 522.

[49] See cases above cited. Service of process on a general officer of a foreign corporation, who voluntarily came into the state to adjust a difference between the corporation and plaintiff with reference to the subject-matter of the suit, while such agent was within the state, was sufficient to confer

should go into the state, not as the representative of the corporation, but on business of his own, service on him would not bind the corporation, either in the state or in the federal courts.[50] Where the president of a foreign corporation came to New York to settle a claim for wrongful death in the state of the domicile of the corporation, the federal court held that this was not such a doing of business by the corporation as to confer jurisdiction on the New York courts by service of process on the president while so engaged.[51] The mere fact that one who is a director, but is not a resident agent, of a foreign corporation resides within a state, does not give the courts of that state jurisdiction over a corporation which is not doing business and has no resident agent therein.[52] And the test of the right to acquire jurisdiction was declared to be the "character and power of the one served as an agent of the corporation." [53] It was recently held in New Jersey that the statute authorizing personal service of process in the state on a director of a foreign corporation does not authorize service on a director of a foreign corporation who is in the state in attendance at a stockholders' meeting of a domestic corporation to vote stock owned by the foreign corporation in the domestic corporation, no other business of the foreign corporation having been at any time transacted

jurisdiction of the corporation. Brush Creek Coal & Mining Co. v. Morgan-Gardner Electric Co. (C. C.) 136 Fed. 505. But see Hoyt v. Ogden Portland Cement Co. (C. C.) 185 Fed. 889, 898, doubting the soundness of this decision.

[50] Newell v. Great Western Railway Co. of Canada, 19 Mich. 336; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Moulin v. Trenton Mut. Life & Fire Insurance Co., 24 N. J. Law, 222, 224; Good Hope Co. v. Railway Barb Fencing Co. (C. C.) 22 Fed. 635; Bentlif v. London & Colonial Finance Corp. (C. C.) 44 Fed. 667; State v. District Court of Ramsey County, 26 Minn. 233, 2 N. W. 698; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; RIVERSIDE & DAN RIVER COTTON MILLS v. MENEFEE, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910, Wormser Cas. Corporations, 420. Carstens & Earles v. Leidigh & H. Lumber Co., 18 Wash. 450, 51 Pac. 1051, 39 L. R. A. 548, 63 Am. St. Rep. 906; Mecke v. Valleytown Mineral Co., 93 Fed. 697, 35 C. C. A. 151; Scott v. Stockholders' Oil Co. (C. C.) 122 Fed. 835; Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co. (C. C.) 124 Fed. 259; Louden Machinery Co. v. American Mal. Iron Co. (C. C.) 127 Fed. 1009; Puster v. Parker Mercantile Co., 70 N. J. Eq. 771, 59 Atl. 232, 67 Atl. 1102.

[51] Hoyt v. Ogden Portland Cement Co. (C. C.) 185 Fed. 889.

[52] RIVERSIDE & DAN RIVER COTTON MILLS v. MENEFEE, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910, Wormser Cas. Corporations, 420.

[53] RIVERSIDE & DAN RIVER COTTON MILLS v. MENEFEE, supra; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. Contra, semble, Grant v. Cananea Consol. Copper Co., 189 N. Y. 241, 82 N. E. 191. But see BAGDON v. PHILADELPHIA & READING COAL & IRON CO., 217 N. Y. 432, 111 N. E. 1075, Wormser Cas. Corporations, 424.

in the state.[54] The point is that an officer of a foreign corporation may be in a foreign jurisdiction without bringing the corporation itself within the jurisdiction. The officer must be there "officially, representing the corporation in its business." [55] To give judgment in violation of this principle is to condemn the corporation unheard and to ignore the essentials of due process of law.[56]

The foregoing is the settled rule of the federal courts, and of most of the state courts, but it is not fully recognized by all of the state courts.[57] In New York it is provided that personal service of the summons upon a foreign corporation in an action for a cause arising in the state may be made by delivering a copy thereof, within the state, to the president, secretary, or treasurer, or a director thereof; and it has been held that it is not necessary that the officer served shall be in the state in his official capacity or engaged in the business of the corporation, nor that the corporation shall have property, or even do business, or have a place of business, in the state.[58] Thus it was recently held that jurisdiction over a foreign corporation which neither had done nor was authorized to do business in New York might be obtained by service of summons upon its treasurer, a resident of a foreign state, while passing casually through New York.[59] It must be borne in mind, however, that it

[54] Doctor v. Desmond, 80 N. J. Eq. 77, 82 Atl. 522.

[55] RIVERSIDE & DAN RIVER COTTON MILLS v. MENEFEE, 237 U. S. 189, 192, 35 Sup. Ct. 579, 59 L. Ed. 910, Wormser Cas. Corporations, 420. Kendall v. American Automatic Loom Co., 198 U. S. 477, 25 Sup. Ct. 768, 49 L. Ed. 1133; Conley v. Mathieson Alkali Works, supra; Goldey v. Morning News, supra. And see BAGDON v. PHILADELPHIA & READING COAL & IRON CO., 217 N. Y. 432, 111 N. E. 1075, Wormser Cas. Corporations, 424.

[56] RIVERSIDE & DAN RIVER COTTON MILLS v. MENEFEE, supra; BAGDON v. PHILADELPHIA & READING COAL & IRON CO., supra.

[57] Hiller v. Burlington & M. Railroad Co., 70 N. Y. 223; Pope v. Terre Haute Car & Manufacturing Co., 87 N. Y. 137; Sadler v. Boston & Bolivia Rubber Co., 140 App. Div. 367, 125 N. Y. Supp. 405, affirmed 202 N. Y. 547, 95 N. E. 1139; Grant v. Cananea Consol. Copper Co., 189 N. Y. 241, 82 N. E. 191; Klopp v. Creston City Guarantee Water Works Co., 34 Neb. 808, 52 N. W. 819, 33 Am. St. Rep. 666; Jester v. Baltimore Steam Packet Co., 131 N. C. 54, 42 S. E. 447; Payne & Joubert v. East Union Lumber Co., 109 La. 706, 33 South. 739. And see Houston v. Filer & Stowell Co. (C. C.) 85 Fed. 757; Weston v. Citizens' Nat. Bank, 64 App. Div. 145, 71 N. Y. Supp. 827. But see the recent case of BAGDON v. PHILADELPHIA & READING COAL & IRON CO., 217 N. Y. 432, 111 N. E. 1075, Wormser Cas. Corporations, 424.

[58] Hiller v. Burlington & M. Railroad Co., supra; Pope v. Terre Haute Car & Manufacturing Co., supra; Grant v. Cananea Consol. Copper Co., supra. But see BAGDON v. PHILADELPHIA & READING COAL & IRON CO., 217 N. Y. 432, 111 N. E. 1075, Wormser Cas. Corporations, 424; and note, 2 Fordham Law Rev. 101–103; Magnola Metal Co. v. Savannah Supply Co. (Sup.) 157 N. Y. Supp. 355.

[59] Sadler v. Boston & Bolivia Rubber Co., 140 App. Div. 367, 125 N. Y. Supp.

is only by coming into the state that a foreign corporation submits to the jurisdiction, and that, even if service is made in the manner required by statute, the court acquires no jurisdiction over it, unless it is doing business in the state.[60] If the corporation does transact business in the state, unless the statute otherwise provides, it is amenable to process even in an action upon a cause of action which arose outside the state, whether the action is one of contract or of tort.[61]

When a corporation is doing business in the jurisdiction and is represented therein by an officer, he is its agent to accept service, though the cause of action has no relation to the business transact-

405, affirmed 202 N. Y. 547, 95 N. E. 1139. The opinion of Clarke, J., in the court below, clearly indicated the serious conflict between the New York and the federal cases.

In a recent decision, Magnola Metal Co. v. Savannah Supply Co. (Sup.) 157 N. Y. Supp. 355, the New York court held that where a summons in an action against a foreign corporation, having no office or property within the state, was served upon its president, who was not in the state on any business of the corporation, the service was void, since this was not due process of law under the Fourteenth Amendment. The decision, in effect, overrules the earlier New York cases to the contrary, and follows the federal rule enunciated in RIVERSIDE & DAN RIVER COTTON MILLS v. MENEFEE, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910, Wormser Cas. Corporations, 420. See, also, BAGDON v. PHILADELPHIA & READING COAL & IRON CO., 217 N. Y. 432, 111 N. E. 1075, Wormser Cas. Corporations, 424.

[60] ST. CLAIR v. COX, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, Wormser Cas. Corporations, 412; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; St. Louis Southwestern Ry. Co. of Texas v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77; Boardman v. S. S. McClure Co. (C. C.) 123 Fed. 614; Central Grain & Stock Exchange of Hammond v. Board of Trade of City of Chicago, 125 Fed. 463, 60 C. C. A. 299; Earle v. Chesapeake & O. Ry. Co. (C. C.) 127 Fed. 235; Martin v. New Trinidad Lake Asphalt Co. (C. C.) 130 Fed. 394; Crook v. Gifard Iron & Metal Co., 87 Md. 138, 39 Atl. 94, 67 Am. St. Rep. 325; Greaves v. Posner, 111 Iowa, 651, 82 N. W. 1022; Walter A. Zelnicker Supply Co. v. Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321; Remington v. Central Pac. R. Co., 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959; Kendall v. American Automatic Loan Co., 198 U. S. 477, 25 Sup. Ct. 768, 49 L. Ed. 1133. Service of summons within the state on the directors of a foreign insurance company residing in the state, as provided by the New York statute, when the cause of action arises therein, is a valid service if the company is doing business in the state, and confers jurisdiction on a federal court sitting in that state. Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810.

[61] Barrow S. S. Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; Smith v. Empire State-Idaho Mining & Development Co. (C. C.) 127 Fed. 462; Insurance Co. of North America v. McLimans, 28 Neb. 653, 44 N. W. 991; Humphreys v. Newport News & M. V. Co., 33 W. Va. 135, 10 S. E. 39. Contra, Olson v. Buffalo Hump Min. Co. (C. C.) 130 Fed. 1017 (Washington statute).

ed in the state.[62] And the Court of Appeals of New York recently held, distinguishing two federal cases,[63] that where a foreign corporation doing business in a state has designated a person as an agent upon whom process against the corporation may be served as provided in the state statute, the agency of such person is not limited to actions which arise out of business transacted in the state, but extends to causes of action arising in other states as well.[64]

If a foreign corporation has property so situated within the limits of a state, and under its jurisdiction, that it may be attached by the ordinary process of law, a suit may be there maintained against the corporation by an attachment of the property, as it might against a foreign individual having property so situated, though a personal judgment could not be rendered against the corporation.[65] And, in general, if a foreign corporation has property within the limits of a state, the courts have jurisdiction to the extent of controlling its disposition.[66]

A foreign corporation may, of course, waive its right to object to the jurisdiction.[67] And it is held that a foreign corporation by setting up a counterclaim thereby submits to the jurisdiction of the court.[68]

Same—Ceasing to do Business in the State

Where the statute provides for service of process upon officers and agents of foreign corporations doing business in the state, as we have seen a foreign corporation, by transacting business in the state, impliedly consents to be sued and submits to the jurisdiction. Accordingly, if it ceases to do business in the state, and has designated no agent on whom services can be made, it can no longer be sued.[69] Some statutes provide that the corporation shall name

[62] Barrow S. S. Co. v. Kane, supra. And see other cases cited in preceding notes.

[63] Old Wayne Mut. Life Ass'n of Indianapolis, Ind., v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345; Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492.

[64] BAGDON v. PHILADELPHIA & READING COAL & IRON CO., 217 N. Y. 432, 111 N. E. 1075, Wormser Cas. Corporations, 424. And see Smolik v. Philadelphia & Reading Coal & Iron Co. (D. C.) 222 Fed. 148.

[65] Blackstone Mfg. Co. v. Inhabitants of Blackstone, 13 Gray (Mass.) 488; Hodgson v. Southern Building & Loan Ass'n, 91 Md. 439, 46 Atl. 971; Chitty v. Pennsylvania Ry. Co., 62 S. C. 526, 40 S. E. 944. See, also, Strom v. Montana Central Ry. Co., 81 Minn. 346, 84 N. W. 46.

[66] People's Nat. Bank v. Cleveland, 117 Ga. 908, 44 S. E. 20; Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574.

[67] Grant v. Cananea Consol. Copper Co., 189 N. Y. 241, 82 N. E. 191.

[68] Texas & Pacific Ry. Co. v. Eastin & Knox, 214 U. S. 153, 159, 29 Sup. Ct. 564, 53 L. Ed. 946.

[69] Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47

some person on whom service of process can be made, and under such a statute the death or removal of the agent from the state, or the revocation of his authority, leaves the corporation without any agent on whom process can be served.[70] To remedy his defect many statutes provide that service shall be made upon a permanent official of the state, so that death, removal, or change of officer shall not put the corporation beyond the reach of the process of the courts; and under such statutes a withdrawal of the authority is not operative to deprive the courts of jurisdiction of actions which have arisen out of transactions entered into by the company while doing business in the state.[71] A few separate and disconnected transactions by a foreign corporation after its withdrawal from a state, all relating to matters existing before such withdrawal, do not constitute doing business in the state, so as to preclude such a corporation from revoking the power of attorney to accept process given by it to a state officer as required by a statute of the state in order to enable it to enter and do business in the state.[72]

L. Ed. 1113; Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122; Cady v. Associated Colonies (C. C.) 119 Fed. 421. But see McCord Lumber Co. v. Doyle, 97 Fed. 22, 38 C. C. A. 34.

[70] Forrest v. Pittsburgh Bridge Co., 116 Fed. 357, 53 C. C. A. 577.

[71] Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; Collier v. Mutual Reserve Fund Life Ass'n (C. C.) 119 Fed. 617; Davis v. Kansas & Texas Coal Co. (C. C.) 129 Fed. 149; Home Benefit Soc. of New York v. Muehl, 109 Ky. 479, 59 S. W. 520; Magoffin v. Mutual Reserve Fund Life Ass'n, 87 Minn. 260, 91 N. W. 1115, 94 Am. St. Rep. 699; Groel v. United Electric Co. of New Jersey, 69 N. J. Eq. 397, 60 Atl. 822; Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519, appeal dismissed 200 U. S. 623, 26 Sup. Ct. 754, 50 L. Ed. 625; Johnson v. Mutual Reserve Life Ins. Co., 45 Misc. Rep. 316, 90 N. Y. Supp. 539, affirmed Johnston v. Same, 104 App. Div. 544, 93 N. Y. Supp. 1048, 1052, 1062; Moore v. Mutual Reserve Fund Life Ass'n, 129 N. C. 31, 39 S. E. 637; Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667. Contra, Swann v. Mutual Reserve Fund Life Ass'n (C. C.) 100 Fed. 922; Friedman v. Empire Life Ass'n (C. C.) 101 Fed. 535. These two cases must now be regarded as overruled by Mutual Reserve Fund Life Ass'n v. Phelps, supra. See Mutual Reserve Fund Life Ass'n v. Tuchfeld, 159 Fed. 833, 86 C. C. A. 657. Where a foreign insurance company appointed agents in a state, and did business therein, it is conclusively presumed to have assented to a statute providing that, when such company ceased to do business in such state, the agent last designated by it to receive service shall be deemed to continue as its attorney for such purpose. Green v. Equitable Mut. Life & Endowment Ass'n, 105 Iowa, 628, 75 N. W. 635.

[72] Hunter v. Mutual Reserve Life Ins. Co., 218 U. S. 573, 31 Sup. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686, affirming 184 N. Y. 136, 76 N. E. 1072, 30 L. R. A. (N. S.) 677, 6 Ann. Cas. 291; Hunter v. Mutual Reserve Life Ins. Co., 192 N. Y. 85, 84 N. E. 576. Cf. Mutual Reserve Life Ins. Co. v. Birch, 200 U. S. 612, 26 Sup. Ct. 752, 50 L. Ed. 620; COMMERCIAL MUTUAL ACC. CO. v. DAVIS, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782, Wormser Cas. Corporations, 407.

Same—Who May Sue

As a rule a foreign corporation may be sued by a nonresident as well as by a citizen.[73] In some states, however, it is enacted that a foreign corporation may be sued by a nonresident or by another foreign corporation only upon a cause of action which arises within the state.[74] Such a provision in discriminating between resident and nonresident plaintiffs, is not repugnant to the provisions of the federal constitution, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states;[75] nor is it unconstitutional, as denying full faith

[73] Johnson v. Trade Insurance Co., 132 Mass. 432; Youmans v. Minnesota Title Ins. & Trust Co. (C. C.) 67 Fed. 282. A foreign corporation may be sued, for a personal tort committed abroad, in a federal court in New York, by serving process upon the agents conducting its business there, though, by the state statutes, service upon such agents would not be sufficient to bring the corporation within the jurisdiction of the state courts. Barrow S. S. Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964. See, also, Western Union Tel. Co. v. Shaw, 33 Tex. Civ. App. 395, 77 S. W. 433; Reeves v. Southern Ry. Co., 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513, 2 Ann. Cas. 207.

[74] See Robinson v. Oceanic Steam Nav. Co., 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; Strawn v. Edward J. Brandt-Dent Co., 71 App. Div. 234, 75 N. Y. Supp. 698, affirmed 175 N. Y. 463, 67 N. E. 1090; Coolidge v. American Realty Co., 91 App. Div. 14, 86 N. Y. Supp. 318; Emerson T. & Co. v. McCormick Mach. Co., 51 Mich. 5, 16 N. W. 182; Central Railroad & Banking Co. v. Georgia Construction & Invest. Co., 32 S. C. 319, 11 S. E. 192; Bryan v. Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938. The New York statute (Code Civ. Proc.) reads as follows: "Sec. 1780. When foreign corporation may be sued. An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a nonresident, in one of the following cases only: 1. Where the action is brought to recover damages for the breach of a contract made within the state or relating to property situated within the state, at the time of the making thereof. 2. Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state. 3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state. 4. Where a foreign corporation is doing business within this state." It has been held that the newly added fourth subdivision (Laws 1913, c. 60) applies only to the defendant and does not give the court jurisdiction where plaintiff only is doing business within the state. Hence a complaint by one foreign corporation against another foreign corporation, which fails to allege that defendant is doing business within the state of New York, does not state a cause of action. United States Asphalt Refining Co. v. Comptoir National D'Escompte De Paris, 166 App. Div. 64, 151 N. Y. Supp. 604. It has been held that the provisions of section 1780, Code Civ. Proc. do not affect the inherent power of a court of equity to take jurisdiction when invoked in a case falling within some subject of equity jurisdiction. Trotter v. Lisman, 209 N. Y. 174, 102 N. E. 575.

[75] Robinson v. Oceanic Steam Nav. Co., supra; Central Railroad & Banking Co. v. Georgia Construction & Invest. Co., supra.

and credit to the judgment of another state, in so far as it precludes the maintenance of an action on such judgment by a foreign corporation.[76] In an action, under these circumstances against a foreign corporation it is necessary for plaintiff affirmatively to plead the requisite jurisdictional facts.[77]

Effect of Judgment against Foreign Corporation

A judgment recovered against a foreign corporation after due service of process on an authorized agent in the state is entitled, under the Constitution and laws of the United States, to the same faith and credit in all other states as in the state in which it was rendered.[78] A judgment against a corporation in one state can always be attacked in another state by showing that the court acquired no jurisdiction to render a personal judgment against it. And, to sustain a personal judgment against a foreign corporation, there must have been personal service upon an authorized agent within the state, or a voluntary appearance by the corporation.[79] In St. Clair v. Cox,[80] it was held: (1) That, when service is made

[76] Anglo-American Provision Co. v. Davis Provision Co. No. 1, 191 U. S. 373, 24 Sup. Ct. 92, 48 L. Ed. 225. And see Fauntleroy v. Lum, 210 U. S. 230, 284, 28 Sup. Ct. 641, 52 L. Ed. 1039; Sioux Remedy Co. v. Cope, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. 193. In the last cited case, the court indicated that a state may not impose a burden on suit by a foreign corporation which would thereby also burden interstate commerce.

[77] Ladenburg v. Commercial Bank, 87 Hun, 269, 33 N. Y. Supp. 821, affirmed 146 N. Y. 406, 42 N. E. 543.

[78] Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. Ed. 451.

[79] ST. CLAIR v. COX, 106 U. S. 350, 1 Sup. Ct. 354, 22 L. Ed. 222, Wormser Cas. Corporations, 412. If the corporation appears generally, the court acquires jurisdiction. Moffitt v. Chicago Chronicle Co., 107 Iowa, 407, 78 N. W. 45; Wineburgh v. United States Steam & Street Railway Advertising Co., 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261; Newcomb v. New York Central & H. R. R. Co., 182 Mo. 687, 81 S. W. 1069. The filing of a petition and bond for the removal of a cause from a state to a federal court, and the proceedings thereon, do not constitute such a general appearance as will prevent the federal court from setting aside the service as illegal and void. Farmer v. National Life Ass'n of Hartford, Conn. (C. C.) 50 Fed. 829, appeal dismissed 163 U. S. 685, 16 Sup. Ct. 1201, 41 L. Ed. 318 (special appearance in federal court). Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517 (special appearance in both state and federal courts).

[80] 106 U. S. 350, 1 Sup. Ct. 354, 22 L. Ed. 222, Wormser Cas. Corporations, 412. And see Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810. See, also, Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; Central Grain & Stock Exch. of Hammond v. Board of Trade of City of Chicago, 125 Fed. 463, 60 C. C. A. 299; Earle v. Chesapeake & O. R. Co. (C. C.) 127 Fed. 235; Jackson v. Delaware River Amusement Co. (C. C.) 131 Fed. 134; Higham v. Iowa State Travelers' Ass'n (C. C.) 183 Fed. 845, 847; Chinn v. Foster-Milburn Co. (D. C.) 195 Fed. 158, 161; Eureka Mercantile Co. v. California Ins.

within a state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the state court to render a personal judgment which will be recognized by the federal courts as binding upon the corporation, that it shall appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or finding of the court—that the corporation was engaged in business in the state. (2) That if the transaction of business by the corporation in the state, general or special, appears, a certificate of service by the proper officer on a person who was its agent there is prima facie evidence that the agent represented the company in the business, but it may be shown, when the record is offered as evidence in another jurisdiction, that the agent did not represent the corporation; that his duties were limited to those of a subordinate employé, or to a particular transaction; or that his agency had ceased when the matter in suit arose. (3) That where there is nothing in the record offered in evidence to show that the corporation was engaged in business in the state where service was made on its agent, and the return of the officer gives no information on the subject, so that it does not appear, even prima facie, that the alleged agent stood in any such representative character to the company as could justify service upon him, the record is properly excluded.

VISITORIAL POWER OVER FOREIGN CORPORATIONS

254. The courts of a state have no visitorial power over foreign corporations, nor jurisdiction to regulate their internal affairs, or their management. Such matters as these are of local administration, and should be relegated to the courts of the state under the laws of which the corporation was organized.

This, as a general proposition, is well settled. Courts of one state will not assume to regulate the internal management of a foreign corporation. Such power and jurisdiction belong solely to the courts of the state in which the corporation was created. It has been suggested that the refusal to adjudicate such controversies is

Co., 130 Cal. 153, 62 Pac. 393; J. B. Watkins Land-Mtg. Co. v. Elliott, 62 Kan. 291, 62 Pac. 1004, 84 Am. St. Rep. 385. In New York the rule as to (3) is seemingly otherwise. Sadler v. Boston & Bolivia Rubber Co., 140 App. Div. 367, 125 N. Y. Supp. 405, affirmed 202 N. Y. 547, 95 N. E. 1139. But see the recent significant dicta in BAGDON v. PHILADELPHIA & READING COAL & IRON CO., 217 N. Y. 432, 111 N. E. 1075, Wormser Cas. Corporations, 424.

due to absence of jurisdiction in the strict sense, or to inability to make a decree effective, or to considerations of public policy and discretion. And no such jurisdiction is conferred upon the courts of a state by a statute subjecting foreign corporations doing business in the state to actions in its courts. Thus, the courts of a state cannot enforce a forfeiture of the charter of a foreign corporation for violation of law, or removal of officers for misconduct; nor can they exercise authority over the corporate functions, the by-laws, or the relations between the corporation and its members, arising out of, and depending upon, the law of its creation.[81] Therefore, it has been held that they cannot entertain an application of a stockholder of a foreign corporation, even though he be a resident of the state, for a writ of mandamus to compel the corporation to annul a forfeiture of his stock, and reinstate him as a stockholder;[82] nor a suit to enjoin a foreign corporation from paying a stock dividend, upon the ground that it has no authority to declare such a dividend;[83] nor a suit to appoint a receiver generally, and not merely of the assets within the state;[84] nor a suit by a stockholder to

[81] North State Copper & Gold Min. Co. v. Field, 64 Md. 151, 20 Atl. 1039; Wilkins v. Thorne, 60 Md. 253; Condon v. Mutual Reserve Fund Life Ass'n, 89 Md. 99, 42 Atl. 948, 44 L. R. A. 149, 73 Am. St. Rep. 169; Stockley v. Thomas, 89 Md. 663, 43 Atl. 766; State ex rel. Watkins v. North American Land & Timber Co., 106 La. 621, 31 South. 172, 87 Am. St. Rep. 309; Madden v. Pennsylvania Electric Light Co., 199 Pa. 454, 49 Atl. 296; Van Dyke v. Railway Mail Ass'n, 118 Minn. 390, 137 N. W. 15, Ann. Cas. 1913E, 455 (no intermeddling in foreign corporate affairs); Travis v. Knox Terpezone Co., 215 N. Y. 259, 109 N. E. 250, L. R. A. 1916A, 542; German-American Coffee Co. v. Diehl, 216 N. Y. 57, 109 N. E. 875; Hallenborg v. Greene, 66 App. Div. 590, 597, 73 N. Y. Supp. 403. But see Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189; Richardson v. Clinton Wall Trunk Mfg. Co., 181 Mass. 580, 64 N. E. 400; Miller v. Quincy, 179 N. Y. 294, 72 N. E. 116.

[82] North State Copper & Gold Min. Co. v. Field, 64 Md. 151, 20 Atl. 1039. But see Guilford v. Western Union Telegraph Co., 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407. In Travis v. Knox Terpezone Co., 215 N. Y. 259, 109 N. E. 250, L. R. A. 1916A, 542, it was held that, irrespective of the question whether mandamus would lie, a court of equity had power to compel a transfer of shares on the books of the foreign corporation and the delivery of new stock certificates. This was said to be not the exercise of any power of visitation, but merely the enforcement of a contract between the corporation and its members. See, also, Andrews v. Mines Corporation, 205 Mass. 121, 123, 91 N. E. 122, 137 Am. St. Rep. 428. Cf. Matter of Rappleye, 43 App. Div. 84, 59 N. Y. Supp. 338.

[83] Howell v. Chicago & N. W. Railway Co., 51 Barb. (N. Y.) 378. See, also, Taylor v. Mutual Reserve Fund Life Ass'n, 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621. But see Prouty v. Michigan Southern & N. I. R. Co., 1 Hun (N. Y.) 655.

[84] Stafford v. American Mills Co., 13 R. I. 310. See, also, Leary v. Columbia

compel a distribution of assets;[85] nor a suit by a former member of a foreign mutual insurance company to compel it to restore him to his rights under a policy issued to him in the state where the corporation was created.[86] Similarly, they will not annul an election of directors by the stockholders of a corporation chartered in another state.[87]

But it has been held that this doctrine does not prevent the courts of a state from issuing a writ of mandamus, upon application of a stockholder, to compel the resident president of a foreign corporation doing business in the state to allow an inspection of books of the corporation in his possession;[88] nor from entertaining an action by a stockholder to compel a foreign corporation doing business in the state to issue to him a new or duplicate stock certificate in place of one which has been lost or destroyed.[89] And when a receiver has been appointed by the court where the corporation is domiciled, the court of another jurisdiction has power to appoint an ancillary receiver for the assets within its jurisdiction,[90] although such appointment is discretionary.[91]

The dissolution of a corporation, whether by the expiration of its charter, the forfeiture of its privileges, or as the result of its insolvency, is governed and controlled by its charter and the law of the

River & P. S. Nav. Co. (C. C.) 82 Fed. 775; Sidway v. Missouri Land & Live Stock Co. (C. C.) 101 Fed. 481.

[85] Redmond v. Enfield Manufacturing Co., 13 Abb. Prac. N. S. (N. Y.) 332.

[86] Smith v. Mutual Life Insurance Co. of New York, 14 Allen (Mass.) 336.

[87] Wason v. Buzzell, 181 Mass. 338, 63 N. E. 909; Butler v. Standard Milk Flour Co., 146 App. Div. 735, 131 N. Y. Supp. 451. And see, Travis v. Knox Terpezone Co., 215 N. Y. 259, 109 N. E. 250, L. R. A. 1916A, 542.

[88] Richardson v. Swift, 7 Houst. (Del.) 137, 30 Atl. 781. And see State ex rel. Curtis v. McCullough, 3 Nev. 202; Tyng v. Corporation Trust Co., 104 App. Div. 486, 93 N. Y. Supp. 928; Fay v. Coughlin-Sandford Switch Co., 47 Misc. Rep. 687, 94 N. Y. Supp. 628. But see People v. Parker Vein Coal Co., 10 How. Prac. (N. Y.) 543. Under Stock Corporation Law N. Y. (Consol. Laws, c. 59), § 33, it has been held that the stockholder, irrespective of his motives, is entitled to an inspection of the stock book of the foreign corporation. Henry v. Babcock & Wilcox Co., 196 N. Y. 302, 89 N. E. 942, 134 Am. St. Rep. 835.

[89] Guilford v. Western Union Telegraph Co., 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407.

[90] Buswell v. Supreme Sitting of Order of Iron Hall, 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846; Shinney v. North American Savings, Loan & Building Co. (C. C.) 97 Fed. 9; Hallenborg v. Greene, 66 App. Div. 590, 73 N. Y. Supp. 403. In the last cited case, there was no receiver of the foreign corporation other than the one appointed in the foreign state, New York.

[91] Borton v. Brines-Chase Co., 175 Pa. 209, 34 Atl. 597; Irwin v. Granite State Provident Ass'n, 56 N. J. Eq. 244, 38 Atl. 680; Mabon v. Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805.

sovereignty by which it was created;[92] and such dissolution is effective everywhere.[93] A court of one state or country, therefore, has no jurisdiction of a suit to dissolve a corporation created by the laws of another state or country.[94] Local courts of equity, however, will take jurisdiction of the assets of a foreign corporation which may be within the state, in case of the dissolution or insolvency of the corporation, and see to their equitable distribution.[95]

[92] A statute providing that corporations whose existence is terminated shall be continued for a certain period for the purpose of prosecuting and defending suits does not apply to foreign corporations. Marion Phosphate Co. v. Perry, 74 Fed. 425, 20 C. C. A. 490, 33 L. R. A. 252; Rodgers v. Adriatic Fire Ins. Co., 148 N. Y. 34, 42 N. E. 515; Fitts v. National Life Ass'n, 130 Ala. 413, 30 South. 374; Olds v. City Trust, Safe Deposit & Surety Co., 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356.

[93] Marion Phosphate Co. v. Perry, 74 Fed. 425, 20 C. C. A. 490, 33 L. R. A. 252; In re Stewart, 39 Misc. Rep. 275, 79 N. Y. Supp. 525; Fitts v. National Life Ass'n, 130 Ala. 413, 30 South. 374. And see E. F. Kirwan Mfg. Co. v. Truxton, 2 Pennewill (Del.) 48, 44 Atl. 427. Where it is alleged that a foreign corporation has been dissolved by decree, the jurisdiction of the court of the home state to dissolve it must be shown, and may be inquired into. Olds v. City Trust, Safe Deposit & Surety Co., 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356; Hammond v. National Life Ass'n, 31 Misc. Rep. 182, 65 N. Y. Supp. 407. See, also, Martyne v. American Union Fire Ins. Co. of Philadelphia, 216 N. Y. 183, 110 N. E. 502.

[94] Note by Wm. L. Murfree, 7 C. C. A. 421; Republican Mountain Silver Mines v. Brown, 7 C. C. A. 412, 58 Fed. 644, 24 L. R. A. 776.

[95] Note, 7 C. C. A. 421; Smith v. St. Louis Mut. Life Insurance Co., 3 Tenn. Ch. 502; Id., 6 Lea (Tenn.) 564; Leipold v. Marony, 7 Lea (Tenn.) 128; Patterson v. Lynde, 112 Ill. 196; Barclay v. Talman, 4 Edw. Ch. (N. Y.) 123; Day v. Postal Telegraph Co., 66 Md. 354, 7 Atl. 608; Bank Com'rs v. Granite State Provident Ass'n, 70 N. H. 557, 49 Atl. 124, 85 Am. St. Rep. 646; Hallenborg v. Greene, 66 App. Div. 590, 73 N. Y. Supp. 403; Olds v. City Trust, Safe Deposit & Surety Co., 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356.

TABLE OF CASES CITED

[THE FIGURES REFER TO PAGES]

A

A. A. Griffing Iron Co., In re, 670.
Aaron's Reefs v. Twiss, 128, 359.
Abbey v. Long, 748.
Abbey v. W. B. Grimes Dry Goods Co., 735.
Abbot v. American Hard Rubber Co., 297.
Abbott v. American Hard Rubber Co., 167.
Abbott v. Baltimore & R. Steam Packet Co., 213.
Abbott v. Goddall, 739.
Abbott v. Hapgood, 131.
Abbott v. New York & N. E. R. Co., 193.
Abbott v. Omaha Smelting & Refining Co., 59, 103, 119, 125.
Aberdeen R. Co. v. Blakie, 641, 643.
Aberthaw Const. Co. v. Cameron, 246.
A. Booth & Co. v. Weigand, 779.
Adam v. New England Inv. Co., 188, 189.
Adams v. Burke, 618, 668.
Adams v. Kehlor Milling Co., 753.
Adams v. Slingerland, 705.
Adams v. Yazoo & M. V. R. Co., 192.
Adams Express Co. v. New York, 768.
Adams & Westlake Co. v. Deyette, 171, 187, 189.
Adderly v. Storm, 722, 723.
Addlestone Linoleum Co., In re, 459.
Adelbert v. Kearns, 691.
Adler v. Milwaukee Patent Brick Mfg. Co., 730.
Advance Thresher Co. v. Rockafellow, 207.
Adyston Pipe & Steel Co. v. U. S., 180.
Ætna Ins. Co. v. Harvey, 779, 782.
Ætna Nat. Bank v. Charter Oak Life Ins. Co., 174.
Africa v. Duluth News Tribune Co., 620.
Africa v. Knoxville, 193.
Agate v. Sands, 748.
Agricultural Branch R. Co. v. Winchester, 405, 567.
Agua Fria Copper Co. v. Bashford-Burmister Co., 71, 121, 122.
Aiello v. Crampton, 8.
Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co., 215.
Alabama Foundry & Mach. Works v. Dallas, 359.
Alabama & G. Mfg. Co. v. Riverdale Cotton Mills, 86.
Albany Fertilizer Farm Improvement Co. v. Arnold, 421.
Albany N. R. Co. v. Brownell, 275.
Albert v. Savings Bank of Baltimore, 213, 543.
Aldine Mfg. Co. v. Phillips, 640.
Aldrich v. Union Bag & Paper Co., 499.
Alexander v. Atlanta & W. P. R. Co., 488, 571.
Alexander v. Cauldwell, 621, 624.
Alexander v. North Carolina Sav. Bank & Trust Co., 370.
Alexander v. Relfe, 189.
Alexander v. Searcy, 500, 501.
Alexandria, A. & Ft. S. R. Co. v. Johnson, 225.
Alleghany Co. v. Allen, 778.
Allen v. American Bldg. & L. Ass'n, 327, 397.
Allen v. Brown, 199.
Allen v. Chicago Undertakers' Ass'n, 506.
Allen v. Clark, 755.
Allen v. Curtis, 485, 487, 504, 632, 672, 673.
Allen v. Fairbanks, 749.
Allen v. Grant, 480, 732.
Allen v. Montgomery R. Co., 396, 518, 698.
Allen v. North Des Moines M. E. Church, 92.
Allen v. Portland, 196.
Allen v. Pullman's Palace Car Co., 766.
Allen v. South Boston R. Co., 555, 659.
Allen v. Stewart, 536.
Allen v. Tyson-Jones Buggy Co., 775.
Allen v. Wilson, 490, 501.
Allen v. Woonsocket, 177.
Alley v. Bowen-Merrill Co., 776.
Allibone v. Hager, 347, 365.
Alling v. Wenzel, 460.
Allis v. Jones, 200.
Allison v. Southern R. Co., 87.
Allison v. Tennessee, Coal, Iron & Railroad Co., 626.
Allman v. Havana R. & E. R. Co., 388.
Almada & Tirito Co., In re, 456.
Alpena Portland Cement Co. v. Jenkins & Reynolds Co., 760.
Alsing Co. v. New England Quartz & Spar Co., 789.
Alton Mfg. Co. v. Garrett Biblical Institute, 161, 173.
Ambrose Lake Tin & C. Min. Co. v. Hayes, 458.

[The figures refer to pages]

American Alkali Co. v. Campbell, 113, 393, 519.
American Alkali Co. v. Kurtz, 721.
American Asylum for Education & Instruction of Deaf & Dumb v. President, Directors, etc., of Phœnix Bank, 30.
American Bible Soc. v. Marshall, 154.
American Building & Loan Ass'n v. Rainbolt, 363, 376, 406.
American Cent. R. Co. v. Miles, 666.
American Cigar Lighter Co., In re, 77.
American Clay Mfg. Co. v. American Clay Mfg. Co. of New Jersey, 785.
American Exch. Nat. Bank v. First Nat. Bank, 615, 627.
American Exch. Nat. Bank v. Ward, 753.
American Exchange Nat. Bank v. Woodlawn Cemetery, 544, 546.
American Exp. Co. v. Patterson, 160.
American File Co. v. Garrett, 724.
American Homestead Co. v. Linigan, 113, 121.
American Life & Accident Co. v. Ferguson, 323.
American Live Stock Commission Co. v. Chicago Live Stock Exch., 322.
American Loan & Trust Co. v. East & West R. Co., 782.
American Loan & Trust Co. v. General Electric Co., 168, 169.
American Loan & Trust Co. v. Minnesota & N. W. R. Co., 103, 191.
American Mtg. Co. of Scotland v. Tennille, 206.
American Nat. Bank v. American Wood Paper Co., 172.
American Nat. Bank v. Dallas Tinware Mfg. Co., 693.
American Nat. Bank v. National Wall Paper Co., 224.
American Nat. Bank v. Oriental Mills, 532.
American Nat. Bank v. Supplee, 738.
American Nat. Bank v. Wheeler-Adams Auto Co., 171.
American Nat. Beverage, In re, 364.
American Press Ass'n v. Brantingham, 549, 559.
American Radiator Co. v. Kinnear, 60.
American Ry. Frog Co. v. Haven, 595.
American Steel & Wire Co. v. Eddy, 435.
American Surety Co. v. Pauly, 631.
American Tobacco Co. v. U. S., 179, 182.
American Tube Works v. Boston Mach. Co., 444, 450.
American Typefounders' Co. v. Conner, 790.
American Union Tel. Co. v. Union Pac. R. Co., 162, 169.
American & F. Christian Union v. Yount, 785.
Ames & Frost v. Heslet, 678, 692.
Ames & Frost Co. v. Heslet, 692.
Amesbury v. Bowditch Mut. Fire Ins. Co., 575, 579.
Ammons v. Brunswick-Balke-Collender Co., 776.
Anderson v. Bullock County Bank, 753.
Anderson v. Newcastle & R. R. Co., 113, 362.
Anderson v. Philadelphia Warehouse Co., 723.
Anderson v. Railroad, 382, 383, 384.
Anderson v. Scott, 348, 355, 358.
Anderson v. Shawnee Compress Co., 166.
Anderson v. Thompson, 114.
Anderson v. U. S., 180.
Anderson v. War Eagle Consol. Min. Co., 688.
Anderson v. W. J. Dyer & Bro., 427.
Anderson's Case, 459.
Andover & Medford Turnpike Corp. v. Gould, 392.
Andres v. Fry, 200.
Andres v. Morgan, 688.
Andrews v. Estes, 33.
Andrews v. Gas Meter Co., 448.
Andrews v. Guayquil & Q. Ry. Co., 550.
Andrews v. Mines Corp., 801.
Andrews v. Mockford, 127.
Andrews Bros. Co. v. Youngstown Coke Co., 15, 22.
Anglo-American Land, Mortgage & Agency Co. v. Dyer, 383, 392.
Anglo-American Land, Mortgage & Agency Co. v. Lombard, 184, 213, 739.
Anglo-American Provision Co. v. Davis Provision Co., 799.
Annapolis & Elk Ridge R. Co. v. Anne Arundel County, 288.
Anthony v. Household S. M. Co., 220.
Anvil Min. Co. v. Sherman, 382, 384, 401.
Appleton v. American Malting Co., 494, 500.
Appleton v. Citizens' Cent. Nat. Bank of N. Y., 231.
Appleton v. Turnbull, 747.
Appleton Mut. Fire Ins. Co. v. Jesser, 99.
Application of Brooklyn Elevated R. Co., Matter of, 309.
Apsey v. Chattel Loan Co., 196.
Arapahoe Cattle & Land Co. v. Stevens, 457.
Argus Co., In re, 605, 616, 617.
Argus Printing Co., In re, 608.
Arkadelphia Cotton Mills v. Trimble, 383.
Arkadelphia Lbr. Co. v. Posey, 225.
Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co., 13, 457, 475.
Arkansas Val. Agr. Soc. v. Eichholtz, 633.
Armington v. Palmer, 563.
Armour v. East Rome Town Co., 429, 430.
Armour Bros. Banking Co. v. St. Louis Nat. Bank, 328, 329.
Armour Packing Co. v. Lacy, 766.
Arms v. Conant, 615.
Armstrong v. Karshner, 360, 369, 370, 371, 372, 407, 408, 409.

[The figures refer to pages]

Armstrong v. Sun Printing & Pub. Ass'n, 126.
Arnold v. Ruggles, 325.
Arnold v. Searing, 139, 489.
Arnot v. Erie R. Co., 176.
Artcher v. Zeh, 327.
Arthur v. Griswold, 665.
Arthur v. President, etc., of Commercial & R. Bank of Vicksburg, 168.
Arthur v. Willius, 712.
Artizans' Land & M. Corp., In re, 433.
Ashbury Ry. Carriage & Iron Co. v. Riebe, 143.
Ashby v. Blackwell, 554.
Ashhurst's Appeal, 501.
Ashley's Case, 363.
Ashley Wire Co. v. Illinois Steel Co., 198, 580, 616, 626.
Ashtabula & N. L. R. Co. v. Smith, 369.
Ashton v. Burbank, 566.
Ashton v. Penfield, 311.
Ashton v. Zeila Min. Co., 430.
Ashuelot Boot & Shoe Co. v. Holt, 334.
Ashuelot R. Co. v. Elliot, 271, 277.
Asiatic Banking Corp., In re, 183.
Asphalt Const. Co. v. Bouker, 639, 640.
Aspinwall v. Daviess County Com'rs, 53.
Aspinwall v. Ohio & M. R. Co., 83.
Associated Lawyers' Co., In re, 75.
Astor v. New York Arcade R. Co., 38, 47.
Astoria & S. C. R. Co. v. Hill, 383.
Atchison, T. & S. F. R. Co. v. Campbell, 273.
Atchison, T. & S. F. R. Co. v. Matthews, 266.
Athol Music Hall Co. v. Carey, 334, 336, 338, 341.
Atkins v. Albree, 438.
Atkinson v. Marietta & C. R. Co., 48, 100.
Atlanta & Walworth Butter & Cheese Ass'n v. Smith, 189.
Atlantic City Water-Works Co. v. Consumers Water Co., 48.
Atlantic Coast Line v. Goldsboro, 263.
Atlantic Cotton Mills v. Abbott, 374, 382.
Atlantic Cotton Mills v. Indian Orchard Mills, 630.
Atlantic De Laine Co. v. Mason, 584.
Atlantic Dredging Co. v. Beard, 315, 318.
Atlantic Mut. Fire Ins. Co. v. Sanders, 584, 615.
Atlantic & G. R. Co. v. Georgia, 192.
Atlantic & G. W. R. Co. v. Dunn, 248.
Atlantic & O. R. Co. v. Sullivant, 100.
Atlantic & P. R. Co. v. St. Louis, 51.
Atlantic & P. Tel. Co. v. Philadelphia, 766.
Atlantic & Pac. Tel. Co. v. Union Pac. R. Co., 217, 222, 238.
Atlas Nat. Bank v. John Moran Packing Co., 690.
Atlas Tack Co. v. Macon Hardware Co., 754.
Attalla Iron Ore Co. v. Virginia Iron, Coal & Coke Co., 638, 641.
Attorney General v. American Tobacco Co., 313.
Attorney General v. Bay State Min. Co., 763.
Attorney General v. Chicago & E. R. Co., 301.
Attorney General v. Chicago & N. W. R. Co., 47, 48, 278.
Attorney General v. Consolidated Gas Co., 304.
Attorney General v. Electric Storage Battery Co., 761, 762, 787.
Attorney General v. Garrison, 313.
Attorney General v. Gay, 65, 91.
Attorney General v. Great Northern R. Co., 313.
Attorney General v. Hanchett, 57, 65.
Attorney General v. Haverhill Gaslight Co., 32, 169.
Attorney General v. Jamaica Pond Aqueduct Corp., 313.
Attorney General v. Joy, 46, 51.
Attorney General v. Looker, 509.
Attorney General v. Lorman, 58, 71.
Attorney General v. McArthur, 48.
Attorney General v. Mercantile Marine Ins. Co., 22.
Attorney General v. Mersey R. Co., 143.
Attorney General v. North America Life Ins. Co., 46, 267.
Attorney General v. Perkins, 91.
Attorney General v. Simonton, 31.
Attorney General v. Stevens, 102, 312.
Attorney General v. Superior & St. C. R. Co., 295, 298, 306.
Attorney General v. Tudor Ice Co., 312.
Attorney General v. Utica Ins. Co., 312.
Attrill v. Huntington, 757.
Atwood v. Merryweather, 487.
Auburn Bolt & Nut Works v. Shultz, 339.
Auburn Button Co. v. Sylvester, 298.
Auburn Opera-House & Pavilion Ass'n v. Hill, 384.
Audenried v. East Coast Milling Co., 382, 614, 755.
Auerbach v. Le Sueur Mill Co., 218, 219.
Augsburg Land & Imp. Co. v. Pepper, 189.
Augusta & S. R. Co. v. City Council of Augusta, 91.
Auld v. Caunt, 391.
Aultman v. Waddle, 113.
Aultman's Appeal, 594, 722.
Aurora Agr. & Horticultural Soc. v. Paddock, 166, 611, 627.
Australian Royal Mail Steam Nav. Co. v. Marzetti, 196.
Automatic Syndicate Co., Limited, v. Cunninghame, 564, 609.
Avondale Land Co. v. Shook, 567, 571.
Avon Springs Sanitarium Co. v. Kellogg, 337.
Avon Springs Sanitarium Co. v. Weed, 337.
Ayers v. Banking Co., 206.
Aygarn v. Rogers Grain Co., 248.
Ayres v. French, 327.

[The figures refer to pages]

B

Babbitt v. Field, 776.
Babbitt v. Read, 478.
Babcock v. Farwell, 458, 502.
Bacon v. Irvine, 494.
Bacon v. Michigan Cent. R. Co., 245.
Bacon v. Mississippi Ins. Co., 171, 173, 213.
Bacon v. Robertson, 153, 317, 486.
Badger v. American Popular Life Ins. Co., 198.
Badger Paper Co. v. Rose, 133, 344.
Bagdon v. Philadelphia & R. Coal & Iron Co., 764, 778, 792, 793, 794, 795, 796, 800.
Bagg's Case, 53.
Bagley v. Carthage W. & H. R. Co., 666, 667.
Bagley v. Reno Oil Co., 573, 578.
Bagnall v. Carlton, 136.
Bahia & S. F. R. Co., In re, 541, 552, 554.
Bailey v. Bancker, 727.
Bailey v. Citizens' Gas Light Co., 487.
Bailey v. Hollister, 275, 725.
Bailey v. Master Plumbers, 575.
Bailey v. New York, 32.
Bailey v. Trustees of Lincoln Academy, 94.
Baines v. Babcock, 731, 740.
Baker v. Backus' Adm'r, 64, 299, 307.
Baker v. Fales, 30.
Baker v. Marshal, 558.
Baker v. Northwestern Guaranty Loan Co., 210.
Baker v. Wasson, 557.
Bakewell v. Board of Education, 30.
Balch v. Hallet, 438.
Balch v. Wilson, 748.
Baldwin v. Canfield, 7, 8, 531, 614.
Baldwin v. Johnson, 316.
Balfour-Guthrie Co. v. Woodworth, 616.
Ball v. Anderson, 739, 748.
Ball v. Reese, 742.
Ball v. Rutland R. Co., 259.
Ballantine v. Young, 442.
Ball Electric Light Co. v. Child, 748.
Baltimore City Pass. R. Co. v. Hambleton, 443.
Baltimore Retort & Fire Brick Co. v. Mali, 527.
Baltimore & D. P. R. Co. v. Pumphrey, 369.
Baltimore & O. R. Co. v. Barger, 248.
Baltimore & O. R. Co. v. Gallahue's Adm'r, 791.
Baltimore & O. R. Co. v. Gallahue's Adm'rs, 26, 86.
Baltimore & O. R. Co. v. Glenn, 83.
Baltimore & O. R. Co. v. Harris, 85, 89, 761, 791.
Baltimore & P. R. Co. v. Fifty Baptist Church, 244.
B. A. Meyers v. Montgomery, 315.
Bancroft & Sons Co. v. Bloede, 183, 184.
Banet v. Alton & S. R. Co., 398, 399, 401, 567, 568.
Bangor Slab Co., In re, 453.
Banigan v. Bard, 448, 450.
Bank v. Bank of Victoria, 210.
Bank Com'rs v. Granite State Provident Ass'n, 803.
Bank of Alabama v. Gibson's Adm'rs, 31.
Bank of Attica v. Manufacturers' & Traders' Bank, 513, 532, 576.
Bank of Augusta v. Earle, 83, 615, 759, 761, 762, 788.
Bank of Batavia v. New York, L. E. & W. R. Co., 555, 659.
Bank of Berwick v. George Vinson Shingle & Mfg. Co., 174.
Bank of British Columbia v. Page, 779.
Bank of China, Japan & The Straits v. Morse, 733.
Bank of Circleville, Receivers of, v. Renick, 307.
Bank of Columbia v. Patterson, 195, 196, 197.
Bank of Columbia v. Patterson's Adm'r, 607.
Bank of Commerce v. McGowan, 287.
Bank of Commerce v. Tennessee, 281, 290.
Bank of Commerce v. Tennessee, Use of Memphis, 283.
Bank of Commerce's Appeal, 317, 531.
Bank of Culloden v. Bank of Forsyth, 526, 577.
Bank of De Soto v. Reed, 59.
Bank of Ft. Madison v. Alden, 469.
Bank of Genesee v. Patchin Bank, 177.
Bank of Holly Springs v. Pinson, 576.
Bank of Kentucky v. Bonnie, 523.
Bank of Little Rock v. McCarthy, 617.
Bank of Long Island v. Young, 193.
Bank of Louisville v. Gray, 432.
Bank of Michigan, President, etc., of, v. Niles, 233.
Bank of Middlebury v. Rutland & W. R. Co., 614.
Bank of Montreal v. J. E. Potts Salt & Lumber Co., 692.
Bank of National City v. Johnston, 617.
Bank of Niagara v. Johnson, 298.
Bank of North America v. Rindge, 738.
Bank of Poughkeepsie v. Ibbotson, 735.
Bank of Saginaw v. Pierson, 754.
Bank of St. Marys v. St. John, 751.
Bank of Shasta v. Boyd, 115.
Bank of South Carolina v. Gibbs, 31.
Bank of Toledo v. City of Toledo, 258, 287.
Bank of Toledo v. International Bank, 99, 786.
Bank of U. S. v. Dandridge, 54, 195.
Bank of United States v. Davis, 629.
Bank of U. S. v. Deveaux, 85.
Bank of United States v. Dunn, 620, 623.
Bank of United States v. Lyman, 95.
Bank of U. S. v. Planters' Bank, 31.
Bank of Utica v. Magher, 94.
Bankers' Mut. Casualty Co. v. First Nat. Bank of Council Bluffs, 148.

[The figures refer to pages]

Bankers' Union of the World v. Crawford, 143.
Banks v. Poitiaux, 206.
Barbor v. Boehm, 779.
Barbot v. Mutual Reserve Fund Life Ass'n, 580.
Barclay v. Talman, 298, 803.
Barcus v. Gates, 358, 456.
Bard v. Banigan, 450.
Bard v. Poole, 760.
Bardstown & L. R. Co. v. Metcalfe, 167, 169.
Barker, In re, 594, 599.
Barker v. Mechanic Fire Ins. Co., 194.
Barned's Banking Co., In re, 183.
Barnes v. Arnold, 748.
Barnes v. Hall, 327.
Barnes v. Lynch, 638.
Barnes v. Smith, 292.
Barnes v. Suddard, 206.
Barr v. New York, L. E. & W. R. Co., 466, 641, 644, 645.
Barr v. Pittsburgh Plate Glass Co., 642, 645.
Barrell v. Lake View Land Co., 611.
Barrett v. King, 514, 576.
Barrick v. Gifford, 710, 717, 734, 735, 741, 745.
Barron v. Burnside, 769.
Barron v. McKinnon, 210, 213.
Barron v. Paine, 698, 730, 743.
Barrow v. National & C. Turnpike Co., 206.
Barrow, S. S. Co. v. Kane, 791, 795, 796, 798.
Barrows v. Natchaug Silk Co., 362, 363.
Barry v. Merchants' Exch. Co., 166, 167, 171, 172, 323.
Barry v. Moeller, 489, 504.
Barry v. The Players, 507, 508, 510.
Barse Live-Stock Co. v. Range Valley Cattle Co., 430, 534, 535.
Barstow v. Savage Min. Co., 541.
Bartholomew v. Derby Rubber Co., 168, 297.
Bartlett v. Drew, 678, 680, 702, 731.
Bartlett v. Fourton, 596.
Bartlett v. Gates, 591.
Bartlett v. L. Bartlett & Son Co., 511.
Bartlett v. New York, N. H. & H. R. Co., 487, 494, 495.
Barto v. Nix, 187.
Bartol v. Walton & Whann Co., 363.
Barton v. Enterprise Loan & Bldg. Ass'n, 296, 562.
Barton v. International Fraternal Alliance of Baltimore City, 313.
Barton Nat. Bank v. Atkins, 713, 734.
Barwick v. Bank, 246.
Barwick v. English Joint Stock Bank, 624.
Bash v. Culver Gold Min. Co., 105, 108.
Bassett v. Fairchild, 640, 667, 668.
Bassett v. United States Cast Iron Pipe & Foundry Co., 425.
Basshor v. Dressel, 51.
Bateman v. R. Co., 172.
Bateman v. Western Star Milling Co., 765.
Bates v. Boston & N. Y. C. R. Co., 199.
Bates v. Coronado Beach Co., 178.
Bates v. Day, 739.
Bates v. Lewis, 377.
Bates v. New York Ins. Co., 431.
Bates v. United Shoe Machinery Co., 445.
Bates v. Wilson, 60, 109, 121.
Bates County v. Winters, 193.
Bates-Farley Sav. Bank v. Dismukes, 531.
Bath v. Standard Land Co., 750.
Bath Gaslight Co. v. Claffy, 216, 227, 231, 232, 233.
Bathe v. Decatur County Agriculture Soc., 243, 661.
Battelle v. Northwestern Cement C. P. Co., 133.
Battelle v. Northwestern Cement & C. P. Co., 131, 132, 134, 645.
Battey v. Eureka Bank, 523.
Baumgarten v. Alliance Assur Co., 84.
Bausman v. Kinnear, 747.
Bavington v. Pittsburgh & S. R. Co., 373, 393.
Bawden v. Taylor, 673.
Bayless v. Orne, 310, 509, 669, 670.
Beach v. First Methodist Episcopal Church, 339.
Beach v. Fulton Bank, 243.
Beach v. Miller, 642, 752.
Beach v. Smith, 388, 389, 390.
Beach v. Wakefield, 239.
Beacon Trust Co. v. Souther, 627.
Beal v. Dillon, 355, 356.
Beal v. Essex Sav. Bank, 723.
Bean v. American Loan & Trust Co., 550, 556, 558.
Bear Creek Lumber Co. v. Second Nat. Bank of Cumberland, 187.
Bear River Valley Orchard Co. v. Hanley, 223, 641.
Beard v. Boylan, 374, 381.
Beatty v. Marine Ins. Co., 198.
Beatty v. Northwest Transp. Co., 597.
Becher v. West Flouring-Mill Co., 530.
Beckett v. Houston, 391.
Bedford v. American Aluminum & Specialty Co., 557.
Bedford v. Eastern Bldg. & L. Ass'n, 260, 769.
Beebe v. Richmond Light, Heat & Power Co., 168.
Beekman Lumber Co. v. Ahern, 754.
Beers v. Bridgeport Spring Co., 421, 427, 432, 433.
Beers v. New York Life Ins. Co., 667, 668.
Beggs v. Edison Electric Illuminating Co., 71.
Behre v. National Cash Register Co., 245.
Beidenkopf v. Des Moines Life Ins. Co., 298.
Beitman v. Steiner, 602.
Belerby v. Rovland & M. S. S. Co., 187.

[The figures refer to pages]

Belfast & M. L. R. Co. v. Belfast, 425, 426, 427, 447, 450, 451.
Bell v. Bank of Nashville, 37.
Bell v. Farwell, 707, 736.
Bell v. Standard Quicksilver Co., 616.
Bell v. Wood, 677.
Bell's Appeal, 519, 731.
Bell's Gap R. Co. v. Christy, 134.
Bell & Coggeshall Co. v. Kentucky Glass Works Co., 167, 239.
Belle City Mfg. Co. v. Frizzell, 775.
Belleville & I. R. Co. v. Gregory, 38, 49.
Bellows v. Hallowell & A. Bank, 91, 92, 695.
Bellows v. Todd, 586, 615.
Belmont v. Coleman, 742.
Belmont v. Erie R. Co., 311.
Belo v. Forsyth County Com'rs, 282.
Belton, In re, 294, 295, 298.
Beman v. Rufford, 169.
Benbow v. Cook, 54, 166, 200.
Bend v. Susquehanna Bridge & Bank Co., 518.
Benedict v. Guardian Trust Co., 127.
Benevolent & Protective Order of Elks of United States of America v. Improved Benevolent & Protective Order of Elks of the World, 79.
Bennett v. Thorne, 745.
Bennison v. McConnell, 749.
Bensel, In re, 75.
Bent v. Priest, 639.
Bent v. Underdown, 474.
Bentlif v. London & Colonial Finance Corp., 793.
Benton v. Elizabeth, 170, 207.
Berea College v. Kentucky, 273.
Berger v. United States Steel Corp., 189.
Bergeron v. Hobbs, 59, 106, 125.
Bergman v. St. Paul Mut. Bldg. Ass'n, 577, 578.
Bergner & Engel Brewing Co. v. Dreyfus, 83.
Berks County v. Railroad, 289.
Bernhardt v. Brown, 86.
Bernier v. Griscom-Spencer Co., 326, 420.
Berry v. Kansas City, Ft. S. & M. R. Co., 695.
Berry v. Knights Templars & Masons' Life Indemnity Co., 781.
Berry v. Rood, 469, 478, 480.
Bertha Zinc & Mineral Co. v. Clute, 775.
Beshoar v. Chappell, 503.
Best Brewing Co. v. Klassen, 143, 174, 213, 225.
Beveridge v. New York El. R. Co., 420, 426, 564, 632, 633.
Beyer v. Wollpert, 296.
Bias v. Atkinson, 498.
Bickley v. Schlag, 470.
Bigbee & W. R. Packet Co. v. Moore, 186, 215.
Bigby v. Atlanta & W. P. R. Co., 552.
Bigelow v. Calumet & Heckla Min. Co., 183, 184.
Bigelow v. Calumet & Hecla Min. Co., 487.
Bigelow v. Gregory, 59, 64, 106, 119, 125.
Bigelow v. Old Dominion Copper Min. & Smelting Co., 126.
Bijur v. Standard Distilling & Distributing Co., 316, 317, 330.
Bill v. Western Union Tel. Co., 496, 497.
Billings v. Shaw, 639.
Bills v. Silver King Min. Co., 432.
Bingham v. Lipman, Wolfe & Co., 247.
Bingham v. Marion Trust Co., 435.
Binghamton Bridge, The, 148, 261.
Bird v. Hayden, 756.
Bird Coal & Iron Co. v. Humes, 634.
Birmingham Ry., Light & Power Co. v. Enslen, 191.
Bischoff v. Automobile Touring Co., 790.
Bish v. Bradford, 360.
Bishop v. Bishop, 422.
Bishop v. Brainerd, 87.
Bishop v. Eaton, 335.
Bishop v. Globe Co., 522, 524.
Bishop v. Readsboro Chair Mfg. Co., 248.
Bissell v. Heath, 356.
Bissell v. Michigan Southern & N. I. R. Co., 218, 224, 663.
Bissell v. Michigan Southern & N. I. R. Cos., 203, 663.
Bissell v. Michigan Southern & N. Q. R. Co., 225, 229, 243.
Bissell v. Spring Valley Tp., 197.
Bissit v. Kentucky R. Nav. Co., 698, 727, 730, 743.
Bjorngaard v. Goodhue County Bank, 597.
Black v. Delaware & R. Canal Co., 148, 161, 169, 191, 192, 238, 260, 268.
Black v. Huggins, 490, 504.
Black v. Zacharie, 527, 530, 535.
Blackburn v. Selma M. & M. R. R. Co., 84.
Blackburn Bldg. Soc. v. Cunliffe, 223.
Black River Imp. Co. v. Holway, 115.
Black River & U. R. Co. v. Clarke, 113, 388, 389.
Black & White Smiths' Society v. Vandyke, 510, 511.
Blackrock Copper Min. & Mill. Co. v. Tingey, 36.
Blackstone Mfg. Co. v. Blackstone, 760, 763, 796.
Blackwell's Durham Tobacco Co. v. American Tobacco Co., 78.
Blackwood v. Lansing Chamber of Commerce, 223, 225, 227, 228.
Blair v. Chicago, 207.
Blair v. Compton, 327, 328.
Blair v. Metropolitan Sav. Bank, 581.
Blair v. Newbegin, 736.
Blair v. Telegram Newspaper Co., 490.
Blake v. Brown, 371.
Blake v. Domestic Mfg. Co., 622, 625.
Blake v. McClung, 762, 769.
Blake v. People, 39.
Blake v. Ray, 643.
Blanchard v. Kaull, 15, 124.

[The figures refer to pages]

Blanchard's Gun-Stock Turning Factory v. Warner, 151.
Blien v. Rand, 346, 410, 514.
Bligh v. Brent, 326.
Blinn v. Gillett, 597.
Blinn v. Riggs, 597.
Bliss v. Harris, 197, 200.
Bliss v. Kaweah, C. & I. Co., 200, 612.
Blodgett v. Lanyon Zinc Co., 785, 789.
Blodgett v. Morrill, 362, 378, 385.
Bloede Co. v. Bloede, 513.
Blood v. La Serena Land & Water Co., 627.
Blouin v. Liquidators of Hart, 531.
Bloxam v. Metropolitan Ry., 500.
Blue v. Capital Nat. Bank, 666.
Blue Jacket Consol. Copper Min. Co. v. Scherr, 764.
Blum v. Whitney, 136.
Blunt v. Walker, 154.
Bly v. White Deer Mountain Water Co., 148.
Boardman v. Cutter, 326.
Boardman v. Lake Shore & M. S. Ry. Co., 428, 429, 433, 452.
Boardman v. S. S. McClure Co., 775, 795.
Board of Com'rs for Filling Certain Slough Ponds in City of St. Louis v. Shields, 121.
Board of Com'rs of Hamilton Co. v. Mighels, 33.
Board of Com'rs of Tippecanoe County v. Reynolds, 673.
Board of Directors for Leveling Wabash River v. Houston, 32.
Board of Directors of Automatic Chain Co., In re, 310.
Board of Education v. Bakewell, 30, 31.
Board of Education of Detroit v. Union Trust Co., 621.
Board of Education of State of Illinois v. Greenebaum, 30, 31, 196.
Board of Improvement of Sewer Dist. No. 2 of Ft. Smith v. Sisters of Mercy, 258.
Board of Revenue of Montgomery County v. Montgomery Gaslight Co., 281.
Board of Sup'rs of Schuyler County v. People, 40.
Board of Trade of Chicago v. Hammond Elevator Co., 774.
Board of Trade of City of Chicago v. Nelson, 507, 509.
Board of Trustees for Vincennes University v. Indiana, 31.
Board of Trustees of Charlotte Tp. v. Piedmont Realty Co., 225.
Board of Trustees of Illinois & M. Canal v. Chicago & R. I. R. Co., 268.
Board of Trustees of Seventh St. Colored M. E. Church v. Campbell, 58.
Boatmen's Bank v. Gillespie, 54, 55, 56, 68, 84, 115, 615.
Boatmen's Bank of St. Louis, Mo., v. Fritzlen, 778.
Boatmen's Ins. & Trust Co. v. Able, 527, 557.
Bobzin v. Gould Balance Valve Co., 368, 370, 376.
Boca Mill Co. v. Curry, 37, 42, 91.
Bocock's Ex'r v. Alleghany Coal & Iron Co., 624.
Bogardus v. Trinity Church, 152.
Boggiano v. Chicago Macaroni Mfg. Co., 598.
Boggs v. Boggs & Buhl, 506.
Boldenweck v. Bullis, 500.
Bole v. Fulton, 331, 338, 344.
Bommer v. American Spiral Spring Butt Hinge Mfg. Co., 132.
Bonaparte v. Baltimore, H. & L. R. R. Co., 54.
Bonaparte v. Camden & A. R. Co., 32.
Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 93, 113.
Bond v. Appleton, 717.
Bond v. Atlantic Terra Cotta Co., 130, 273.
Bond v. Barrow Haematite Steel Co., 425.
Bond v. Bean, 526.
Bond v. Pike, 133.
Bond v. Terrell Cotton & Woolen Mfg. Co., 227.
Bone v. President, etc., Delaware & H. Canal Co., 206.
Boney v. Williams, 378.
Bonnell v. Griswold, 754.
Boone v. Van Gorder, 535.
Booske v. Gulf Ice Co., 115.
Booth v. Bunce, 688.
Booth v. Consolidated Fruit Jar Co., 430.
Booth v. Dear, 705.
Booth v. Dexter Steam Fire Engine Co., 646.
Booth v. Land Filling & Imp. Co., 639.
Booth v. Robinson, 166, 171, 183, 487, 490, 641.
Booth & Co. v. Weigand, 779.
Borland's Trustee v. Steel Bros. & Co., 515.
Bornn Hat Co., In re, 27.
Borough of Braddock v. Penn Water Co., 59.
Borton v. Brines-Chase Co., 802.
Bosher v. Richmond & H. Land Co., 127.
Bosshardt & Wilson Co. v. Crescent Oil Co., 162, 164, 165, 215, 228.
Boston Acid Mfg. Co. v. Moring, 64.
Boston Beer Co. v. Massachusetts, 263, 264, 265, 267, 269.
Boston, B. & G. R. Co. v. Wellington, 383.
Boston, C. & M. R. R. v. Gilmore, 677.
Boston Glass Manufactory v. Langdon, 294, 295, 298, 299, 307, 314.
Boston Inv. Co. v. Boston, 83.
Boston Music Hall Ass'n v. Cory, 526, 536.
Boston Safe Deposit & Trust Co. v. Adams, 438, 451.
Boston Water-Power Co. v. Boston & W. R. Corp., 268.
Boston & A. R. Co. v. Pearson, 24.

[The figures refer to pages]

Boston & A. R. Co. v. Richardson, 542, 554.
Boston & Sandwich Glass Co. v. Boston, 281.
Bostwick v. Chapman, 601, 602, 604.
Bostwick v. Young, 337, 466.
Bosworth v. Allen, 632, 653.
Botts v. Simpsonville & B. C. Turnpike Road Co., 192.
Bouche v. Sproule, 441.
Boulton Carbon Co. v. Mills, 471, 747.
Bourdette v. Sieward, 413.
Bouton v. Dement, 405.
Bow v. Allenstown, 37, 50.
Bowden v. Johnson, 720.
Bowden Lime Works v. Moss, 634.
Bowditch v. Jackson Co., 12, 167, 296, 297, 562.
Bowers v. Ocean Accident & Guarantee Corp., 225.
Bowman Lumber Co. v. Pierson, 231.
Boyce v. Montauk Gas Coal Co., 218, 501.
Boyce v. Trustees of Towsonton Station of Methodist Episcopal Church, 120.
Boyd v. American Carbon-Black Co., 177, 227.
Boyd v. Conshohocken Worsted Mills, 430.
Boyd v. Peach Bottom R. Co., 373, 388, 389.
Boyd v. Redd, 523.
Boyer v. Boyer, 286.
Boyer v. Nesbitt, 601, 602, 604.
Boyer v. Northern Pac. R. Co., 84.
Boykin v. State, 51.
Boynton v. Andrews, 471.
Boynton v. Hatch, 471, 477.
Boynton v. Roe, 610.
Braceville Coal Co. v. People, 276.
Bradbury v. Boston Canoe Club, 171, 173.
Bradford v. Frankfort, 115.
Bradley v. Ballard, 225, 226, 228.
Bradley v. Bauder, 282, 284.
Bradley v. Case, 32.
Bradley v. Poole, 355.
Bradley v. Reppell, 100, 101, 292.
Bradley Engineering & Mfg. Co. v. Heyburn, 175.
Bradshaw v. Knoll, 130.
Bradt v. Benedict, 298.
Brady v. Moulton, 48.
Braintree Water Supply Co. v. Braintree, 63.
Bramah v. Roberts, 172.
Branch v. Jesup, 450.
Branch v. Roberts, 752.
Brand v. Lawrenceville Branch R. R., 370, 382, 385.
Brandenburg v. Jefferson Club Ass'n, 507, 509.
Brandenstein v. Hoke, 104, 120.
Brander v. Brander, 441.
Brandon v. Umpqua Lbr. & Timber Co., 315.
Branin v. Connecticut & P. R. R. Co., 267.
Brant v. Ehlen, 467, 470, 480.
Brantigam v. Dean & Co., 132.
Brassey v. New York & N. E. R. Co., 731.
Bray v. Farwell, 23, 25, 382.
Breeze v. Lone Pine Surprise Consol. Min. Co., 503.
Breinig v. Sparrow, 177.
Breitung v. Lindauer, 756.
Brennan v. Emery-Bird-Thayer Dry Goods Co., 630.
Brennan v. Tracy, 252.
Brent v. Bank of Washington, 522.
Breslin v. Fries-Breslin Co., 236, 450.
Brewer v. Boston Theater, 490, 494.
Brewer v. State, 112.
Brewer & Hofmann Brewing Co. v. Boddie, 218.
Brewster v. Hartley, 574, 577.
Brewster v. Hatch, 136.
Brickley v. Edwards, 115.
Brick Presbyterian Church Corp. v. Mayor, etc., of New York, 265.
Bridgers v. First Nat. Bank, 601.
Bridges v. National Bank of Troy, 577.
Bridge Street & Allendale Gravel Road Co. v. Hogadone, 99.
Bridgham v. Nathan, 745.
Briggs v. Penniman, 298, 678, 698, 705, 710, 727, 730, 735.
Briggs v. Spaulding, 633, 648, 649, 651, 752.
Brigham v. Mead, 390.
Brigham v. Nathan, 745.
Brigham v. Peter Bent Brigham Hospital, 208.
Bright v. Lord, 429.
Brightman v. Bates, 601, 602, 603, 604.
Brighton Packing Co. v. Butchers' Slaughtering & Melting Ass'n, 10.
Brill Co. v. Norton & T. St. R. Co., 175.
Brinckerhoff v. Bostwick, 487, 504, 648, 653, 751.
Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co., 513, 577.
Brinkley v. Hambleton, 518, 519.
Brisbane v. Delaware L. & W. R. Co., 429.
Bristol v. Sanford, 726.
Bristol Bank & Trust Co. v. Jonesboro Banking Trust Co,, 607.
Bristol Creamery Co. v. Tilton, 386.
Bristor v. Smith, 712.
British American Land Co. v. Ames, 788.
Brittan v. Oakland Bank of Savings, 526, 544.
Broadway Bank v. McElrath, 536.
Broadway Nat. Bank v. Baker, 177, 736, 739, 746, 748.
Broadway & S. A. R. Co., In re, 100.
Broadwell v. Merritt, 115, 121.
Brock v. Poor, 8, 11.
Brockway Mfg. Co., In re, 751.
Broderip v. Salomon, 69.
Brokaw v. New Jersey R. Co. & Transp. Co., 249.

[The figures refer to pages]

Brokaw v. New Jersey R. & Transp. Co., 662, 663.
Bronson v. Schneider, 710, 741, 742, 745.
Bronson Electric Co. v. Rheubottom, 576.
Brooker v. William H. Thompson Trust Co., 139.
Brooklyn, W. & N. R. Co., In re, 100, 300.
Broomall v. North American Steel Co., 172.
Broughton v. Jones, 614.
Brown, In re, 438.
Brown v. Adams, 530.
Brown v. Allebach, 355, 363.
Brown v. Bradford, 610.
Brown v. British & American Mtg. Co., 196.
Brown v. Corbin, 73.
Brown v. Creston Ice Co., 667.
Brown v. De Young, 502.
Brown v. Eastern Slate Co., 704.
Brown v. Hitchcock, 717.
Brown v. Morristown Co-op. Stove Co., 692.
Brown v. Pacific Mail S. S. Co., 602.
Brown v. Trail, 711.
Brown v. Webb, 99, 102.
Brown v. Winnisimmet Co., 149, 166.
Brownell v. Anthony, 437.
Browning v. Waycross, 765, 766.
Bruce v. Platt, 754, 755.
Brum v. Merchants' Mut. Ins. Co., 687.
Brundage v. Monumental G. & S. Mining Co., 730, 731.
Brundred v. Rice, 182.
Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 169, 180, 214, 216, 220, 676.
Brunswick Terminal Co. v. National Bank, 746.
Brush Electric Light & Power Co. of Montgomery v. City Council of Montgomery, 621.
Brush Creek Coal & Mining Co. v. Morgan-Gardner Electric Co., 793.
Bryan v. Western Union Tel. Co., 798.
Bryant v. Rich, 660.
Bryant's Pond Steam Mill Co. v. Felt, 338, 339, 340.
B. S. Green Co. v. Blodgett, 162, 196.
Buchanan v. Meisser, 735.
Bucher v. Dillsburg & M. R. Co., 354.
Buchler v. Black, 636.
Buck v. Troy Aqueduct Co., 573, 581, 616.
Buck Stove & Range Co. v. Vickers, 314, 767.
Buckeye Marble & Freestone Co. v. Harvey, 183, 184, 214.
Budd v. Multnomah St. R. Co., 394, 395, 399, 400; 577.
Buell v. Buckingham, 617.
Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Electric Light Co., 295.
Buffalo Lubricating Oil Co. v. Standard Oil Co., 246.
Buffalo, N. Y. & E. R. Co., In re, 184, 596.
Buffalo Zinc & Copper Co. v. Crump, 776, 789.
Buffalo & A. R. Co. v. Cary, 99.
Buffalo & J. R. Co. v. Gifford, 334, 351, 352, 408, 409.
Buffalo & N. Y. City R. Co. v. Dudley, 334, 338, 342, 386, 393, 396, 407, 570.
Buffalo & P. R. Co. v. Hatch, 61.
Buffett v. Troy & B. R. Co., 663.
Buffington v. Bardon, 131, 132.
Buie v. Chicago, R. I. & P. R. Co., 774.
Building & Loan Ass'n of Dakota v. Chamberlain, 113, 115, 119, 121.
Bulkeley v. Worthington Ecclesiastical Soc., 437.
Bulkley v. Derby Fishing Co., 197.
Bulkley v. Whitcomb, 748.
Bullard v. National Eagle Bank, 523, 577.
Bullen v. Milwaukee Trading Co., 223.
Bullock v. Billheimer, 31.
Bullock v. Falmouth & C. H. Turnpike Co., 334, 345, 349.
Bult v. Morrell, 172.
Buncombe Turnpike Co. v. McCarson, 95.
Bundy v. Ophir Iron Co., 8.
Burbank v. Dennis, 136.
Burden v. Burden, 133, 207, 426, 574.
Burgess v. Seligman, 723.
Burke v. Concord R. R., 178.
Burke v. Smith, 373, 378, 699, 730.
Burke v. State, 242.
Burland v. Earle, 498, 597, 635, 639.
Burleson v. Davis, 362.
Burnes v. Burnes, 188, 189.
Burnes v. Pennell, 23, 24.
Burr v. Wilcox, 330, 365, 391.
Burrall v. Bushwick R. Co., 325, 329.
Burrill v. President, etc., of Nahant Bank, 610, 612, 627.
Burroughs v. North Carolina R. Co., 429, 436.
Burrows v. Interborough Metropolitan Co., 458, 501.
Burrows v. Smith, 354, 386.
Burt v. British, etc., Ass'n, 501.
Burt v. Grand Lodge F. & A. Masons, 509.
Burton v. Schlidbach, 104.
Busenback v. Attica & B. Gravel Road Co., 58.
Bushnell v. Consolidated Ice Mach. Co., 99, 101, 102, 107, 114, 120, 293.
Business Men's Ass'n v. Williams, 332, 338, 353, 391.
Buswell v. Supreme Sitting of Order of Iron Hall, 802.
Butchers' & Drovers' Bank of St. Louis v. McDonald, 99, 109, 110, 115, 120.
Butler v. Harrison Land & Min. Co., 678.
Butler v. New Keystone Copper Co., 297.
Butler v. Standard Milk Flour Co., 802.
Butler Paper Co. v. Cleveland, 63, 124.
Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co., 620.

[The figures refer to pages]

Butterfield v. Beardsley, 23, 24.
Butternuts & P. Turnpike Co. v. North, 370.
Butterworth & Lowe v. Kritzer Mill. Co., 238.
Button v. Hoffman, 7, 8, 294, 484.
Buttrick v. Nashua & L. R. R. Co., 535, 614, 629.
Buxton v. Hamblen, 780.
Byrne v. Schuyler Electric Mfg. Co., 142, 163, 183, 205.
Byronville Creamery Ass'n v. Ivers, 60, 117.

C

Cable v. United States Life Ins. Co., 768.
Cady v. Associated Colonies, 797.
Cady v. Sanford, 755.
Cæsar v. Bernard, 693.
Cæser v. Capell, 775.
Caffee v. Berkley, 136.
Cahall v. Citizens' Mut. Bldg. Ass'n, 114, 120.
Cahill v. Kalamazoo Mut. Ins. Co., 573, 577.
Cahill v. Original Big Gun Beneficial & Pleasure Ass'n, 748.
Cairo & F. R. Co. v. Hecht, 263.
Caldwell v. Morganton Mfg. Co., 199.
Caldwell v. Mutual Reserve Fund Life Ass'n, 612.
Caldwell v. North Carolina, 765, 766.
Caley v. Philadelphia & C. C. R. Co., 369, 373.
California v. Central Pac. R. Co., 40, 286.
California Fruit Exch. v. Buck, 115.
California Nat. Bank v. Kennedy, 183, 184, 213, 720.
California Southern Hotel Co. v. Callender, 384.
California Southern Hotel Co. v. Russell, 385.
California State Tel. Co. v. Alta Tel. Co., 47.
Calkins v. Equitable Bldg. & Loan Ass'n, 527.
Calkins v. State, 93, 95.
Callanan v. Windsor, 458.
Callender v. Painesville & H. R. Co., 113.
Calor Oil & Gas Co. v. Franzell, 95.
Calumet Paper Co. v. Haskell-Show Printing Co., 610, 612, 614, 617.
Calumet Paper Co. v. Stotts Inv. Co., 183.
Cambridge Water Works v. Somerville Dyeing & Bleaching Co., 733, 741.
Camden v. Stuart, 460, 472, 678, 680.
Camden Interstate R. Co. v. Lee, 695.
Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co., 635, 640.
Camden & A. R. Co. v. May's Landing & E. H. C. R. Co., 202, 203, 216, 225.
Camden & A. R. & Transp. Co. v. Commissioners of Mansfield Tp., 289.
Cameron v. Kenyon-Connell Commercial Co., 665.
Cameron v. Seaman, 755.
Cameron's Coalbrook, etc., R. Co., In re, 632.
Cammeyer v. United German Lutheran Churches, 614.
Campbell v. American Alkali Co., 396, 400, 519.
Campbell v. American Zylonite Co., 448.
Campbell v. Farmers' & Merchants' Bank, 688.
Campbell v. Perth Amboy Mut. Loan, Homestead & Bldg. Ass'n, 101.
Campbell v. Poultney, 596.
Campbell v. Watson, 649, 751.
Campbell's Case, 639.
Canada-Atlantic & Plant S. S. Co. v. Flanders, 612.
Canada Southern Ry. Co. v. Gebhard, 783.
Canal Street Gravel Road Co. v. Paas, 96.
Canfield v. Gregory, 114.
Cape May Yacht Club v. Cape May Yacht & Country Club, 80.
Capps v. Hastings Prospecting Co., 60, 93, 114, 117, 334.
Card v. Moore, 59, 105, 109, 116.
Carey v. Des Moines Co-op. Coal & Min. Co., 131.
Carey v. Giles, 263, 277.
Carey v. Williams, 715.
Carlaftes v. Goldmeyer Co., 175.
Carlisle v. Saginaw Valley & St. L. R. Co., 331, 338, 349, 350.
Carlow v. C. Aultman & Co., 207, 786.
Carmody v. Powers, 131.
Carnaghan v. Exporters' & Producers' Oil Co., 671.
Carpenter v. American Bldg. & Loan Ass'n, 327, 397.
Carpenter v. Black Hawk Gold Min. Co., 168.
Carpenter v. Danforth, 678.
Carpenter v. Frazier, 61.
Carpenter v. People, 49.
Carr v. Iglehart, 697.
Carr v. Kimball, 489.
Carr v. Le Fevre, 172, 467, 470, 473.
Carrington v. Thomas C. Basshor Co., 647, 649.
Carrington v. Turner, 625.
Carrol v. Green, 746.
Carroll v. East St. Louis, 207, 770, 772, 784.
Carroll v. Greenwich Ins. Co. of New York, 770.
Carson v. Arctic Min. Co., 393, 396.
Carson City Sav. Bank v. Carson City Elevator Co., 225, 624.
Carson-Rand Co. v. Stern, 789.
Carstens & Earles v. Leidigh & H. Lumber Co., 793.
Cartwright v. Dickinson, 187, 404, 406, 699.
Carver v. Braintree Mfg. Co., 711.
Carver Mercantile Co. v. Hulme, 71.

[The figures refer to pages]

Carver v. Southern Iron & Steel Co., 458.
Cary Library v. Bliss, 258, 259.
Cary-Lombard Lumber Co. v. Thomas, 780.
Casanas v. Audubon Hotel Co., 260, 354.
Casco Nat. Bank of Portland v. Clark, 630, 631.
Case v. Citizens' Bank, 557.
Case v. Kelly, 150, 151, 152, 164, 165, 208, 233.
Casey v. Galli, 122, 402.
Cashman v. Brownlee, 193.
Cass v. Pittsburg, V. & C. R. Co., 371, 381, 398.
Cass v. Realty Securities Co., 329.
Cassidy v. Uhlmann, 665.
Castner v. Twitchell-Champlin Co., 589.
Castle Braid Co., In re, 188.
Catlin v. Eagle Bank of New Haven, 692.
Catskill Bank v. Gray, 177.
C. B. Rogers & Co. v. Simmons, 778, 788.
Cecil Nat. Bank v. Watsontown Bank, 523.
Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co., 47, 51, 120.
Central Bridge Corp. v. Lowell, 268.
Central City Sav. Bank v. Walker, 124.
Central Grain & Stock Exchange of Hammond v. Board of Trade of City of Chicago, 795, 799.
Central Land Co. v. Obenchain, 136, 139.
Central Lumber Co. v. Kelter, 175.
Central Nat. Bank of Junction City v. Sheldon, 125.
Central Nebraska Nat. Bank v. Wilder, 429, 430.
Central of Georgia R. Co. v. Paul, 687.
Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co., 160, 207.
Central Plankroad Co. v. Clemens, 405.
Central R. Banking Co. v. Georgia, 192.
Central R. Co. of New Jersey v. Pennsylvania R. Co., 67.
Central R. & Banking Co. v. Cheatham, 160.
Central R. & Banking Co. v. Georgia Const. & Invest. Co., 798.
Central R. & Banking Co. v. Smith, 161, 177, 242, 243, 662, 663.
Central R. & B. Co. v. Wright, 288.
Central Transp. Co. v. Pullman Palace Car Co., 148, 161, 169, 212, 213, 214, 216, 217, 220, 221, 231, 232, 235.
Central Trust Co. v. Citizens' St. R. Co., 259.
Central Trust Co. v. Columbus, H. V. & T. R. Co., 177.
Central Trust Co. v. East Tennessee Land Co., 140.
Central Trust Co. of New York v. West India Imp. Co., 325, 330, 526, 540.
Central Trust Co. of Pittsburg v. Lappe, 132.
Central Turnpike Corp. v. Valentine, 384, 385, 401.
Chadwick v. Old Colony R. Co., 171.
Chafee v. Fourth Nat. Bank of New York, 83.
Chaffee v. Rutland R. Co., 449, 451.
Chaffin v. Cummings, 334, 349, 391.
Chamberlain v. Bromberg, 610, 691, 729.
Chamberlain v. Chamberlain, 208.
Chamberlain v. Painesville & H. R. Co., 374.
Chamberlain v. Southern California Edison Co., 243.
Chamberlain v. Trogden, 355.
Chambers v. Chambers & McKee Glass Co., 610.
Chambers v. George Vassar's Sons & Co., 193.
Chambers v. Lancaster, 625.
Chambers v. St. Louis, 155.
Champollion v. Corbin, 326.
Chandler v. Bacon, 136, 137.
Chapman v. Barney, 25.
Chapman v. Bates, 601, 604.
Chapman v. Iron Clad Rheostat Co., 188.
Charles River Bridge v. Warren Bridge, 148. 261.
Charlotte, C. & A. R. Co. v. Gibbes, 26.
Chasé v. Curtis, 755.
Chase v. Michigan Tel. Co., 680, 688.
Chase v. Railroad Co., 369.
Chase v. Tuttle, 610, 616, 617.
Chattanooga Nat. Bldg. & Loan Ass'n v. Denson, 780.
Chautauqua County Bank v. Risley, 194.
Chavelle v. Washington Trust Co., 614.
Cheeney v. Lafayette B. & M. R. Co., 666.
Chemical Nat. Bank v. Hartford Deposit Co., 298.
Chemical Nat. Bank of New York v. Colwell, 531, 532, 537, 608, 717, 719.
Chemical Nat. Bank of New York v. Havermale, 184.
Chemical Nat. Bank of New York v. Wagner, 622, 628.
Chenango County Mut. Ins. Co., In re, 588, 605.
Cheney v. Scharmann, 705.
Cheraw & C. R. Co. v. White, 64.
Cherry v. Frost, 544.
Chesapeake & Ohio Canal Co. v. Baltimore & O. R. Co., 277.
Chesapeake & O. R. Co. v. Howard, 243, 663.
Chesapeake & O. R. Co. v. Paine, 328.
Chesebrough v. Conover, 241.
Chesley v. Pierce, 717.
Chester v. Buffalo Car Mfg. Co., 440.
Chester Glass Co. v. Dewey, 113, 390.
Chestnut Hill & Spring Home Turnpike Co. v. Rutter, 242, 244.
Chetlain v. Republic Life Ins. Co., 406.
Chew v. Bank of Baltimore. 552.
Chewacla Lime Works v. Dismukes, 157, 165, 213.

[The figures refer to pages]

Chicago Bldg. & Mfg. Co. v. Peterson, 342.
Chicago Bldg. & Mfg. Co. v. Talbotton Creamery & Mfg. Co., 131.
Chicago, B. & Q. R. Co. v. Iowa, 267.
Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha, 266.
Chicago City R. Co. v. Allerton, 55, 443, 487, 611.
Chicago Edison Co. v. Fay, 541.
Chicago Gaslight Co. v. People's Gaslight & Coke Co., 180.
Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 169.
Chicago Hansom Cab Co. v. Yerkes, 498, 562.
Chicago, I. & L. R. Co. v. Southern Indiana R. Co., 240.
Chicago K. & W. R. Co. v. Stafford Co. Com'rs, 99.
Chicago Life Ins. Co. v. Auditor of Public Accounts, 263, 267.
Chicago Life Ins. Co. v. Needles, 263, 267.
Chicago Macaroni Mfg. Co. v. Boggiano, 489, 591, 667, 670.
Chicago Mill & Lumber Co. v. Sims, 778, 789.
Chicago Open Board of Trade v. Imperial Bldg. Co., 100.
Chicago, P. & St. L. R. Co. v. Ayres, 179.
Chicago, P. & S. W. R. Co. v. President, etc., of Town of Marseilles, 188.
Chicago, R. I. & P. R. Co. v. Howard, 166, 176.
Chicago, R. I. & P. R. Co. v. Moffitt, 695.
Chicago, S. F. & C. R. Co. v. Ashling, 192.
Chicago Tip & Tire Co. v. Chicago Nat. Bank, 625.
Chicago Title & Trust Co. v. Bashford, 760, 776.
Chicago Title & Trust Co. v. Doyle, 192.
Chicago Union Traction Co. v. Chicago, 53, 147.
Chicago & A. Ry. Co. v. Derkes, 225.
Chicago & A. R. Co. v. Keegan, 207.
Chicago & A. R. Co. v. Mulford, 179.
Chicago & A. R. Co. v. People to Use of Pierson, 266.
Chicago & A. R. Co. v. Suffern, 182.
Chicago & E. I. R. Co. v. People, 250.
Chicago & E. R. Co. v. Flexman, 660.
Chicago & N. W. R. Co. v. Auditor General, 87.
Chicago & N. W. R. Co. v. Whitton, 87.
Chicago & W. I. R. Co. v. Heidenreich, 100, 104.
Child v. Boston & Fairhaven Iron Works, 711.
Child v. Coffin, 266.
Child v. Hudson's Bay Co., 576.
Childs v. Bank of Missouri, 244.
Childs v. Cleaves, 726, 736.
Childs v. Hurd, 59, 100.
Childs v. White, 647, 650, 651.
Chinn v. Foster-Milburn Co., 799.
Chitty v. Pennsylvania Ry. Co., 796.
Chouteau Ins. Co. v. Floyd, 362, 404.
Chouteau Spring Co. v. Harris, 513, 515, 520, 532, 539, 576, 720.
Christensen v. Eno, 323, 456, 457, 461, 467.
Christian v. American Freehold Land Mtg. Co., 775.
Christian & Craft Grocery Co. v. Fruitdale Lumber Co., 107, 109, 117.
Christopher v. Norvell, 347, 725.
Chubb v. Upton, 113, 114.
Church v. Church Cementico Co., 131.
Church v. Imperial Gaslight & C. Co., 195.
Church of Jesus Christ of Latter Day Saints v. U. S., 153, 319.
Cicotte v. Corporation of Catholic, etc., Church, 196.
Cilumbus Ins. Co. v. Walsh, 779.
Cincinnati, etc., R. Co. v. Danville, etc., R. Co., 112.
Cincinnati Mut. Health Assur. Co. v. Rosenthal, 779, 782.
Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank, 554, 555, 659.
Cincinnati Volksblatt Co. v. Hoffmeister, 413, 415, 416, 417.
Citizens' Life Ass'n Co. v. Brown, 242, 245.
Citizens' Mut. Fire Ins. Co. v. Sortwell, 590, 591.
Citizens' Nat. Bank v. Elliott, 666.
Citizens' Nat. Cent. Bank of N. Y. v. Appleton, 231.
Citizens' Sav. Bank v. Owensboro, 288.
Citizens' Sav. Loan Ass'n v. Topeka, 280.
Citizens' State Bank v. Hawkins, 719.
Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie, 729, 731.
City and County of San Francisco v. Spring Valley Waterworks, 47, 49.
City Bank of Columbus v. Bruce, 187, 188.
City Bank of Macon v. Bartlett, 362, 363.
City Nat. Bank v. Goshen Woolen Mills Co., 753.
City of Atlanta v. Gate City Gaslight Co., 53.
City of Chicago v. Cameron, 487, 494.
City of Chicago v. Stein, 622.
City of Chicago v. Turner, 33.
City of Corpus Christi v. Central Wharf & Warehouse Co., 216, 225.
City of Covington v. Covington & C. Bridge Co., 449.
City of Danville v. Danville Water Co., 277.
City of Davenport v. Dows, 487.
City of Denver v. Sherret, 629.
City of Detroit v. Dean, 494.
City of Detroit v. Detroit & H. P. R. Co., 274.
City of Fall River v. County Com'rs of Bristol, 281.

[The figures refer to pages]

City of Indianapolis v. Navin, 48.
City of Louisville v. McAteer, 8.
City of Memphis v. Ensley, 282.
City of Memphis v. Kimbrough, 32.
City of Minneapolis v. Minneapolis St. R. Co., 152.
City of New York, In re, 75.
City of New York v. Crowell, 125.
City of Norwich v. Norfolk R. Co., 201.
City of Ottawa v. People, 38.
City of Parkersburg v. Brown, 280.
City of Pomona v. Sunset Telephone & Telegraph Co., 286.
City of Quincy v. Chicago, B. & Q. R. Co., 170.
City of Roxbury v. Boston & P. R. Corp., 275.
City of Santa Cruz v. Wykes, 215.
City of Selma v. Mullen, 196.
City of South Pasadena v. Pasadena Land & Water Co., 169.
City Water Co. v. State, 168.
Clapp v. Peterson, 188, 189.
Clark v. American Cannel Coal Co., 104, 292.
Clark v. American Coal Co., 502.
Clark v. Barnard, 90.
Clark v. Bever, 89, 463.
Clark v. Brown, 55, 292, 611.
Clark v. Campbell, 428.
Clark v. Continental Imp. Co., 332.
Clark v. E. C. Clark Mach. Co., 190.
Clark v. Edgar, 664.
Clark v. Jones, 116.
Clark v. Knowles, 739.
Clark v. Memphis St. R. Co., 184.
Clark v. Monongahela Nav. Co., 567.
Clark v. New England Mut. Fire Ins. Co., 581.
Clark v. Pittsburg Natural Gas Co., 501.
Clark v. Turner, 444.
Clark Co. v. Colton, 753.
Clarke v. Lincoln Lumber Co., 476.
Clarksville & R. Turnpike Co. v. Montgomery County, 148.
Clausen v. Head, 114.
Clawson v. Clayton, 412, 417.
Clayton v. Ore Knob Co., 470.
Clearwater v. Meredith, 161, 192, 567.
Cleaveland v. Mullin, 60, 334.
Clegg v. Hamilton & Wright Grange Co., 59, 62.
Clegg v. Hamilton & Wright County Grange Co., 62, 124.
Cleghorn v. New York Cent. & H. R. Co., 247, 248.
Clem v. Newcastle & D. R. Co., 360.
Cleveland v. Burnham, 718, 734.
Cleveland, C., C. & St. L. R. Co. v. Closser, 181.
Cleveland, C., C. & St. L. R. Co. v. Prewitt, 695.
Cleveland City Forge Iron Co. v. Taylor Bros. Iron Works, 694.
Cleveland Rolling-Mill Co. v. Texas & St. L. R. Co., 480, 730.
Cleveland & M. R. Co. v. Robbins, 429.
Clevenger v. Moore, 471.
Clews v. Friedman, 534, 540.
Clinton Co. v. Schwartz, 59.
Clinton Co. v. Schwarz, 115.
Close v. Glenwood Cemetery, 115, 122, 272.
Clough v. Rocky Mountain Oil Co., 92.
Clow v. Brown, 470, 754.
Clowe v. Imperial Pine Product Co., 198.
Clowes v. Miller, 602.
Coal Belt Electric R. Co. v. Peabody Coal Co., 295.
Coal Creek Min. & Mfg. Co. v. Tennessee Coal, Iron & R. Co., 91.
Coasts, In re, 415.
Coats v. Donnell, 693.
Coates v. Mayor, etc., of New York, 265.
Cobb v. Fant, 437.
Cobb v. Lagarde, 416.
Cobb v. United Engineering & Contracting Co., 621.
Cobe v. Guyer, 311.
Cochran v. Arnold, 102, 115, 118, 119, 120, 123.
Cochran v. McGee, 432.
Cochran v. Wiechers, 708, 725.
Cockburn v. Union Bank of Louisiana, 413.
Cocking v. Ward, 727.
Cockran v. Wiechers, 725.
Coe v. Columbus, P. & I. R. Co., 169, 170.
Coe v. East & W. R. Co. of Alabama, 466.
Coffey v. Coffey, 527.
Coffin v. Collins, 95.
Coffin v. Ransdell, 467, 470.
Coffin v. Rich, 713.
Coffing v. Dodge, 738.
Cogswell v. Bull, 487.
Cogswell v. Cogswell, 436.
Cohen v. Big Stone Gap Iron Co., 167, 296.
Cohen v. U. S., 253.
Coit v. North Carolina Gold Amalgamating Co., 469, 470, 473.
Colby v. Equitable Trust Co., 273.
Colchester v. Seaber, 299.
Coldwater Copper Min. Co. v. Gillis, 114.
Cole v. Cassidy, 665.
Cole v. Cole Realty Co., 188, 236.
Cole v. Millerton Iron Co., 191, 678, 680.
Coleman v. Coleman, 125.
Coleman v. Hagey, 167.
Coleman v. Howe, 468.
Coleman v. Ry. Co., 157, 161.
Coleman v. White, 705, 734, 745.
Coler v. Tacoma Ry. & Power Co., 184.
Coleridge Creamery Co. v. Jenkins, 209.
Coles v. Kennedy, 359.
Colfax Hotel Co. v. Lyon, 349.
Colgate v. United States Leather Co., 30.
Collector of Taxes of Boston v. Proprietors of Mt. Auburn Cemetery, 84.
Collier v. Consolidated Ry., Lighting & Refrigerating Co., 611.
Collier v. Deering Camp Ground Ass'n, 485.

[The figures refer to pages]

Collier v. Mutual Reserve Fund Life Ass'n, 797.
Collins v. Penn-Wyoming Copper Co., 494.
Colman v. Ry. Co., 142.
Colonial Bank v. Cady, 544, 547.
Colonial Trust Co. v. McMillan, 474.
Colorado Fuel & Iron Co. v. Sedalia Smelting Co., 747.
Colorado Iron Works v. Sierra Grande Min. Co., 777, 791.
Colorado Springs Co. v. American Pub. Co., 41, 158, 218, 564, 624.
Colt v. Ives, 530, 535, 538.
Colton Imp. Co. v. Richter, 137, 140.
Columbia Electric Co. v. Dixon, 114, 115, 117, 360, 391.
Columbia Mill Co. v. National Bank of Commerce, 625.
Columbia Nat. Bank v. Mathews, 585.
Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co., 494.
Columbus Ins. Co. v. Walsh, 779.
Comanche Cotton Oil Co. v. Browne, 352.
Commercial Bank of Keokuk v. Pfeiffer, 114.
Commercial Bank of New Orleans v. Newport Mfg. Co., 171, 173.
Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County, 183.
Commercial Mut. Acc. Co. v. Davis, 774, 797.
Commercial Nat. Bank v. Burch, 189.
Commercial Nat. Bank v. Farmers' & Traders' Nat. Bank, 328.
Commercial Nat. Bank v. Weinhard, 55, 443, 609.
Commercial Nat. Bank of Council Bluffs v. Gilinsky, 61, 63.
Commissioners of Inland Fisheries v. Holyoke Water Power Co., 267, 274, 276.
Com. v. American Snuff Co., 76.
Com. v. Boston & A. R. R., 189.
Com. v. Bringhurst, 599.
Com. v. Chesapeake & O. R. Co., 280.
Com. v. Compton, 526.
Com. v. Cullen, 54, 55, 611.
Com. v. Dalzell, 593, 594, 595.
Com. v. Detwiller, 574, 599, 608.
Com. v. Eastern R. Co., 266, 269, 270, 275.
Com. v. Empire Pass Ry. Co., 414.
Com. v. Erie & N. E. R. Co., 148.
Com. v. Essex Co., 267, 274.
Com. v. Flannery, 598.
Com. v. Hazen, 40.
Com. v. Hemmingway, 346, 598.
Com. v. Illinois Cent. R. Co., 251, 255.
Com. v. Licking Valley Bldg. Ass'n No. 3, 92.
Com. v. Milton, 764.
Com. v. Monongahela Bridge Co., 295, 303.
Com. v. Nebo Consol. Coal & Coking Co., 77.
Com. v. Newport, L. & A. Turnpike Co., 305.
Com. v. New York Cent. & H. R. Co., 254.
Com. v. New York, L. E. & W. R. Co., 9, 206.
Com. v. Northern Electric Light & Power Co., 71.
Com. v. Philadelphia County, 104.
Com. v. Phœnix Iron Co., 412, 414.
Com. v. Pike Beneficial Soc., 509.
Com. v. President, etc., of Swift Run Gap Turnpike Co., 250.
Com. v. Proprietors of New Bedford Bridge, 250, 251, 253.
Com. v. Pulaski County Agricultural & Mechanical Ass'n, 250, 251.
Com. v. Read Phosphate Co., 761.
Com. v. St. Patrick Benev. Soc., 506, 508.
Com. v. Smith, 167, 168, 169, 172.
Com. v. Standard Oil Co., 280, 777.
Com. v. Union Fire & Marine Ins. Co., 307, 309.
Com. v. Union League of Philadelphia, 510.
Com. v. Wickersham, 589.
Com. v. Woelper, 574.
Com. v. Worcester, 575.
Commonwealth Mut. Fire Ins. Co. v. Hayden, 733.
Comstock, In re, 779, 782.
Condon v. Mutual Reserve Fund Life Ass'n, 801.
Cone v. Tuscaloosa Mfg. Co., 774.
Cone Export & Commission Co. v. Poole, 788.
Congregational Church Bldg. Soc. v. Everett, 207.
Congress & E. Spring Co. v. Knowlton, 240, 444, 476.
Conkey Co. v. Goldman, 21.
Conklin v. Second Nat. Bank of Oswego, 577.
Conklin v. United States Shipbuilding Co., 311.
Conley v. Daughters of Republic, 155.
Conley v. Mathieson Alkali Works, 793, 794, 796.
Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co., 198.
Connecticut Mut. Life Ins. Co. v. Spratley, 774, 790, 799.
Connecticut & P. R. Co. v. Bailey, 362, 377, 378, 382, 386, 392, 396, 405.
Connecticut & P. R. Co. v. Baxter, 370.
Connell v. Ernst-Marx-Nathan Co., 621.
Conner, Ex parte, 40.
Connolly's Estate, In re, 439, 441.
Conro v. Gray, 691.
Conro v. Port Henry Iron Co., 564, 614.
Conservators of River Tone v. Ash, 15, 16, 18, 50.
Consolidated Coal Co. of St. Louis v. Miller, 323, 325.
Consolidated Gas Co. v. Commissioners of Baltimore County, 193.
Consolidated Water Power Co. v. Nash, 611.
Continental Ins. Co. v. New York & H. R. Co., 564.

[The figures refer to pages]

Continental Nat. Bank v. Buford, 756.
Continental Nat. Bank v. Eliot Nat. Bank, 536.
Continental Securities Co. v. Belmont, 488, 489, 491, 492, 493, 494, 503, 643, 644, 653.
Continental Securities Co. v. Interborough Rapid Transit Co., 323.
Continental Securities Co. v. Northern Securities Co., 181, 426.
Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 104, 114.
Continental Tyre & Rubber Co., Ltd., v. Daimler Co., Ltd., 6.
Converse v. Emerson, Talcott & Co., 183, 213.
Converse v. Gardner Governor Co., 382, 384.
Converse v. Stewart, 736.
Converse v. United Shoe Machinery Co., 485, 488, 653, 672.
Cook v. American Tubing & Webbing Co., 175.
Cook v. Burlington, 281, 282.
Cook v. Detroit, G. H. & M. R. Co., 696.
Cook v. Detroit & M. R. Co., 691.
Cook v. Moody, 692.
Cook v. Rome Brick Co., 765.
Cook v. Sherman, 634.
Cooke v. Marshall, 323, 443.
Coolidge v. American Realty Co., 798.
Coombs v. Barber, 636.
Cooney v. A. Booth Packing Co., 206.
Cooper v. Adel Security Co., 733.
Cooper v. Illinois Cent. R. Co., 552.
Cooper v. Utah Light & R. Co., 36.
Cooper Mfg. Co. v. Ferguson, 765.
Co-operative Law Co., In re, 75, 163.
Copeland v. Johnson Mfg. Co., 618, 640.
Copland v. American De Forest Wireless Tel. Co., 774.
Copley v. Grover & Baker Sewing-Mach. Co., 245.
Copp v. Colorado Coal & Iron Co., 695.
Coppage v. Hutton, 321, 343, 350.
Copper Belle Min. Co. v. Costello, 167, 189.
Coppin v. Greenlees & Ransom Co., 187.
Coquard v. National Linseed Oil Co., 413, 436.
Corbus v. Alaska Treadwell Gold Min. Co., 491, 499.
Corey v. Morrill, 58, 113, 121, 369.
Corey v. Wadsworth, 678, 693, 753.
Corinne Mill. Canal & Stock Co. v. Toponce, 667.
Cork & B. R. Co. v. Cazenove, 346.
Cork & Youghal R. Co., In re, 171, 222.
Cornell's Appeal, 374, 384, 699.
Cornford v. Carlton Bank, 246.
Corning v. McCullough, 704, 709, 710, 745.
Corning Glass Works v. Corning Cut Glass Co., 77, 78.
Corrigan v. Coney Island Jockey Club, 32.
Costa Rica Ry. v. Forwood, 641.
Cotheal v. Brouwer, 416.
Cottentin v. Meyer, 121.
Cotting v. New York & N. E. Co., 452.
Cotton v. Mississippi & Rum River Boom Co., 46.
Coulter v. Robertson, 694.
Council of Jewish Women v. Boston Section, Council of Jewish Women, 79.
County Com'rs of Frederick County v. Farmers' & Mechanics' Nat. Bank of Frederick, 283.
County of Richland v. Lawrence County, 32.
County of Todd v. St. Paul, M. & M. R. Co., 289.
Courtright v. Deeds, 391.
Covington Drawbridge Co. v. Shepherd, 691.
Covington Gaslight Co. v. Covington, 193.
Covington & L. Turnpike Road Co. v. Sandford, 27, 91.
Cowell v. Colorado Springs Co., 772, 785.
Cowley v. Smyth, 664, 665.
Cox v. Dickie, 353.
Cox v. First Nat. Bank, 553.
Cox v. Hardee, 347.
Cox v. National Coal & Oil Inv. Co., 127.
Cox v. Paul, 418.
Coxe v. State, 104.
Craft v. South Boston R. Co., 622.
Cragie v. Hadley, 246.
Craig v. Andes, 370.
Craig v. Wade, 360.
Craig Silver Co. v. Smith, 586.
Craker v. Chicago & N. W. R. Co., 600.
Crall & Ostrander v. Com., 251.
Crandall v. Nevada, 285.
Cratty v. Peoria Law Library Ass'n, 421.
Cravens v. Eagle Cotton Mills Co., 113, 405.
Crawford v. Roney, 393, 423.
Crease v. Babcock, 277, 293, 722, 723, 734.
Credit Co. v. Howe Machine Co., 625, 628.
Creditors' Audit & Adjustment Ass'n, In re, 75.
Crenshaw v. Arkansas, 767.
Creteau v. Foote & Thorne Glass Co., 777.
Crete Bldg. & Loan Ass'n v. Patz, 122.
Crichton v. Webb Press Co., 427, 597, 632, 668.
Crippen v. Laighton, 738.
Crissey v. Cook, 394.
Crittenden & Cowler Co. v. Cowler, 635.
Crocker v. Crane, 367, 386, 390.
Cromie's Heirs v. Institution of Mercy of New York, 208.
Crook v. Girard Iron & Metal Co., 777, 795.
Crook v. International Trust Co., 401, 402.

[The figures refer to pages]

Crosby v. Stratton, 445.
Cross v. Pinckneyville Mill Co., 63, 71.
Cross v. West Virginia Cent. & P. R. Co., 276, 598, 599.
Crow v. Oxford, 549.
Crowder State Bank v. Ætna Powder Co., 202, 213.
Crowe v. Malba Land Co., 138.
Crowell v. Jackson, 673, 674.
Crown Bank, In re, 58, 62.
Crump v. United States Min. Co., 299, 307, 355, 357, 359.
Crutcher v. Kentucky, 765.
Cuba Colony Co. v. Kirby, 129.
Culbertson v. Wabash Nav. Co., 9.
Cullen v. Coal Creek Min. & Mfg. Co., 645.
Cullen v. Friedland, 188.
Cullerne v. London, etc., Society, 648.
Culp v. Mulvane, 531, 538.
Culver v. Reno Real Estate Co., 174.
Cumberland Coal & Iron Co. v. Sherman, 632, 644.
Cumberland Tel. & T. Co. v. Evansville, 143, 169.
Cumberland Tel. & T. Co. v. Louisville Home Tel. Co., 771, 788.
Cummer Lumber Co. v. Associated Mfrs. Mut. Fire Ins. Corp., 775.
Cunningham v. Alabama Life Ins. & Trust Co., 576.
Cunningham v. German Ins. Bank, 607.
Cunningham v. Pell, 752.
Cuppy v. Stollwerck Bros., 670.
Currier v. Lebanon Slate Co., 187, 189.
Currie's Case, 459.
Curry v. Scott, 445.
Curry v. Woodward, 420.
Curtice v. Crawford County Bank, 523.
Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co., 618.
Curtis v. Harlow, 717.
Curtis v. Leavitt, 166, 171, 172, 241.
Curtis v. Piedmont Lumber & Min. Co., 198.
Curtis v. Steever, 328.
Curtis v. Tracey, 114.
Cushing v. Perot, 736.
Cushion Heel Shoe Co. v. Hartt, 129, 132.
Cuykendall v. Miles, 708, 736.

D

Daggett v. Davis, 327.
Daland v. Williams, 439.
Dalton Grocery Co. v. Blanton, 188.
Dalton & M. R. Co. v. McDaniel, 732.
Dana v. Bank of St. Paul, 198.
Dana v. Brown, 522.
Dana v. Morgan, 504.
Danbury & N. R. Co. v. Wilson, 114, 334, 338, 393, 397.
Dane v. Young, 533.
Danforth v. President, etc., of Schoharie & D. Turnpike Road, 197.
Daniel v. Gold Hill Min. Co., 89.
Daniels v. Hart, 168.
Dannmeyer v. Coleman, 494.
Danville Banking & Trust Co. v. Parks, 282, 288.
Danville, H. & W. R. Co. v. Kase, 667.
Danville Seminary v. Mott, 199, 319.
Darcey v. Brooklyn & N. Y. Ferry Co., 757.
D'Arcy v. Ry. Co., 614.
Darknell v. Cœur D'Alene & St. L. Transp. Co., 225.
Darrin v. Hoff, 575, 589.
Darst v. Gale, 225.
Dartmouth College Case, 259, 270, 571.
Dartmouth College v. Woodward, 3.
Dauchy v. Brown, 717, 720, 733.
Daughters of Isabella No. 1 v. National Order, Daughters of Isabella, 79.
Davenport v. Dows, 504.
Davenport v. Newton, 665.
Davenport Nat. Bank v. Board of Equalization, 286.
David Payne & Co., In re, 218.
David Reus Permanent Loan & Sav. Co. v. Conrad, 650.
Davids v. Davids, 489.
Davidson v. Westchester Gaslight Co., 168.
Davidson College, Trustees of, v. Chamber's Ex'rs, 208.
Davies v. Munroe Waterworks & Light Co., 573.
Davies v. Ball, 341, 348.
Davis v. Flagstaff Silver Mining Co., 422.
Davis v. Gemmell, 489, 498, 505.
Davis v. Hofer, 653.
Davis v. Jackson, 439.
Davis v. Kansas & Texas Coal Co., 797.
Davis v. Las Ovas Co., 139.
Davis v. Memphis City R. Co., 640.
Davis v. Miller Signal Co., 549.
Davis v. Mills, 746, 757.
Davis v. Montgomery Furnace & Chemical Co., 473.
Davis v. National Eagle Bank, 543.
Davis v. Old Colony R. Co., 157, 161, 162, 213, 214, 217, 220.
Davis v. Proprietors of Second Universalist Meetinghouse, 447.
Davis v. Ravenna Creamery Co., 7, 135.
Davis v. Stevens, 103, 292, 721.
Davis v. Thomas & Davis Co., 668.
Davis v. United States Electric Power & Light Co., 183.
Davis v. Valley Electric Light Co., 134.
Davis Provision Co. v. Fowler Bros., 641.
Davis & Rankin Bldg. & Mfg. Co. v. Caigle, 776.
Davison v. Gillies, 425.
Dawkins v. Antrobus, 507.
Day v. Essex County Bank, 791.
Day v. New York S. & W. R. Co., 193.
Day v. Postal Tel. Co., 803.
Day v. Spiral Springs Buggy Co., 164, 165, 220, 221, 225, 228.
Day v. Stetson, 69.

[The figures refer to pages]

Dayton v. Borst, 393, 729, 731.
Dayton Coal & Iron Co. v. Barton, 769.
Deaderick v. Bank of Commerce, 751.
Deal v. Erie Coal & Coke Co., 591.
Dean v. Davis, 50.
Dean & Son, Ltd., v. W. B. Conkey Co., 93.
Dearborn v. Washington Sav. Bank, 522.
Deaton Grocery Co. v. International Harvester Co., 231.
De Bardeleben v. Bessemer Land & Imp. Co., 639.
De Beers, etc., Mines, Ltd., v. Howe, 83.
Decatur Land Co. v. Robinson, 297.
Decatur Mineral Land Co. v. Palm, 495, 505.
Deere Plow Co. v. Wyland, 776.
De Gendre v. Kent, 429, 436.
De Hart v. Good Will Hook & Ladder Co., 510.
Deitch v. Staub, 115.
De Koven v. Alsop, 431, 438, 442.
Delano v. Case, 648, 751.
De La Vergne Refrigerating Mach. Co. v. German Savings Inst., 183, 213.
Delaware Bay & C. M. R. Co. v. Markley, 48.
Delaware Division Canal Co. v. Com., 250.
Delaware, L. & W. R. Co. v. Welser, 170.
Delaware Railroad Tax, 280, 288.
Delaware River Quarry & Const. Co. v. Bethlehem & N. Pass. Ry. Co., 782, 788, 789.
Delaware & A. Telegraph & Telephone Co. v. Pensauken Tp., 790.
Delaware & H. Co. v. Albany & S. R. Co., 493, 494.
Delaware & Hudson Canal Co. v. Mahlenbrock, 776, 777.
Demarest v. Flack, 54, 68, 109, 770.
Dempster Mfg. Co. v. Downs, 522.
Denike v. New York & R. Lime & Cement Co., 311.
De Neufville v. New York & N. R. Co., 485.
Dennis v. Joslin Mfg. Co., 590.
Denny Hotel Co. of Seattle v. Schram, 26, 67, 68, 183, 382, 383, 385.
Densmore v. Shepard, 712.
Densmore Oil Co. v. Densmore, 139.
Denson v. Chattanooga Nat. Bldg. & Loan Ass'n, 777.
Dent v. Tramways Co., 425, 452.
Denton v. Livingston, 327.
Denver Fire Ins. Co. v. McClelland, 227, 228, 229.
Denver & R. G. Ry. v. Harris, 244, 657, 663.
De Pass' Case, 720.
De Peyster v. American Fire Ins. Co., 424.
Deposit Bank of Owensboro v. Daviess County, 271.
Deposit Bank of Owensborough v. Barrett, 192.
Deppen v. German-American Title Co., 356.
Deringer's Adm'r v. Deringer's Adm'r, 772.
Derrickson v. Smith, 756.
Derry v. Peek, 127.
De Ruvigne, Case of, 459.
Desdoity, Ex parte, 606.
De Shelter v. American Spring Water Supply Co., 469.
Despatch Line of Packets v. Bellamy Mfg. Co., 609, 616, 618, 627.
Detroit v. Mutual Gaslight Co., 166.
Detroit, G. H. & M. R. Co. v. Powers, 287.
De Voss v. Richmond, 32.
Dewey v. Toledo A. A. & N. M. R. Co., 226.
De Witt v. Hastings, 116.
De Witt County Nat. Bank v. Mickleberry, 207.
Dexter v. Edmands, 746.
Dexter Sav. Bank v. Friend, 628.
Dexter & Mason Plank Road Co. v. Millerd, 393.
Diamond Glue Co. v. United States Glue Co., 774.
Diamond Match Co. v. Roeber, 788.
Diamond State Iron Co. v. Husbands, 91, 318.
Dickenson v. Chamber of Commerce of City of Milwaukee, 506, 507.
Dickerman v. Northern Trust Co., 136, 456, 501.
Dickinson v. Consolidated Traction Co., 491.
Dickinson v. Matheson Motor Car Co., 129.
Dickinson v. Valpy, 172.
Diggs v. Fidelity & Deposit Co., 192.
Dillingham v. Snow, 37.
Dillon v. Lee, 490.
Dimpfel v. Ohio & M. R. Co., 499, 501.
Directors, etc., of Ashbury Ry. Carriage & Iron Co. v. Riche, 150, 157, 212, 235.
Directors, etc., of Central R. Co. of Venezuela v. Kisch, 355, 357, 358, 361, 363.
Distilling & Cattle Feeding Co. v. People, 73, 237, 304, 306.
District of Columbia v. Camden Iron Works, 200.
Dittman v. Distilling Co. of America, 70, 184.
Diversey v. Smith, 708, 725.
D. M. Steward Mfg. Co. v. Steward, 639.
Doak v. Stahlman, 384.
Dobson v. Simonton, 101, 292, 314.
Dock v. Schlichter-Jute Cordage Co., 188.
Doctor v. Desmond, 792, 794.
Doctor v. Harrington, 85, 504.
Dodge v. Council Bluffs, 761.
Dodge v. Kenwood Ice Co., 671.
Dodge v. Woolsey, 287, 486, 487.

[The figures refer to pages]

Dodgson's Case, 357.
Doe v. Northwestern Coal & Transp. Co., 648.
Doernbecher v. Columbia City Lumber Co., 616.
Doherty v. Arkansas & O. R. Co., 334.
Doherty v. Mercantile Trust Co., 491.
Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co., 541.
Donald v. American Smelting & Refining Co., 458, 470.
Donnell v. Herring-Hall-Marvin Safe Co., 8.
Donohoe v. Mariposa Land & Min. Co., 610.
Donovan v. Purtell, 10, 69, 73.
D'Ooge v. Leeds, 438.
Dooley v. Cheshire Glass Co., 113.
Doolittle v. Marsh, 711.
Dorr v. Life Ins. Clearing Co., 522.
Dorris v. Sweeney, 117, 334, 352.
Dorsey Mach. Co. v. McCaffrey, 355.
Doty v. American Tel. & Tel. Co., 150.
Doty v. Patterson, 99, 102, 110, 123.
Doubleday, Page & Co. v. Shumaker, 215.
Doud v. Wisconsin P. & S. Ry. Co., 490, 493.
Douglas County Com'rs v. Bolles, 114.
Douglas Printing Co. v. Over, 688.
Douglass v. Ireland, 469, 470.
Douglass v. Merchants' Ins. Co., 580, 670.
Dovey v. Cory, 647, 650, 651.
Dow v. Northern R. Co., 258, 272.
Downey v. Finucane, 127, 128, 359, 664, 665.
Downer v. Union Land Co. of St. Paul, 461, 473, 681, 683.
Downing v. Indiana State Board of Agriculture, 31, 258, 259.
Downing v. Marshall, 153, 154.
Downing v. Mt. Washington Road Co., 142, 149, 157, 162, 164, 194, 213, 214, 628.
Dows v. Naper, 121.
Doyle v. Continental Ins. Co., 766, 768.
Doyle v. Mizner, 58, 118, 616.
Dozier v. Alabama, 765.
Driscoll v. West Bradley & Cary Mfg. Co., 513, 522, 531, 577.
Droege v. Ahrens & Ott Mfg. Co., 775.
Drucklieb v. Harris, 130, 323, 489.
Drummond's Case, 469.
Dublin & W. R. Co. v. Black, 346.
Ducat v. Chicago, 761, 762, 763.
Dudley v. Collier, 780.
Dudley v. Kentucky High School, 496, 561.
Dueber Watch Case Mfg. Co. v. Daugherty, 543.
Duggan v. Colorado Mortg. & Inv. Co., 99, 103, 107.
Duke v. Cahawba, 531.
Duke v. Markham, 583.
Duke v. Taylor, 83, 103, 117, 125, 586, 587.
Duluth Club v. MacDonald, 578, 697.
Duluth & I. R. Co. v. County of St. Louis, 288.
Dummer v. Smedley, 465.
Dunbar v. American Tel. & Tel. Co., 180, 237, 497.
Duncan v. St. Louis, I. M. & S. R. Co., 87.
Duncomb v. New York, H. & N. R. Co., 167.
Dundee Mortgage & T. I. Co. v. Hughes, 314.
Dunlap v. Rauch, 468.
Dunn v. State Bank of Minneapolis, 356.
Dunn v. University of Oregon, 50.
Dunphy v. Traveller Newspaper Ass'n, 490, 497, 501, 502.
Dunston v. Coke Co., 195.
Dupee v. Boston Water Power Co., 159, 166, 188.
Dupee v. Chicago Horse-Shoe Co., 348.
Du Pont v. Tilden, 468, 480.
Duquesne Gold Min. Co. v. Glaser, 492.
Durant v. Abendroth, 390.
Durfee v. Harper, 558.
Durfee v. Old Colony & F. R. Co., 496, 561, 562, 567, 569.
Durgin v. Smith, 131.
Dutcher v. Marine Nat. Bank, 726.
Dutchess Cotton Manufactory v. Davis, 113.
Dutchess & C. County R. Co. v. Mabbett, 350, 354.
Dutch West India Co. v. Van Moses, 80.
Dwelling-House Ins. Co. v. Wilder, 787.
Dwinelle v. New York Cent. & H. R. R. Co., 660.
Dykman v. Keeney, 653.

E

Eagle Ins. Co. of Cincinnati v. Ohio ex rel. Kinder, 263.
Eagle Ins. Co. v. Ohio ex rel. Kinder, 267.
Eakright v. Logansport & N. I. R. Co., 61, 63.
Earle v. Carson, 719, 721.
Earle v. Chesapeake & O. Ry. Co., 795, 799.
Earp's Appeal, 437, 439.
East v. Bennett Bros., Limited, 589.
East Alabama R. Co. v. Doe ex dem. Visscher, 676, 677.
East Anglian Ry. Co. v. Eastern Counties R. Co., 157, 161, 212, 235.
East Birmingham Land Co. v. Dennis, 540, 541.
East Boston Freight R. Co. v. Eastern R. Co., 168, 170.
East Line & R. R. R. Co. v. State, 191.
East London Waterworks Co. v. Bailey, 195.
East Norway Lake Church v. Froislie, 99, 102, 110.
East St. Louis Connecting Ry. Co. v. Jarvis, 719.
East Tennessee Land Co. v. Leeson, 137.

[The figures refer to pages]

East Tennessee & V. R. Co. v. Gammon, 338, 393.
Eastern Counties Ry. Co. v. Broom, 242, 244, 661.
Eastern Plank Road Co. v. Vaughan, 61.
Eastern R. Co. v. Boston & M. R., 56, 268, 609, 610.
Eastman v. Meredith, 32, 33.
Easton Nat. Bank v. American Brick & Tile Co., 460, 519.
Easun v. Buckeye Brewing Co., 167.
Eaton v. Aspinwall, 99, 113, 120.
Eaton v. Pacific Nat. Bank, 383.
Eaton v. Walker, 39, 102, 103, 104, 105, 108, 117, 124.
Eaton v. Woman's Home Missionary Soc. of M. E. Church, 785.
Ebbett's Case, 346.
Ebelhar v. German American Security Co.'s Assignee, 651.
Ebling v. Nekarda, 489.
Eckman v. Chicago, B. & Q. R. Co., 225, 227.
Economy Building & L. Ass'n v. Paris Ice Mfg. Co., 295.
Edelhoff v. State, 96.
Edenborn v. Sim, 136.
Edgerly v. Emerson, 616, 618.
Edgerton Tobacco Mfg. Co. v. Croft, 506.
Edgeworth v. Wood, 15, 19.
Edinboro Academy v. Robinson, 335.
Edinburgh L. & N. R. Co. v. Hebblewhite, 396.
Edison General Electric Co. v. Canadian Pac. Nav. Co., 779.
Edwards v. Armour Packing Co., 755.
Edwards v. Bay State Gas Co., 504.
Edwards v. Fairbanks, 210.
Edwards v. Mercantile Trust Co., 505.
Edwards v. National Window Glass Jobbers' Ass'n, 750.
Edwards v. Snow Hill Supply Co., 200.
Edwards v. Warren Linoline & Gasoline Works, 15.
Efird v. Piedmont Land Imp. & Inv. Co., 747.
E. F. Kirwan Mfg. Co. v. Truxton, 803.
Ehle v. Chittenango Bank, 430.
Ehrman v. Teutonia Ins. Co., 781, 791.
Eichelberger v. Mann, 378.
Eichner v. Bowery Bank, 245.
Eidman v. Bowman, 55, 443, 445.
Einstein v. Rochester Gas & Electric Co., 443.
Eisfeld v. Kenworth, 64.
Eldman v. Bowman, 55.
Eldred v. American Palace Car Co., 494, 504.
Election of Directors of Newark Library Ass'n, In re, 260, 276.
Election of Directors of New York & Westchester Town-Site Co., In re, 395.
Election of Directors of St. Lawrence Steamboat Co., In re, 600.
Electric Co. of America v. Edison Electric Illuminating Co., 445.
Electric Supply Co., In re, 311.
Electric Welding Co. v. Prince, 141.
Elfird v. Piedmont Land Imp. & Inv. Co., 518.
Elgin Butter Co. v. Elgin Creamery Co., 77.
Elgin Nat. Watch Co. v. Loveland, 59, 108.
Elias, In re, 608.
Eliot v. Freeman, 23.
Eliot v. Himrod, 125.
Elizabeth City Cotton Mills v. Dunstan, 394, 402, 577.
Elizabethtown Gaslight Co. v. Green, 109.
Elkhorn Land & Imp. Co. v. Childers, 326.
Elkins v. Camden & A. R. Co., 179.
Ellerman v. Chicago Junction Rys. & Union Stockyards Co., 176, 194, 564.
Elliott v. Parlin & Orendorff Co., 774.
Elliott v. Puget Sound Wood Products Co., 494.
Elliott v. Sullivan, 295.
Ellis v. Marshall, 53, 271.
Ellis v. Vandergrift, 494.
Ellis v. Ward, 647, 654, 666, 667, 751.
Ellison v. Branstrator, 199.
Ellison v. Mobile & O. R. Co., 360.
Elston v. Piggott, 761.
Ely v. Oakland Circuit Judge, 221.
Elyea v. Lehigh Salt Min. Co., 167, 544.
Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 468, 471, 478.
Elyton Land Co. v. Dowdell, 186.
Emerson v. Gaither, 653.
Emerson v. McCormick Machine Co., 788, 791.
Emerson T. & Co. v. McCormick Mach. Co., 798.
Emery v. DePeyster, 108.
Emery v. Parrott, 136, 137.
Emma Silver Min. Co. v. Grant, 136.
Emmerling v. First Nat. Bank, 220.
Emory v. Grand United Order of Odd Fellows, 79.
Empire City Bank, In re, 748.
Empire Cream Sep. Co. v. De Laval Dairy Supply Co., 245.
Empire Milling & Min. Co. v. Tombstone Milling & Min. Co., 776.
Empire Mills v. Alston Grocery Co., 109, 119, 120, 124, 772.
Empress Engineering Co., In re, 132.
Endakaitis v. St. George's Lithuanian Soc., 196.
English, etc., Produce Co., In re, 129, 132, 135.
Enterprise Brewing Co. v. Grime, 760, 772, 778.
Enterprise Ditch Co. v. Moffit, 697.
Equitable Life Assur. Soc. of United States v. Union Pac. R. Co., 440, 447, 451.
Erb v. Grimes, 91.
Erickson v. Nesmith, 739.
Erickson v. Revere Elevator Co., 8, 10.
Erie & N. E. R. v. Casey, 278.

Erlanger v. New Sombrero Phosphate Co., 140.
Erlanger v. Phosphate Co., 136.
Ernst v. Elmira Municipal Imp. Co., 448.
Erny v. G. W. Schmidt Co., 502.
Ersfeld v. Exner, 477.
Essex Turnpike Corp. v. Collins, 366.
Estabrook, Ex parte, 173, 174, 219.
Estey Mfg. Co. v. Runnels, 118, 120.
Eureka Iron & Steel Works v. Bresnahan, 166.
Eureka Mercantile Co. v. California Ins. Co., 799.
Evangelical Baptist Benevolent & Missionary Soc. v. Boston, 208.
Evans v. Boston Heating Co., 166, 584.
Evans v. Coventry, 691.
Evans v. Job, 49.
Evans v. Nellis, 260, 713, 737, 738.
Evans v. Philadelphia Club, 507, 508.
Evansville Public Hall Co. v. Bank of Commerce, 641.
Evenson v. Ellingson, 103.
Everhart v. Searle, 638.
Everhart v. West Chester & P. R. Co., 519, 567.
Ewing v. Composite Brake-Shoe Co., 680, 687.
Excelsior Grain Binder Co. v. Stayner, 390.
Excelsior Petroleum Co. v. Lacey, 434, 647, 751.
Excelsior Water & Mining Co. v. Pierce, 423, 425.
Exchange Bank of Macon v. Macon Const. Co., 8.
Ex-Mission Land & Water Co. v. Flash, 136, 140.
Exposition Ry. & Imp. Co. v. Canal St. E. R. Co., 382.
Exter v. Sawyer, 136, 487, 489, 490.

F

Fahrig v. Milwaukee & Chicago Breweries, 329.
Fahrney v. Kelly, 537.
Fairbanks v. Merchants' Nat. Bank of Chicago, 430.
Fairfax v. Bloch, 407.
Fairfield County Turnpike Co. v. Thorp, 8, 374.
Falconer v. Campbell, 38, 53.
Falk v. Curtis Pub. Co., 251.
Fall River Gas Works Co. v. Board of Gas & Electric Light Com'rs, 481.
Fanning v. Hibernia Ins. Co., 348.
Fargo v. Michigan, 285.
Farmer v. National Life Ass'n of Hartford, Conn., 799.
Farmers' Bank v. Diebold Safe & Lock Co., 541.
Farmers' Bank of Vine Grove v. Smith, 129.
Farmers' Co-op. Trust Co. v. Floyd, 655.
Farmers' Loan & Trust Co. v. Lake St. El. R. Co., 774.
Farmers' Loan & Trust Co. v. New York & N. R. Co., 498, 563.
Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. R. Co., 113, 498.
Farmers' Mut. Fire Ins. Co. v. Stewart, 246.
Farmers' Mut. Tel. Co. v. Howell, 114.
Farmers' & Citizens' Bank v. Payne, 629, 630.
Farmers' & Mechanics' Bank v. Baldwin, 150, 165.
Farmers' & Mechanics' Bank v. Colby, 655.
Farmers' & Mechanics' Nat. Bank v. Dearing, 286.
Farmers' & Mechanics' Sav. Bank of Minneapolis v. Minnesota, 285, 290.
Farmers' & Merchants' Bank of Lineville v. Wasson, 513, 516, 521, 576.
Farmers' & Merchants' Bank of Los Angeles v. Downey, 634.
Farmers' & Merchants' Ins. Co. v. Harrah, 779.
Farnsworth v. Wood, 727.
Farnum v. Ballard Vale Machine Shop, 742.
Farr v. Briggs' Estate, 739, 756.
Farrar v. Walker, 362, 363.
Farrel Foundry v. Dart, 629, 630.
Farrington v. Putnam, 207.
Farrington v. South Boston R. Co., 555, 659.
Farrington v. Tennessee, 282, 287.
Farrior v. New England Mtg. Security Co., 776.
Farwell v. Houghton Copper Works, 616.
Farwell Co. v. Wolf, 210.
Faulds v. Yates, 602.
Fauntleroy v. Lum, 799.
Fawcett v. Charles, 506.
Fay v. Coughlin-Sandford Switch Co., 802.
Fay v. Noble, 123, 124, 622.
Fay Fruit Co. v. McKinney Bros. & Co., 774.
Fayette Land Co. v. Louisville & N. R. Co., 152, 206.
Fayetteville Waterworks Co. v. Tillinghast, 115.
Fear v. Bartlett, 355, 362.
Fearing v. Glenn, 671.
Featherstonehaugh v. Lee Moore Porcelain Clay Co., 166.
Fechheimer Fishel Co., In re, 190, 329, 702.
Fechteler v. Palm Bros. & Co., 177.
Feckheimer v. National Exch. Bank of Norfolk, 514.
Fee v. New Orleans Gas Light Co., 192.
Feitel v. Dreyfous, 339.
Felgate's Case, 357.
Fenn v. Ostrander, Inc., 691.
Fensky v. Maryland Casualty Co., 245.
Fentress v. Steele & Sons, 131, 135.
Ferguson v. Meredith, 191.
Ferguson v. Sherman, 736.
Ferguson v. Wilson, 632.

[The figures refer to pages]

Ferry v. Cincinnati Underwriters, 80.
Fidelity Ins. Co. v. German Sav. Bank, 186, 215.
Fidelity Insurance, Trust & Safe Deposit Co. v. Mechanics' Sav. Bank, 739, 748.
Fidelity Trust Co. v. Lehigh Valley R. Co., 452.
Fidelity Trust Co. v. Louisville Gas Co., 167, 176.
Fidelity & D. Co. v. Courtney, 629.
Field v. Eastern Building & Loan Ass'n, 230, 791.
Field v. Field, 589.
Field v. Haines, 756, 757.
Field v. Lamson & Goodnow Mfg. Co., 452.
Fields v. U. S., 298.
Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co., 246, 555, 557, 657, 658.
Fifth Ave. Coach Co. v. New York, 273.
Fifth Ward Sav. Bank v. First Nat. Bank, 171, 173, 622, 625.
Filon v. Miller Brewing Co., 614.
Finn v. Brown, 716.
Finnegan v. Noerenberg, 99, 103, 105, 106, 107.
Finney v. Guy, 738, 739.
Fire Department of New York v. Kip, 54.
Firemen's Benevolent Ass'n v. Lounsbury, 39.
Firestone Tire & Rubber Co. v. Agnew, 741.
First Ave. Land Co. v. Parker, 475, 541, 554, 659.
First Congregational Church of Cripple Creek v. Grand Rapids School Furniture Co., 115.
First M. E. Church of Chicago v. Dixon, 148.
First Nat. Bank v. Asheville Furniture & Lumber Co., 617.
First Nat. Bank v. Christopher, 614.
First Nat. Bank v. Converse, 214.
First Nat. Bank v. Council Bluffs City Waterworks Co., 622.
First Nat. Bank v. Davies, 59.
First Nat. Bank v. Dovetail Body & Gear Co., 678, 690.
First Nat. Bank v. E. T. Barnum Wire & Iron Works, 696.
First Nat. Bank v. F. C. Trebein Co., 12, 73, 688.
First Nat. Bank v. Garretson, 693.
First Nat. Bank v. Graham, 242, 663.
First Nat. Bank v. Greene, 744.
First Nat. Bank v. Guardian Trust Co., 225.
First Nat. Bank v. Gustin, Minerva Con. Min. Co., 456, 460, 471, 473, 475.
First Nat. Bank v. G. V. B. Min. Co., 200.
First Nat. Bank v. Hawkins, 183, 184, 214, 235.
First Nat. Bank v. Henry, 114, 242.
First Nat. Bank v. Hingham Mfg. Co., 722, 723.
First Nat. Bank v. Hughes, 257.
First Nat. Bank v. Kentucky, 290.
First Nat. Bank v. King, 745.
First Nat. Bank v. Lanier, 513, 522, 556, 577.
First Nat. Bank v. National Broadway Bank, 542.
First Nat. Bank v. National Exch. Bank, 186, 187.
First Nat. Bank v. Northup, 460.
First Nat. Bank v. Peavey, 731.
First Nat. Bank v. Pierson, 165.
First Nat. Bank v. Price, 756.
First Nat. Bank v. Salem Capital Flour Mills Co., 188.
First Nat. Bank v. Stewart, 188.
First Nat. Bank v. Weidenbeck, 757.
First Nat. Bank v. Winchester, 295.
First Nat. Bank v. Winona Plow Co., 712.
First Savings & Trust Co. v. Waukesha Canning Co., 172.
Fischer v. Motor Boat Club of America, 623.
Fish v. Smith, 113, 732.
Fisher v. Bush, 516, 601.
Fisher v. Horicon Iron & Mfg. Co., 26.
Fisher v. New York Cent. & H. R. R. Co., 193.
Fisher v. President, etc., of Essex Bank, 325, 530, 534, 535.
Fisher v. Traders' Mut. Life Ins. Co., 782, 797.
Fishkill Sav. Inst. v. National Bank of Fishkill, 243, 663.
Fisk v. Chicago, R. I. & P. R. Co., 458.
Fisk v. Patton, 207.
Fisk v. Union Pac. R. Co., 678, 691.
Fister v. La Rue, 196, 197.
Fitchburg R. Co. v. Grand Junction R. & Depot Co., 275.
Fitts v. National Life Ass'n, 314, 803.
Fitzgerald v. Fitzgerald & Mallory Const. Co., 642.
Fitzgerald v. Grand Trunk R. Co., 182.
Fitzgerald v. Missouri Pac. R. Co., 87.
Fitzgerald v. Weidenbeck, 708.
Fitzgerald's Estate v. Union Sav. Bank, 400.
Fitzpatrick v. Dispatch Pub. Co., 477.
Fitzpatrick v. O'Neill, 467.
Fitzpatrick v. Rutter, 113, 117.
Fitzwater v. National Bank of Seneca, 498.
Flaherty v. Atlantic Lumber Co., 196.
Flaherty v. Cary, 373.
Flaherty v. Portland Longshoremen's Benev. Soc., 158, 573.
Flanders v. Roberts, 754.
Flash v. Conn, 708, 735, 736, 737, 742.
Fleckner v. Bank of United States, 196, 623.
Fleener v. State, 95.
Fletcher v. Chicago, St. P., M. & O. R. Co., 616.

[The figures refer to pages]

Fletcher v. Newmark Tel. Co., 485.
Flinn v. Bagley, 462.
Flint v. Pierce, 573, 580.
Flint & Fentonville Plank Road Co. v. Woodhull, 277.
Flint & P. M. R. Co. v. Dewey, 634, 638.
Flint & Walling Mfg. Co. v. Kerr-Murray Mfg. Co., 225.
Florida R. Co. v. Thomas, 199.
Florsheim & Co. v. Fry, 116.
Flostroy v. Corby Coal Co., 536.
Flour City Nat. Bank v. Shire, 471.
Flowers v. Bartlett, 755, 757.
Floyd v. National Loan & Inv. Co., 760.
Floyd v. State, 306.
Flynn v. Brooklyn City R. Co., 490, 495, 562, 564.
Flynn v. Columbus Club, 667.
Flynn v. Third Nat. Bank, 653.
Fogg v. Blair, 89, 463.
Folger v. Columbian Ins. Co., 292, 311, 317.
Fontana v. Pacific Can. Co., 196.
Foote, In re, 441.
Foote v. Cunard Min. Co., 495.
Foote v. Illinois Trust & Savings Bank, 723.
Force v. Age-Herald Co., 685.
Ford v. Easthampton Rubber Thread Co., 421, 434, 701.
Ford v. Hill, 196.
Foreman v. Bigelow, 519.
Forrest v. Manchester S. & L. R. Co., 503.
Forrest v. Pittsburgh Bridge Co., 797.
Forrester v. Butte & M. Consol. Copper & Silver Min. Co., 500, 611.
Ft. Dearborn Nat. Bank of Chicago v. Seymour, 631.
Ft. Edwards & Ft. M. Plank Road Co. v. Payne, 370.
Ft. Madison Lumber Co. v. Batavian Bank, 534.
Ft. Payne Rolling Mill v. Hill, 642, 668.
Ft. Worth City Co. v. Smith Bridge Co., 158.
Fortunato v. Patten, 536.
Fosdick v. Schall, 170, 731.
Foss v. Harbottle, 139, 486, 490, 491, 496.
Foss v. People's Gaslight & Coke Co., 549.
Foster v. Bank of Abingdon, 751.
Foster v. Borax Co., 691.
Foster v. Chase, 346.
Foster v. Commissioners of Inland Revenue, 9.
Foster v. Hip Lung Ying Kee & Co., 99.
Foster v. Lincoln's Ex'r, 719, 720.
Foster v. Moulton, 109.
Foster v. New Trinidad Lake Asphalt Co., 423.
Foster v. Potter, 328.
Foster v. President, etc., of Essex Bank, 91, 318.
Foster v. Row, 721.
Foster v. White, 413, 416.
Fougeray v. Cord, 427, 433.
Fourth Nat. Bank v. Francklyn, 713, 733.
Fowler v. Bell, 196, 692, 784.
Fowler v. Great Southern Telephone & Telegraph Co., 580.
Fox v. Horah, 315, 318.
Fox v. Mackay, 631.
Franco-Texan Land Co. v. Laigle, 586.
Franey v. Warner, 358.
Franke v. Mann, 107.
Frankfort & S. Turnpike Co. v. Churchill, 132.
Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati, 183, 184, 186.
Franklin Bridge Co. v. Wood, 42.
Franklin Co. v. Lewiston Inst. for Savings, 157, 165, 171, 183.
Franklin Fire Ins. Co. v. Jenkins, 652.
Franklin Fire Ins. Co. of Baltimore v. Hart, 59, 131.
Franklin Glass Co. v. Alexander, 392.
Franklin Nat. Bank v. Whitehead, 142, 240.
Franklin Sav. Bank v. Bridges, 744.
Franklin Union No. 4 v. People, 255.
Franks Oil Co. v. McCleary, 519.
Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co., 776, 793.
Fredenburg v. Lyon Lake Methodist Episcopal Church, 116, 117.
Freeland v. Pennsylvania Cent. Ins. Co., 113, 121.
Freeman v. Machias Water Power & Mill Co., 56.
Freeman v. Sea View Hotel Co., 164.
Freeport Water Co. v. Freeport, 277.
Free Schools in Andover, Trustees of, v. Flint, 697.
Fremont Carriage Mfg. Co. v. Thomsen, 189.
French v. Donohue, 179.
French v. Teschemaker, 707.
Frenkel v. Hudson, 631.
Frese v. Mutual Life Ins. Co. of New York, 174.
Fresno Canal & Irr. Co. v. Warner, 114, 121.
Fricke v. Angemeier, 422.
Friedman v. Empire Life Ass'n, 797.
Fritts v. Palmer, 207, 786.
Frost v. Walker, 24.
Frostburg Min. Co. v. Cumberland & P. R. Co., 91, 92.
F. R. Patch Mfg. Co. v. Capeless, 23.
Fry v. Rush, 491.
Frye v. Partridge, 48.
Fulgam v. Macon & B. R. Co., 391.
Fuller v. Alexander Hollander & Co., 412, 413.
Fuller v. Ledden, 710, 735.
Fuller & Johnson Mfg. Co. v. Foster, 775, 777.
Fulton v. Commercial Travelers' Mut. Acc. Ass'n, 775.
Funk v. Anglo-Am. Ins. Co., 791.
Fusz v. Spaunhorst, 752.
Furst v. Rawleigh, 415.

[The figures refer to pages]

G

Gable v. Miller, 80.
Gade v. Forest Glen Brick & Tile Co., 59.
Gaff v. Flesher, 519.
Gage v. Fisher, 601, 602.
Gager v. Paul, 435.
Gainesville & Alachua County Hospital Ass'n v. Atlantic Coast Line R. Co., 116.
Gaitley v. Albany Foundry Co., 171.
Galbraith v. McDonald, 332, 391.
Galena & C. U. R. Co. v. Loomis, 263, 266.
Gallagher v. Germania Brewing Co., 10.
Gallery v. National Exch. Bank, 638.
Galveston, Harrisburg & San Antonio R. Co. v. Texas, 285.
Galveston, H. & H. R. Co. v. Cowdrey, 170, 172.
Galveston Land & Imp. Co. v. Perkins, 785.
Gamble v. Queens County Water Co., 469, 470, 472, 478, 563, 597, 643.
Gann v. Great Southern Lumber Co., 659, 660.
Gans v. Switzer, 754.
Ganser v. Fireman's Fund Ins. Co., 781.
Garden City Sand Co. v. American Refuse Crematory Co., 519.
Gardner v. Hamilton Mut. Ins. Co., 321.
Gardner v. Hope Ins. Co., 275.
Gardner v. Minneapolis & St. L. R. Co., 122.
Gardner v. Mobile & N. W. R. Co., 677.
Garey v. St. Joe Min. Co., 258, 270, 271, 273.
Garmany v. Lawton, 607, 619.
Garnett v. Richardson, 59, 106, 125.
Garratt Ford Co. v. Vermont Mfg. Co., 779, 788.
Garrett v. Belmont Land Co., 199.
Garrett v. Burlington Plow Co., 642.
Garrett v. Kansas City Coal Min. Co., 463, 471, 475.
Garrett v. Philadelphia Lawn Mower Co., 335, 841, 342.
Garrigues v. International Agr. Corp., 11.
Garrison v. Howe, 706, 735, 748, 755.
Garrison Canning Co. v. Stanley, 174.
Gartside Coal Co. v. Maxwell, 124.
Gashwiler v. Willis, 564, 614.
Gaskill v. Dudley, 83.
Gaslight Co. of City of New Brunswick v. Borough of South River, 308.
Gast v. King, 378.
Gaston & Ayres v. J. I. Cambell Co., 213.
Gates v. Tippecanoe Stone Co., 468, 469.
Gates Iron Works v. Cohen, 777.
Gauch v. Harrison, 748.
Gaul v. Kiel & Arthe Co., 781.
Gause v. Commonwealth Trust Co., 159, 161.
Gay v. Hudson River Electric P. Co., 11, 688.
Gay v. Kohlsaat, 118.
Gaylord v. Ft. Wayne, M. & C. R. Co., 691.
Geddes v. Anaconda Copper Min. Co., 499, 563.
Geer v. Mathieson Alkali Works, 797.
Geer v. Tenth School Dist. in Richmond, 9.
Gemmell v. Davis, 428, 429, 430, 431.
General Electric Co. v. West Asheville Imp. Co., 498.
General Electric Co. v. Wightman, 345, 373, 389.
General Estates Co., In re, 172.
General Rubber Co. v. Benedict, 485, 647, 650, 651.
Gent v. Manufacturers' & Merchants' Mut. Ins. Co., 131.
Gentile v. State, 49.
George v. Nevada Cent. R. Co., 163.
George R. Barse Live-stock Co. v. Range Valley Cattle Co., 430, 534, 535.
Geo. T. Stagg Co. v. E. H. Taylor, Jr., & Sons, 295.
Georgia R. & Banking Co. v. Haas, 169.
Georgia & A. R. Co. v. Stollenwerck, 87.
German Alliance Ins. Co. v. Lewis, 267.
German-American Coffee Co. v. Diehl, 761, 784, 801.
German-American Inv. Co. v. Youngstown, 48.
German Mercantile Co. v. Wanner, 479.
German Nat. Bank v. Kentucky Trust Co., 523.
German Nat. Bank's Receiver v. Nagel, 360.
German Sav. Bank v. Wulfekuhler, 187.
Germania Fire Ins. Co. v. Francis, 83.
Germania Ins. Co. v. Swigert, 773.
Germania Nat. Bank v. Case, 186, 721, 722.
Germania Safety-Vault & Trust Co. v. Boynton, 174, 235.
Germantown Farmers' Mut. Ins. Co. v. Dhein, 218.
Germantown Passenger R. Co. v. Fitler, 394, 395, 698, 729, 732.
Getty v. Devlin, 136, 137.
Geurinck v. Alcott, 177.
Geyser-Marion Gold Min. Co. v. Stark, 540, 541, 543, 551.
G. Heileman Brewing Co. v. Peimeisl, 789.
Gibbons v. Anderson, 649, 652.
Gibbons v. Ellis, 384.
Gibbons v. Mahon, 438, 439.
Gibbs Estate, In re, 105.
Gibbs v. Queen Ins. Co., 791.
Giesen v. London & Northwest American Mortg. Co., 515, 527, 718, 719, 732.
Gifford v. Livingston, 15, 38.
Gifford v. Thompson, 438.
Gilbert, Case of, 513, 516.
Gilbert v. Crystal Fountain Lodge, 245.
Gilbert v. Hole, 206.
Gilchrist v. Collopy, 589.
Gilchrist v. Helena, H. S. & S. R. Co., 777.

[The figures refer to pages]

Gilchrist v. Highfield, 188.
Giles v. Hutt, 396.
Gilkey v. Paine, 439.
Gilkinson v. Third Ave. R. Co., 527.
Gill v. Balis, 404.
Gillespie v. Ft. Wayne & S. R. Co., 53.
Gillett v. Chicago Title & Trust Co., 468.
Gilligan Co. v. Casey, 80.
Gillin v. Sawyer, 469.
Gilman v. Druse, 107.
Gilman v. German Lithographic Stone Co., 504.
Gilman v. Gross, 374, 381.
Gilman, C. & S. R. Co. v. Kelly, 638, 641.
Gilmer Creamery Ass'n v. Quentin, 300.
Ginn v. New England Mtg. Security Co., 776.
Ginsburg v. Von Seggern, 754.
Girard v. Philadelphia, 81.
Glass v. Turnpike Co., 82.
Gleaves v. Brick Church Turnpike Co., 54, 334, 338.
Glengary Consol. Min. Co. v. Boehmer, 498.
Glen Iron Works, In re, 460.
Glen Salt Co., In re, 593.
Glenn v. Busey, 336.
Glenn v. Garth, 716.
Glenn v. Howard, 398, 399, 744.
Glenn v. Marbury, 744.
Glenn v. Orr, 95.
Glenn v. Porter, 518.
Glenn v. Semple, 744.
Glenn v. Williams, 744.
Glenwood Mfg. Co. v. Syme, 635.
Globe Mut. Ben. Ass'n, In re, 67.
Gloninger v. Pittsburgh & C. R. Co., 170, 220.
Glover v. Lee, 693.
Glover v. Manila Gold Min. & Mill. Co., 487.
Gluckstein v. Barnes, 136, 140, 639.
Glymont Imp. & Excursion Co. v. Toler, 54, 56.
Godbold v. Branch Bank at Mobile, 651.
Goddard v. American Peroxide & Chemical Co., 79.
Goddard v. Grand Trunk R. of Canada, 248.
Godley v. Crandall & Godley Co., 297, 489, 490, 492, 493, 496, 497, 644, 645.
Goetz v. Knie, 610.
Goetz's Estate, In re, 420, 433.
Gogebic Inv. Co. v. Iron Chief Min. Co., 460.
Golconda Northern Ry. v. Gulf Lines Connecting R. of Illinois, 299, 301.
Gold v. Paynter, 744.
Gold Bluff Min. & Lumber Corp. v. Whitlock, 581, 669.
Golden Gate Consolidated H. Min. Co. v. Superior Court, 255.
Gold Ridge Min. & Development Co. v. Rice, 456.
Goldey v. Morning News, 793, 794, 795, 799.
Goldsberry v. Carter, 775.
Goldsmith v. Home Ins. Co., 761.
Goodall v. Jack, 745.
Good Hope Co. v. Railway Barb Fencing Co., 793.
Goodhue Farmers' Warehouse Co. v. Davis, 639.
Goodin v. Cincinnati & W. Canal Co., 638.
Goodloe v. Tennessee Coal, Iron & R. Co., 89.
Goodnow v. American Writing Paper Co., 460.
Goodrich v. Reynolds, 163, 165, 173, 362.
Goodspeed v. East Haddam Bank, 242, 245, 246.
Goodwin v. Hardy, 428.
Goodwin v. New York, N. H. & H. R. Co., 87, 90.
Goodwin v. Union Screw Co., 195, 196, 607.
Goodwin v. Wilbur, 141.
Gorder v. Plattsmouth Canning Co., 200.
Gorder v. Plattsmouth Canning Co., 642.
Gordon v. Preston, 9, 167, 631.
Gordon v. Winchester Bldg. & Accumulating Fund Ass'n, 38.
Gordon's Ex'rs v. Richmond, F. & P. R. Co., 447, 451, 454.
Gores v. Day, 751.
Gormully & Jeffrey Mfg. Co. v. Pope Mfg. Co., 27.
Gorrell v. Home Life Ins. Co., 226.
Goshen & Minisink Turnpike Road, President, etc., of, v. Hurtin, 396.
Goss & Phillips Mfg. Co. v. People, 328.
Gottfried v. Miller, 195.
Gough Mill & Gin Co. v. Looney, 360.
Gould v. Head, 516.
Gould v. Little Rock, M. R. & T. R. Co., 692, 693.
Gould v. Oneonta, 402, 443.
Gould Copper Min. Co. v. Walker, 641.
Governor v. Allen, 28, 33.
Gover's Case, 136.
Gow v. Collin & Parker Lumber Co., 771.
Graebner v. Post, 400.
Graff v. Pittsburgh & S. R. Co., 519.
Grafflin Co. v. Woodside, 577.
Grafner v. Pittsburg, N. I. & C. St. R. Co., 666.
Graham v. Boston, H. & E. R. Co., 89, 588.
Graham v. La Crosse & M. R. Co., 474, 687, 688.
Graham v. Partee, 201.
Gramophone & Typewriter, Ltd., v. Stanley, 8, 70.
Granby Mining & Smelting Co. v. Richards, 42, 59, 64.
Grand De Tour Plow Co. v. Rude Bros. Mfg. Co., 678, 693.
Grand Gulf Bank v. Archer, 26.
Grand Lodge F. & A. M. v. New Orleans, 287.
Grand Rapids Bridge Co. v. Prange, 101, 292.

[The figures refer to pages]

Grand Rapids Sav. Bank v. Warren, 708, 709, 713.
Grand River Bridge Co. v. Rollins, 134.
Grangers' Life & Health Co. v. Kamper, 90, 444.
Grant v. Attrill, 673.
Grant v. Cananea Consol. Copper Co., 793, 794, 796.
Grant v. Duluth, M. & N. R. Co., 621.
Grant v. East & West R. Co., 470.
Grant v. Ross, 435.
Grant v. Southern Contract Co., 435.
Grant Bros. Const. Co. v. U. S., 253.
Grape Sugar & Vinegar Mfg. Co. of Baltimore v. Small, 132, 134, 627.
Graton & Knight Mfg. Co. v. Redelsheimer, 215.
Gratz v. Redd, 424, 434, 435, 436, 647, 648, 702, 751.
Graves v. Brooks, 470.
Gray v. Coffin, 266, 713, 724.
Gray v. Hemenway, 431.
Gray v. National S. S. Co., 688.
Gray v. Portland Bank, 445.
Grays v. Lynchburg & S. Turnpike Co., 396.
Greacen v. Buckley & Douglas Lumber Co., 84.
Great Northern R. Co. v. Kennedy, 396.
Great Southern Fire Proof Hotel Co. v. Jones, 16.
Great Western Min. & Mfg. Co. v. Harris, 435.
Great Western R. Co. v. Drorbaugh, 248.
Great Western Tel. Co. v. Burnham, 400.
Great Western Tel. Co. v. Gray, 744.
Great Western Tel. Co. v. Purdy, 733.
Greaves v. Gouge, 487, 504, 653.
Greaves v. Posner, 795.
Green v. Board of Trade of City of Chicago, 507, 509.
Green v. Brookins, 326.
Green v. Chicago, B. & Q. R. Co., 776.
Green v. Equitable Mut. Life Ins. & Endowment Ass'n, 792, 797.
Green v. Graves, 38, 104.
Green v. Knife Falls Boom Corp., 47, 66.
Green v. London General Omnibus Co., 246.
Green v. Omnibus Co., 242, 245.
Green v. Seymour, 51.
Green Bay & M. R. Co. v. Union Steamboat Co., 161.
Green Co. v. Blodgett, 162, 196.
Green Mount & State Line Turnpike Co. v. Bulla, 558.
Greenbrier Industrial Exposition v. Rodes, 343, 350, 354.
Greenbrier Lbr. Co. v. Ward, 299, 307.
Greenburg v. S. D. Childs & Co., 196.
Greene, Matter of, 257.
Greene v. Dennis, 37.
Greene v. Nash, 601.
Greene v. Smith, 438.
Greene v. Woodland Ave. & W. S. St. R. Co., 193.
Greenfield Sav. Bank v. Abercrombie, 647.
Greensboro Gas Co. v. Home Oil & Gas Co., 198.
Greensboro & N. C. J. Turnpike Co. v. Stratton, 667.
Greensburg Fuel Co. v. Irwin Natural Gas Co., 677.
Greenville & C. R. Co. v. Woodsides, 389.
Greenwich Ins. Co. v. Carroll, 770.
Greenwood v. Law, 326.
Greenwood v. Leather Shod Wheel Co., 128.
Greenwood v. Union Freight R. Co., 268, 269, 270, 293, 314.
Greenwood Ice & Coal Co. v. Georgia Home Ins. Co., 640.
Greer v. Chartiers Ry. Co., 331.
Gregory v. Cleveland, C. & C. R. Co., 9.
Gregory v. German Bank of Denver, 756.
Gregory v. Patchett, 501.
Grenell v. Detroit Gas Co., 680.
Gress v. Knight, 356, 362.
Grew v. Breed, 710, 723, 724, 725.
Grier v. Union Nat. Life Ins. Co., 716.
Griffing v. A. A. Griffing Iron Co., 427.
Griffing Bros. Co. v. Winfield, 195.
Griffing Iron Co., In re, 585, 670.
Griffith v. Blackwater Boom & Lbr. Co., 316, 646.
Griffith v. Jewett, 601.
Griffith v. Watson, 282.
Griswold v. Board of Trustees of Peoria University, 338, 393.
Griswold v. Haven, 659.
Groel v. United Electric Co. of New Jersey, 136, 774, 797.
Grommes v. Sullivan, 606.
Grone v. Economic Life Ins. Co., 360, 361.
Grorud v. Lossl, 246.
Groton Bridge & Mfg. Co. v. American Bridge Co., 778.
Grover v. Muralt, 94.
Guadalupe & S. A. R. Stock Ass'n v. West, 71.
Guarantee Co. of North America v. East Rome Town Co., 429, 430.
Guckert v. Hacke, 117, 124.
Gue v. Tide Water Canal Co., 676, 677.
Guernsey v. Cook, 602.
Guilford v. Western Union Tel. Co., 559, 801, 802.
Guinness v. Land Corp., 448.
Gulf, C. & S. F. R. Co. v. Ellis, 27.
Gulf Yellow Pine Lumber Co. v. Chapman, 161, 174.
Gund Brewing Co. v. U. S., 251.
Gunderson v. Havanna-Clyde Min. Co., 246.
Gunderson v. Illinois Trust & Savings Bank, 498.
Gunn v. Central R. R., 243, 661.
Gunn v. Insurance Co., 132.
Gunnison v. United States Inv. Co., 718.
Guthrie v. Harkness, 257, 412, 414.
Guthrie's Trustee v. Akers, 420.
G. V. B. Min. Co. v. First Nat. Bank, 196, 200, 624, 625, 627.

[The figures refer to pages]

H

Haas v. Bank of Commerce, 102.
Haas v. Universal Phonograph & Record Co., 618, 640.
Haas Co., In re, 423.
Hackensack Water Co. v. De Kay, 198.
Hadden v. Dooley, 631.
Hadley v. Freedman's Savings & Trust Co., 41.
Haebler v. New York Produce Exchange, 507.
Hagan v. Providence & W. R. Co., 247.
Hagar v. Union Nat. Bank, 431, 432.
Hageman v. Southern Electric R. Co., 683.
Hagerstown Mfg., Min. & Land Imp. Co. v. Keedy, 207, 841.
Hager's Town Turnpike Road Co. v. Creeger, 82.
Hahn, Appeal of, 371, 384.
Hale v. Allinson, 738.
Hale v. Cheshire R. Co., 192.
Hale v. Coffin, 736.
Hale v. Hardon, 708, 726, 736, 742.
Hale v. Henkel, 27, 257.
Hale v. Hilliker, 736.
Hale v. Mechanics' Mut. Fire Ins. Co., 574, 582.
Hale v. Sanborn, 382.
Hale v. Walker, 722.
Haley v. Reid, 328.
Hall, In re, 391.
Hall v. Auburn Turnpike Co., 174.
Hall v. Farmers' & Merchants' Bank, 201.
Hall v. Henderson, 189.
Hall v. Klinck, 735.
Hall v. Rose Hill & E. Road Co., 541, 554, 556.
Hall v. United States Ins. Co. of Baltimore, 518.
Hall v. Vermont & M. R. Co., 129.
Hall & Farley v. Alabama Terminal & Imp. Co., 189.
Hall's Safe Co. v. Herring-Hall-Marvin Safe Co., 8.
Hallam v. Indianola Hotel Co., 643.
Hallenbeck v. Powers & Walker Casket Co., 580.
Hallenborg v. Greene, 801, 802, 803.
Halsey v. McLean, 754, 756.
Halsey v. Rapid Transit St. R. Co., 160.
Hambleton v. Glenn, 402, 519.
Hamblock v. Clipper Lawn Mower Co., 451, 564.
Hamill v. Watts, 59.
Hamilton v. Clarion, M. & P. R. Co., 109, 113, 384.
Hamilton v. Glenn, 519.
Hamilton v. Keith, 258.
Hamilton v. Menominee Falls Quarry Co., 687.
Hamilton v. Reeves & Co., 786, 789.
Hamilton Mut. Ins. Co. v. Hobart, 321.
Hamilton & Flamborough Road Co. v. Townsend, 67.
Hamlin v. Toledo, St. L. & K. C. R. Co., 447, 451, 453.
Hamlin v. Union Brass Co., 616.
Hammock v. Farmers' Loan & Trust Co., 170.
Hammond v. Edison Illuminating Co., 445.
Hammond v. Jethro, 53.
Hammond v. National Life Ass'n, 803.
Hammond v. Straus, 60, 64.
Hammond Beef & Provision Co. v. Best, 84, 85, 763.
Hamor v. Taylor-Rice Engineering Co., 187, 190.
Hampton v. Buchanan, 497.
Hamsher v. Hamsher, 207.
Hanchett v. Blair, 631.
Hanchey v. Southern Home Bldg. & Loan Ass'n, 780.
Hancock v. Board of Education of Santa Barbara, 105.
Hancock Mut. L. Ins. Co. v. Warren, 267.
Hancock Nat. Bank v. Ellis, 727, 736, 739.
Hancock Nat. Bank v. Farnum, 707, 708, 738, 742.
Hand v. Clearfield Coal Co., 195.
Handley v. Stutz, 89, 444, 462, 463, 464, 466, 467, 469, 474, 587, 590, 747.
Handy v. Draper, 745.
Hanford Mercantile Stone v. Sowlveere, 352, 353.
Hanger v. Com., 72.
Hanlon Millinery Co. v. Mississippi Valley Trust Co., 139, 217.
Hanna v. Chicago, R. I. & P. R. Co., 225, 230.
Hanover Junction & S. R. Co. v. Grubb, 369.
Hanover Nat. Bank of City of New York v. American Dock & Trust Co., 624.
Hannon v. Siegel-Cooper Co., 75, 243, 663.
Hanson v. Davison, 709, 734.
Hanson v. Donkersley, 709.
Hanson v. Little Sisters of Poor of Baltimore, 207.
Hapgoods v. Lusch, 349, 350, 389, 390.
Harding v. American Glucose Co., 74, 167, 180, 297, 487, 586, 784, 801.
Hardman v. Sage, 741.
Hardon v. Newton, 310, 311, 486.
Hardy v. Merriweather, 173.
Harger v. McCullough, 709.
Harper v. Carroll, 718, 734, 748, 749.
Harpold v. Stobart, 717, 718.
Harrigan v. Gilchrist, 311.
Harrill v. Davis, 107, 120, 121, 125, 131.
Harriman v. First Bryan Baptist Church, 163.
Harriman v. Southam, 120.
Harrington v. Connor, 295.
Harris v. First Parish in Dorchester, 734.
Harris v. Gateway Land Co., 120, 744.
Harris v. Independence Gas Co., 229, 234.

[The figures refer to pages]

Harris v. Lemming-Harris Agr. Works, 668.
Harris v. McGregor, 58.
Harris v. Runnels, 779.
Harris v. Wells, 393.
Harris-Woodbury Lbr. Co. v. Coffin, 315, 318.
Harrison v. St. Louis & S. F. R. Co., 769.
Harrison v. Thomas, 492.
Harrison v. Union Pac. R. Co., 456.
Harrod v. Hamer, 64.
Harshman v. Bates County, 193.
Hartford Fire Ins. Co. v. Perkins, 769.
Hartford Fire Ins. Co. v. Raymond, 761, 770.
Hartford & N. H. R. Co. v. Boorman, 518.
Hartford & N. H. R. Co. v. Croswell, 406, 486, 566.
Hartford & N. H. R. Co. v. Kennedy, 331, 393, 396.
Hartford & N. H. R. Co. v. New York & N. H. R. Co., 181.
Hartley v. Pioneer Iron Works, 618.
Harvard Brewing Co. v. Pratt, 668.
Harvard College v. Amory, 438.
Harvard Co. v. Wicht, 775.
Harvey v. Linville Imp. Co., 601, 604.
Haskell v. Read, 589, 591, 592, 594.
Haskell v. Worthington, 382.
Haslam v. First Nat. Bank of Minneapolis, 536.
Haslett's Ex'rs v. Wotherspoon, 53.
Hassam Paving Co., of New York, Matter of, 608.
Hasselman v. U. S. Mortg. Co., 98.
Hassinger v. Ammon, 115.
Hastings, In re, 412.
Hastings v. Brooklyn Life Ins. Co., 619, 623.
Hastings v. Drew, 678, 680, 702, 730, 742, 743.
Hastings Corporation v. Petton, 315.
Hastings Malting Co. v. Iron Range Brewing Co., 468.
Hatch v. Burroughs, 709.
Hatch v. Dana, 698, 730, 731, 732.
Hatch v. Lucky Bill Min. Co., 617.
Hathorn v. Calef, 713.
Haupt v. Vint, 175.
Hause v. Mannheimer, 114.
Havemeyer v. Havemeyer, 602.
Haven v. New Hampshire Asylum for Insane, 574.
Haver v. Central R. Co. of New Jersey, 247.
Hawes v. City of Oakland, 487, 490, 491, 494, 499.
Hawke v. E. Hulton & Co., 254.
Hawkins v. Citizens' Ins. Co., 375, 402.
Hawkins v. Donnerberg, 744.
Hawkins v. Glenn, 733, 744.
Hawkins v. Mansfield Gold Min. Co., 131.
Hawley v. Malden, 280, 281, 283, 284.
Hawley v. Upton, 460.
Hay v. Platt, 621.
Hayden v. Androscoggin Mills, 84.
Hayden v. Brown, 435.
Hayden v. Green, 136.
Hayden v. Hayden, 207.
Hayden v. Official Hotel Red-Book & Directory Co., 168, 297.
Hayden v. Thompson, 435.
Hayden v. Williams, 435.
Hayes v. Shoemaker, 719.
Haynes v. Brown, 326.
Hays v. Citizens' Bank, 753.
Hays v. Com. ex rel. McCutcheon, 259, 276.
Hays v. Galion Gas Light & Coal Co., 167, 171.
Hays v. Northwestern Bank of Virginia, 94.
Hayward v. Davidson, 207.
Hayward v. Leeson, 137, 140, 479.
Haywood v. Lincoln Lumber Co., 637, 752.
Hazard v. Durant, 487, 490.
Hazelett v. Butler University, 46, 48.
Hazeltine v. Belfast & M. L. R. Co., 452.
Hazeltine v. Mississippi Valley Fire Ins. Co., 775.
Hazen v. Union Bank of Tennessee, 258.
Hazlehurst v. Savannah, G. & N. A. R. Co., 183, 448.
Heacock v. Sherman, 711.
Head v. Curators of University of Missouri, 31, 32.
Head v. Providence Ins. Co., 197, 198.
Healey v. Steele Center Creamery Ass'n, 102, 105.
Heard v. Eldredge, 424, 437, 438.
Heard v. Talbot, 298, 299, 307.
Hearst v. Putnam Min. Co., 5, 487, 496, 504.
Heart v. State Bank, 522.
Heaston v. Cincinnati & Ft. W. R. Co., 99, 120, 401.
Heath v. Barmore, 153, 317, 318.
Heath v. Erie R. Co., 647, 653.
Heath v. Silverthorn Lead Min. & Smelt. Co., 56, 587.
Hebgen v. Koeffler, 136.
Heck v. McEwen, 42.
Heckscher v. Eldenborn, 136.
Hecla Consolidated Gold Min. Co. v. O'Neill, 344.
Hedge & Horn, Appeal of, 22, 335.
Heenan & Finlen v. Parmele, 315.
Hegeman v. Western R. Corp., 266.
Heidbreder v. Superior Ice & Cold Storage Co., 753.
Heileman Brewing Co. v. Peimeisl, 789.
Heinberg Bros. v. Thompson, 706, 708.
Heinig v. Adams & Westlake Mfg. Co., 60.
Heintzelman v. Druids' Relief Ass'n, 573, 618.
Heironimus v. Sweeney, 171.
Heitkamp v. American Pigment & Chemical Co., 311.
Helena Nat. Bank v. Rocky Mountain Tel. Co., 620.
Heller v. National Marine Bank, 454.

[The figures refer to pages]

Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 778.
Hemenway v. Hemenway, 438.
Hemingway v. Hemingway, 415.
Hencke v. Twomey, 709.
Hendee v. Pinkerton, 166, 170.
Henderson v. Australia Steam Nav. Co., 195.
Henderson v. Bank of Australasia, 163.
Henderson v. Hall, 729.
Henderson v. Royal British Bk., 355.
Henderson Bridge Co. v. Kentucky, 282.
Henderson Loan & R. E. Ass'n v. People, 304.
Henderson & N. R. Co. v. Leavell, 369, 377.
Hendrickson v. Bradley, 497.
Henkle v. Salem Mfg. Co., 723.
Hennessy v. Muhleman, 163.
Henni v. Fidelity Bldg. & Loan Ass'n, 779.
Henrietta Mining & Milling Co. v. Johnson, 791.
Henriques v. Dutch West India Co., 788.
Henry v. Babcock & Wilcox Co., 413, 418, 802.
Henry v. Great Northern R. Co., 447.
Henry v. R. Co., 452.
Henry v. Simanton, 776.
Henry v. Vermillion & A. R. Co., 378, 388, 730, 732.
Henry Wood's Sons Co. v. Schaefer, 666.
Herbert v. Duryea, 479.
Herbert Kraft Co. Bank v. Bank of Orland, 542.
Hermitage Hotel Co. v. Dyer, 183.
Hern v. Iowa State Agr. Soc., 661.
Herndon v. Chicago, R. I. & P. R. Co., 763, 768.
Herrick v. Humphrey Hardware Co., 522, 557.
Herring v. Ruskin Co-op. Ass'n, 187, 326, 514, 575.
Hersey v. Tully, 131.
Hersey v. Veazie, 504, 653.
Hess v. W. & J. Sloane, 159, 176, 626.
Hey v. Dolphin, 517.
Hibbard, Spencer, Bartlett & Co. v. Ryan, 246.
Hibbs v. Brown, 24, 25, 33, 172.
Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co., 678, 687.
Hichens v. Congreve, 136, 489.
Hickling v. Wilson, 113, 377, 460.
Higgins v. California Petroleum & Asphalt Co., 73, 92.
Higgins v. Illinois Trust & Sav. Bank, 520.
Higgins v. Lansingh, 636, 642.
Higgins Co. v. Higgins Soap Co., 78.
Higginson & Dean, In re, 153, 315, 693.
Higham v. Iowa State Travelers' Ass'n, 799.
Hightower v. Thornton, 315, 317, 396, 678, 694, 698, 743.
Hildyard v. South-Sea Co., 541, 554.
Hill v. Atoka Coal & Mining Co., 420, 428, 429, 432, 433.
Hill v. Beach, 109, 125, 770.
Hill v. Boston, 33.
Hill v. C. F. Jewett Pub. Co., 555, 659.
Hill v. Marston, 637.
Hill v. Merchants' Mut. Ins. Co., 713.
Hill v. Murphy, 647, 648.
Hill v. Newichawanick Co., 428, 429.
Hill v. Standard Tel. Mfg. Co., 753.
Hill Mfg. Co. v. Boston & L. R. Corp., 159.
Hiller v. Burlington & M. R. Co., 794.
Hillier v. Allegheny County Mut. Ins. Co., 747.
Hilliker v. Hale, 737.
Hillyer v. Overman Silver Min. Co., 614.
Hinchman v. Lincoln, 326.
Hinckley v. Sac Oil & Pipe Line Co., 355.
Hinckley v. Schwarzschild & Sulzberger Co., 276, 448, 572.
Hindman v. First Nat. Bank, 246.
Hine v. Commercial Bank of Bay City, 327.
Hines v. Imperial Naval Stores Co., 200.
Hirsch v. Independent Steel Co., 298.
Hirsch v. Taylor, 298.
Hirshfeld v. Fitzgerald, 727, 746.
Hiscock v. Lacy, 427, 433.
Hitchings v. Cobalt Cent. Mines Co., 501.
Hite's Devisees v. Hite's Ex'r, 439.
Hitt v. Sterling-Gould Mfg. Co., 631.
Hoadley v. Essex County Com'rs, 23.
Hoag v. Edwards, 168.
Hoard v. Chesapeake & O. R. Co., 696.
Hoare's Case, 722.
Hobbs v. National Bank of Commerce, 746.
Hobgood v. Ehlen, 470.
Hoboken Printing & Publishing Co. v. Kahn, 248.
Holder v. George Hogg Co., 415.
Hodge v. United States Steel Corp., 502, 503.
Hodges v. New England Screw Co., 310, 646, 647, 650, 653.
Hodgson v. Duluth, H. & D. R. Co., 587.
Hodgson v. Southern Bldg. & Loan Ass'n, 796.
Hoffman v. Banks, 779.
Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., 644.
Hogan v. St. Louis, 776.
Holbrook v. New Jersey Zinc Co., 549, 550, 556, 559.
Holcombe v. Trenton White City Co., 140, 458, 467, 479.
Holder v. Aultman, Miller & Co., 774.
Holladay v. Elliott, 347.
Holland v. Duluth Iron Mining & Development Co., 715, 742.
Hollander v. Heaslip, 371.
Hollingsworth v. Southern R. Co., 87.
Hollins v. Brierfield Coal & Iron Co., 678, 683, 684, 690, 693.
Holloway v. Memphis, E. P. & P. R. Co., 117.
Holm v. Atlas Nat. Bank, 630.

[The figures refer to pages]

Holm v. Claus Lipsius Brewing Co., 174.
Holman v. State, 59, 306.
Holmes, Ex parte, 187, 595.
Holmes v. Gilliland, 64.
Holmes v. Sherwood, 730, 781, 732.
Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co., 78.
Holmes, Booth & Haydens v. Willard, 162, 174, 648, 649.
Holmes & Griggs Mfg. Co. v. Holmes & Wessel Metal Co., 167, 186, 210, 215, 225.
Holshouser Co. v. Gold Hill Copper Co., 784.
Holt v. Holt Electric Storage Co., 398.
Holt's Case, 357.
Holyoke Bank v. Burnham, 717, 718, 720, 722.
Holyoke Bank v. Goodman Paper Mfg. Co., 742.
Home Benefit Soc. of New York v. Muehl, 797.
Home Bldg. Ass'n v. Bruner, 92.
Home Fire Ins. Co. v. Barber, 13, 75, 500, 502.
Home Ins. Co. v. Morse, 768.
Home Ins. Co. v. Swigert, 773.
Home Min. Co. v. McKibben, 498.
Home of the Friendless v. Rouse, 287.
Home Sav. Bank v. Des Moines, 285, 290.
Home Stock Ins. Co. v. Sherwood, 113.
Honeyman v. Colorado Fuel & Iron Co., 774.
Hook v. Ayers, 638.
Hooker v. Midland Steel Co., 673.
Hooker v. New Haven & N. Co., 244.
Hoole v. Great Western R. Co., 487, 499.
Hooper v. California, 761, 766.
Hooven Mercantile Co. v. Evans Min. Co., 99.
Hope v. International Financial Society, 187.
Hopper v. Sage, 429.
Hopkins v. U. S., 180.
Hoppin v. Buffum, 593, 594.
Horbach v. Marsh, 636, 643.
Horn v. Chicago, M. & St. P. R. Co., 266.
Horn v. Ivy, 195.
Horn Silver Min. Co. v. New York, 768.
Horn Silver Min. Co. v. Ryan, 647, 648, 650, 652, 653.
Hornblower v. Crandall, 128.
Horowitz v. Broads Mfg. Co., 130.
Horst v. Lewis, 175.
Horton v. Sherrill-Russell Lumber Co., 468.
Horton v. Wilder, 598, 608.
Hospes v. Northwestern Mfg. & Car Co., 461, 473, 678, 680, 681, 682, 683, 684.
Hossack v. Ottawa Development Ass'n, 155.
Hotchkiss v. Brainerd Quarry Co., 438.
Hotchkiss & Upson Co. v. Union Nat. Bank, 538.
Hough v. Cook County Land Co., 206.
Household Fire Ins. Co. v. Grant, 335.
House of Mercy of New York v. Davidson, 154, 208.
Houston v. Filer & Stowell Co., 794.
Houston v. Thornton, 665.
Hovey's Estate, In re, 775.
Howard v. Glenn, 356.
Howard v. Patent Ivory Co., 132.
Howarth v. Angle, 736.
Howarth v. Ellwanger, 726.
Howarth v. Lombard, 738.
Howe v. Starkweather, 328.
Howell v. Chicago & N. W. R. Co., 801.
Howeth v. Colbourne Bros. Co., 167.
Hoyle v. Plattsburgh & M. R. Co., 636, 643, 644.
Hoyt v. Ogden Portland Cement Co., 793.
Hoyt v. Thompson's Ex'r, 564, 617, 632, 633, 783.
H. Scherer & Co. v. Everest, 218, 219.
Hubbard v. International Mercantile Agency, 357.
Hubbard v. New York, N. E. & W. Inv. Co., 643.
Hubbard v. Weare, 422.
Hubbard v. Worcester Art Museum, 154, 208.
Huddersfield Canal Co. v. Buckley, 518.
Hudson v. Bank of Pine Bluff, 537.
Hudson v. Carmen, 95.
Hudson v. Green Hill Seminary Corp., 99, 102, 107.
Hudson v. Weir, 326.
Hudson County Water Co. v. McCarter, 264.
Hudson Real Estate Co. v. Tower, 334, 337, 339, 340.
Huffaker v. Krieger's Assignee, 667.
Hughes v. Antietam Mfg. Co. of Washington County, 334, 360, 382, 393, 396, 404, 567.
Hughes v. Cadena De Cobre Min. Co., 138, 139.
Hughes v. Drovers' & Mechanics' Nat. Bank, 552.
Hughesdale Mfg. Co. v. Vanner, 64, 107.
Humble v. Mitchell, 326.
Humboldt Driving Park Ass'n v. Stevens, 445.
Humboldt Min. Co. v. American Mfg., Min. & Mill. Co., 174.
Humphreys v. McKissock, 7.
Humphreys v. Mooney, 63, 102, 124.
Humphreys v. Newport News & M. V. Co., 795.
Humphrey v. Patrons' Mercantile Ass'n, 218.
Hun v. Cary, 646, 647, 650, 751.
Hunnewell v. New York Cent. & H. R. R. Co., 489.
Hunt v. Hauser Malting Co., 184, 223.
Hunt v. Laconia & L. St. Ry., 430.
Hunt v. Le Grand Roller Skating Rink Co., 313.
Hunt v. Memphis Gaslight Co., 169.
Hunt v. O'Shea, 421, 434, 701.
Hunter v. Baker Motor Vehicle Co., 11, 688.

[The figures refer to pages]

Hunter v. Mutual Reserve Life Ins. Co., 797.
Hunter v. Roberts, Throp & Co., 426.
Huntington v. Attrill, 708, 757.
Huntington v. Sheehan, 774.
Huntington C. & Q. Turnpike Road Co. v. Wallace, 31.
Huntington Mfg. Co. v. Schofield, 107.
Hurd v. Hotchkiss, 618.
Hurd v. New York & C. Steam Laundry Co., 680, 687.
Hurlbut v. Marshall, 606.
Huron Printing & Bindery Co. v. Kittleson, 630.
Hurt v. Salisbury, 59, 64, 106.
Huster v. Newkirk Creamery & Ice Co., 374, 378, 404, 408.
Hutchings v. Lamson, 746.
Hutchins v. New England Coal Min. Co., 711, 760.
Hutchins v. Smith, 374.
Hutchinson v. Green, 610, 692.
Hutchinson v. Western & A. R. Co., 242, 244, 663.
Hutchinson v. Young, 754, 756.
Huylar v. Cragin Cattle Co., 413, 415.
H. W. Wright Lumber Co. v. Hixon, 522.
Hyam's Case, 721.
Hyams v. Old Dominion Co., 614.
Hyams v. Old Dominion Copper Mining & Smelting Co., 503.
Hyatt v. Allen, 420, 520.
Hyde v. Doe, 64.
Hyde Park Terrace Co. v. Jackson Bros. Realty Co., 139.
Hyman v. Coleman, 709, 745.
Hypes v. Southern R. Co., 245.

I

Illinois Cent. R. Co. v. Irvin, 289.
Illinois Cent. R. Co. v. People, 258, 267.
Illinois Cent. R. Co. v. Sanford, 89.
Illinois Grand Trunk R. Co. v. Cook, 51.
Illinois River R. Co. v. Zimmer, 55, 388, 407, 568.
Illinois Trust & Sav. Bank v. Arkansas City, 220.
Illinois Trust & S. Bank v. Doud, 303.
Illinios Trust & Sav. Bank v. Pacific R. Co., 220.
Illinois Watch Case Co. v. Pearson, 77.
Imperial Bldg. Co. v. Chicago Open Board of Trade, 75, 104, 120.
Independent Medical College v. People ex rel. Akin, 303.
Independent Order of Mutual Aid v. Paine, 113.
Indiana v. American Exp. Co., 765.
Indiana v. U. S., 40.
Indiana Bond Co. v. Ogle, 70, 103.
Indianapolis, C. & L. R. Co. v. Jones, 694.
Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 148.
Indianapolis Furnace & Min. Co. v. Herkimer, 59, 117.
Indianapolis & St. L. R. Co. v. Vance, 280.
Ingles Land Co. v. Knoxville Fire Ins. Co., 519, 522.
Ingraham v. Commercial Lead Co., 463.
Ingwersen v. Edgecombe, 753.
Inhabitants of First Parish in Brunswick v. Dunning, 29.
Inhabitants of First Parish in Sudbury v. Stearns, 589, 605.
Inhabitants of Fourth School Dist. v. Wood, 33.
Inhabitants of Northampton v. Smith, 9.
Innerarity v. Merchants' Nat. Bank, 629, 631.
Instone v. Frankfort Bridge Co., 334, 338, 393, 396, 397.
Insurance Com'r v. United Fire Ins. Co., 314.
Insurance Co. of North America v. McLimans, 795.
Interior Woodwork Co. v. Prasser, 175.
International Committee of Y. W. C. A. v. Y. W. C. A. of Chicago, 79.
International Fair & Exposition Ass'n v. Walker, 336, 382, 384.
International Harvester Co. of America v. State, 182.
International Paper Co. v. Gazette Co., 755.
International Text-Book Co. v. Heartt, 245.
International Text-Book Co. v. Pigg, 285, 765, 767, 774.
International Trust Co. v. Davis & Farnum Mfg. Co., 223, 225.
Interstate Sav. & Loan Ass'n v. Strine, 784.
Iowa Drug Co. v. Souers, 164.
Iowa Falls Mfg. Co. v. Farrar, 789.
Iowa Lumber Co. v. Foster, 183, 188.
Ireland v. Globe Milling & Reduction Co., 83, 131, 514, 573, 574, 578.
Ireland v. Palestine B., N. P. & N. W. Turnpike Co., 260, 713.
Irons v. Manufacturers' Nat. Bank, 691, 718, 722.
Irvin v. Susquehanna & P. Turnpike Co., 567.
Irvine v. Chicago, W. & V. Coal Co., 183.
Irwin v. Granite State Provident Ass'n, 802.
Isbell v. Graybill, 534.
Isham v. Buckingham, 518, 531, 532.
Isle Royale Land Corp. v. Secretary of State, 769.
Ives v. South Buffalo R. Co., 258.

J

Jackson v. Brown, 167.
Jackson v. Delaware River Amusement Co., 799.
Jackson v. Hooper, 133.

[The figures refer to pages]

Jackson v. Meek, 717.
Jackson v. Phillips, 313.
Jackson v. Traer, 463.
Jackson v. Walsh, 54, 55, 269, 276.
Jackson Co. v. Gardiner Inv. Co., 296.
Jackson Fire & Marine Ins. Co. v. Walle, 402, 404.
Jackson's Adm'rs v. Newark Plank Road Co., 426, 432.
Jacksonville, M. P. R. & Nav. Co. v. Hooper, 149, 200.
Jacobson v. Allen, 726.
Jacobson v. Brooklyn Lumber Co., 639.
Jacobs Pharmacy Co. v. Southern Banking & Trust Co., 219.
Jacobus v. Jamestown Mantel Co., 175, 622, 624, 625.
Jagger Iron Co. v. Walker, 709, 745.
J. A. Holshouser Co. v. Gold Hill Copper Co., 784.
James, Matter of, 284.
James v. Woodruff, 525.
James Clark Co. v. Colton, 753.
Jameson v. People, 37, 51.
Janney v. Minneapolis Industrial Exposition, 637, 727.
Jansen v. Ostrander, 29.
Jaques v. Board of Sup'rs of Yuba County, 99, 102.
Jarvis v. Rogers, 544.
Jarvis-Conklin Mortgage Trust Co. v. Willhoit, 778, 779.
J. B. Watkins Land-Mortg. Co. v. Elliott, 791, 800.
Jefferson Branch Bank v. Skelly, 287.
Jefferys v. Gurr, 197.
Jefts v. York, 655.
Jellenik v. Huron Copper Min. Co., 325, 527.
Jemison v. Citizens' Sav. Bank of Jefferson, 215.
Jemison v. Planters' & Merchants' Bank, 266.
Jenkins v. Auburn City Ry. Co., 503.
Jenkins v. President, etc., of Union Turnpike Road, 388.
Jennie Clarkson Home for Children v. Missouri, K. & T. R. Co., 544.
Jennings v. Dark, 103, 115, 121.
Jenson v. Toltec Ranch Co., 222.
Jermain v. Lake Shore & M. S. R. Co., 428, 452, 520.
Jessup v. Bridge, 167.
Jessup v. Carnegie, 124.
Jester v. Baltimore Steam Packet Co., 794.
Jesup v. Illinois Cent. R. Co., 641, 643.
Jewett v. West Somerville Co-op. Bank, 622.
J. G. Brill Co. v. Norton & T. St. R. Co., 175.
J. H. Wentworth Co. v. French, 594.
J. J. McCaskill Co. v. U. S., 5.
Johanson v. Alaska Treadwell Gold Min. Co., 776.
John v. Farmers' & Mechanics' Bank of Indiana, 115, 299, 307.
John C. Grafflin Co. v. Woodside, 577.
John Deere Plow Co. v. Wyland, 776.
John Gund Brewing Co. v. U. S., 251.
John Hancock Mut. L. Ins. Co. v. Warren, 267.
John V. Farwell Co. v. Wolf, 210.
Johns v. Johns, 326.
Johnson v. Amberson, 543.
Johnson v. Corser, 107, 125.
Johnson v. Fischer, 734.
Johnson v. Georgia M. & G. R. Co., 376.
Johnson v. Goodyear Min. Co., 276.
Johnson v. Johnson Bros., 171.
Johnson v. Joliet & C. R. Co., 49.
Johnson v. Kessler, 60.
Johnson v. Laflin, 513, 515, 516, 530, 576, 718, 719, 720.
Johnson v. Langdon, 417.
Johnson v. Mulvy, 326.
Johnson v. Mutual Reserve Life Ins. Co., 797.
Johnson v. Okerstrom, 103, 105.
Johnson v. People, 39.
Johnson v. Schar, 370.
Johnson v. Sheridan Lumber Co., 136.
Johnson v. Somerville Dyeing & Bleaching Co., 717, 718.
Johnson v. Stoughton Wagon Co., 650.
Johnson v. Trade Ins. Co., 798.
Johnson v. Underhill, 719.
Johnson v. Wabash & Mt. Vernon Plank-road Co., 343.
Johnson Co. v. Miller, 677.
Johnston v. Gumbel, 115.
Johnston v. Jones, 670.
Johnston v. Laflin, 513, 515, 530, 576, 718, 719.
Johnston v. Mutual Reserve Life Ins. Co., 797.
Johnston v. Shortridge, 631.
Johnston v. Townsend, 70, 71.
Johnston Harv. Co. v. Clark, 117.
Jones, Matter of, 24.
Jones v. Aspen Hardware Co., 39, 60, 102, 120, 125.
Jones v. Avery, 712.
Jones v. Barlow, 756.
Jones v. Cincinnati Type Foundry Co., 114, 117.
Jones v. Concord & M. R. R., 445.
Jones v. Davis, 283.
Jones v. Goldtree Bros. Co., 745.
Jones v. Habersham, 207, 208, 785.
Jones v. Hale, 102, 643.
Jones v. Jarman, 734.
Jones v. Milton & R. Turnpike Co., 585, 590.
Jones v. Missouri-Edison Electric Co., 191, 192.
Jones v. Morrison, 189, 445, 640, 643, 668.
Jones v. New York Guaranty & Indemnity Co., 166.
Jones v. Sisson, 402.
Jones v. Smith, 779.
Jones v. Spartanburg Herald Co., 299.

[The figures refer to pages]

Jones v. Terre Haute & R. Co., 428, 433, 520.
Joplin Mercantile Co. v. U. S., 253.
Jordan & Davis v. Annex Corporation, 136.
Jorguson v. Apex Gold Mines Co., 479.
Joseph v. Raff, 188, 189.
Joseph Bancroft & Sons Co. v. Bloede, 183, 184.
Joseph Schlitz Brewing Co. v. Ester, 790.
Joslyn v. St. Paul Distilling Co., 550, 556, 558.
J. P. Morgan & Co. v. Hall & Lyon Co., 176, 218.
J. R. Alsing Co. v. New England Quartz & Spar Co., 789.
Junkins v. Doughty Union School Dist., 642.
Just v. Idaho Canal & Improvement Co., 500, 502.
Just v. State Sav. Bank, 523, 577.
Justices to Inquiry of Senate, 266.
J. Walter Thompson Co. v. Whithed, 789.

K

Kadish v. Garden City Equitable Loan & Bldg. Ass'n, 223.
Kaeppler v. Redfield Creamery Co., 134.
Kaiser v. Lawrence Sav. Bank, 58, 59, 106, 124.
Kaiser Land & Fruit Co. v. Curry, 301.
Kalamazoo, City of, v. Kalamazoo Heat, Light & Power Co., 115.
Kanawha Coal Co. v. Kanawha & O. Coal Co., 51.
Kane, In re, 436.
Kane v. Boston Mut. Life Ins. Co., 245.
Kanneberg v. Evangelical Creed Congregation, 225, 230.
Kansas City Southern R. Co. v. Mixon-McClintock Co., 115.
Kansas Home Ins. Co. v. Wilder, 787.
Kansas, O. & T. R. Co. v. Smith, 192.
Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co., 41.
Karsch v. Pottier & Stymus Mfg. & Imp. Co., 623.
Katama Land Co. v. Jernegan, 354, 392.
Kaufman v. Charlottesville Woolen Mills Co., 429.
Kaufman v. U. S., 253, 254.
Kavanagh v. Omaha Life Ass'n, 191.
Kavanaugh v. Commonwealth Trust Co., 485, 489, 491.
Kavanaugh v. St. Louis, 167, 169.
Kean v. Johnson, 169.
Kearns v. Leaf, 691.
Keating v. J. Stone & Sons Live Stock Co., 328.
Keene Guar. Sav. Bank v. Kawrence, 777.
Keeney v. Converse, 634, 645.
Keith v. Johnson, 152.
Keller v. Johnson, 362, 375.
Kellerher v. Denver Music Co., 116.
Kellerman v. Maier, 475.
Kellogg-Mackay Co. v. Harve Hotel Co., 174, 228.
Kelly v. Biddle, 179.
Kelly v. Clark, 469, 678, 711.
Kelly v. Killian, 390.
Kelner v. Baxter, 132.
Kelsey v. Pfaudler Process Fermentation Co., 417.
Kemble's Estate, In re, 439.
Kemmerer v. St. Louis Blast Furnace Co., 172.
Kendall v. American Automatic Loom Co., 794, 795.
Kendall v. Bishop, 692.
Kennebec Co. v. Augusta Ins. & Banking Co., 760.
Kennebec & P. R. Co. v. Kendall, 392.
Kennedy v. California Sav. Bank, 186.
Kennett v. Woodworth Mason Co., 58.
Kenosha, R. & R. I. R. Co. v. Marsh, 55, 407, 566, 567, 571.
Kent v. Quicksilver Min. Co., 235, 325, 330, 447, 448, 449, 450, 575, 578, 581.
Kenton Furnace R. & Mfg. Co. v. McAlpin, 456, 457.
Keokuk & W. R. Co. v. Missouri, 192.
Kerfoot v. Farmers' & Merchants' Bank, 207.
Kerfoot v. Farmers' & Merchants' Bank, 238.
Kern v. Arbeiter Unterstuetsungs Verein, 494.
Kernochan, In re, 429, 436.
Kerr v. Urie, 530, 723.
Kessler v. Ensley Co., 498.
Kessler & Co. v. Ensley Co., 497, 502.
Keys v. Smith, 102.
Keyser v. Hiltz, 347.
Keyser v. Hitz, 716, 725.
Keystone Driller Co. v. Superior Court of City and County of San Francisco, 84.
Keystone Mfg. Co. v. Howe, 780.
Keystone Wrapping Mach. Co. v. Bromeier, 391.
Kharas v. Barron C. Collier, 245, 247.
Kidd v. Alabama, 283.
Kidd v. New Hampshire Traction Co., 504, 796.
Kidwelly Canal Co. v. Raby, 340.
Kilgore v. Smith, 781.
Killen v. Barnes, 650, 751.
Kilton v. Providence Tool Co., 745.
Kimball v. New England Roller Grata Co., 475.
Kincaid v. Dwinelle, 707.
Kindel v. Beck & Pauli Lithographing Co., 765, 780.
King v. Amery, 299.
King v. Cochran, 736.
King v. Follett, 437.
King v. Governor, etc., of Bank of England, 433.
King v. International Bldg. Loan & Investment Union, 577.
King v. Masters & Wardens of Merchant Tailors' Co., 411.

[The figures refer to pages]

King v. Ohio & M. R. Co., 452.
King v. Pasmore, 294.
King v. Paterson & H. R. Co., 421, 431, 432.
Kingsbury Collieries, Ltd., In re, 165.
Kinnan v. Sullivan County Club, 513.
Kinney v. Reid Ice Cream Co., 789.
Kinston & C. R. Co. v. Stroud, 62, 100.
Kirkland v. Kille, 754.
Kirkman v. Carlstadt Chemical Co., 418.
Kirkpatrick v. United Presbyterian Church of Keota, 117.
Kirtley v. Holmes, 736.
Kirwan Mfg. Co. v. Truxton, 803.
Kiskadden v. Steinle, 478.
Kisseberth v. Prescott, 726.
Klaus, In re, 515, 558, 576.
Klein v. Independent Brewing Ass'n, 164, 634, 639.
Klopp v. Creston City Guarantee Water Works Co., 794.
Knapp v. S. Jarvis Adams Co., 426.
Knapp v. Supreme Commandery, United Order of the Golden Cross of the World, 143, 191.
Knapp v. Tidewater Coal Co., 173.
Knickerbocker Trust Co. v. Iselin, 714, 739.
Knickerbocker Trust Co. v. Myers, 713, 718.
Knight v. Barber, 326.
Knowles v. Board of Education, 49.
Knowles v. Northern Texas Traction Co., 207.
Knowles v. Sandercock, 183.
Knowlton v. Ackley, 733.
Knowlton v. Congress & E. Spring Co., 240, 366, 476.
Knox v. Baldwin, 755, 756.
Knox v. Eden Musee American Co., 330, 541, 546, 660.
Koehler v. Black River Falls Iron Co., 200, 632, 634.
Kohlruss v. Zackery, 208.
Kohlsaat v. Gay, 118.
Kolff v. St. Paul Fuel Exchange, 577, 579.
Koons v. Martin, 749.
Koppel v. Massachusetts Brick Co., 131.
Kortright v. Buffalo Commercial Bank, 557.
Kraft v. Griffon Co., 458, 463, 465.
Kraft v. West Side Brewery Co., 174.
Kraft Co. Bank v. Bank of Orland, 542.
Kraniger v. People's Bldg. Soc., 217, 239.
Kreissl v. Distilling Co. of North America, 601.
Kroegher v. Calivada Colonization Co., 639.
Krohn v. Williamson, 485.
Krulevitz v. Eastern R. Co., 244, 245.
Krutz v. Paola Town Co., 101, 118, 292, 314.
Kuhbach v. Irving Cut Glass Co., 412.
Kuhn v. McAllister, 327.
Kulp v. Fleming, 736.
Kunkelman v. Rentchler, 748.
Kunz v. National Valve Co., 470.
Kuser v. Wright, 198.
Kwapil v. Bell Tower Co., 63, 107.

L

La Bourgogne, 83.
Lackawana Iron & Coal Co. v. Luzerne County, 283.
Ladd v. Cartwright, 730.
Ladenburg v. Commercial Bank, 799.
Ladywell Min. Co. v. Brookes, 139.
Lafayette Ins. Co. v. French, 85, 791, 799.
La France Fire Engine Co. v. Town of Mt. Vernon, 779, 782.
La Grange & M. R. Co. v. Rainey, 292
Lagrone v. Timmerman, 183.
Lagunes Nitrate Co. v. Lagunes Nitrate Syndicate, 137, 140, 650.
Laing v. Burley, 533.
Lake Ontario, A. & N. Y. R. Co. v. Mason, 59, 343, 352, 401, 744.
Lake Ontario Shore R. Co. v. Curtiss, 345.
Lake Shore & M. S. R. Co. v. Ohio ex rel. Lawrence, 266.
Lake Shore & M. S. R. Co. v. Prentice, 245, 247.
Lake Shore & M. S. R. Co. v. Smith, 267, 271, 276.
Lake Street El. R. Co. v. Carmichael, 175.
Lake Superior Iron Co. v. Drexel, 188, 469, 470.
Lakeview Land Co. v. San Antonio Traction Co., 785.
Lamb v. Lamb, 776.
Lamb v. Russell, 692.
Lamming v. Galusha, 99.
Lamphere v. Grand Lodge, 558.
Lamphere v. Lang, 479.
Lancaster v. Amsterdam Imp. Co., 68, 99, 109, 206, 760, 761, 770, 785, 786.
Lancaster v. Southern Life Ins. Co., 223.
Lancaster County v. Lincoln Auditorium Ass'n, 152.
Lancaster Trust Co. v. Mason, 431.
Land Grant Ry. & Trust Co. v. Board Co. Com'rs Coffey County, 770, 772.
Land, Log & Lumber Co. v. McIntyre, 486.
Landes v. Hart, 633, 634.
Landis v. Sea Isle City Hotel Co., 489.
Lane, Appeal of, 731.
Lane v. Brainerd, 376.
Lane v. Minnesota State Agr. Soc., 31.
Lane & Bodley Co. v. City Electric L. & W. W. Co., 765.
Lang v. Lang's Ex'r, 439.
Langston v. Sterling-Gould Mfg. Co., 631.
Lanigan v. North, 736.
Larimer v. Beardsley, 526.
Larned v. Andrews, 780.
Lasher v. Stimson, 655.

[The figures refer to pages]

Late Corporation of Church of Jesus Christ of Latter Day Saints v. U. S., 319.
Lathrop v. Commercial Bank of Scioto, 151, 152, 195.
Latimer v. Citizens' State Bank, 735.
Latulippe v. New England Inv. Co., 187, 230.
Laughlin v. Chicago Ry. Equipment Co., 174.
Lauman v. Lebanon Valley R. Co., 66, 168, 260.
Lauraglenn Mills v. Ruff, 748.
Laurel Springs Land Co. v. Fougeray, 427, 433.
Law v. Fuller, 492.
Law v. Rich, 296, 298, 299, 311, 313.
Lawford v. Billericay, etc., Council, 196.
Lawrence v. Greenup, 435.
Lawrence v. Nelson, 747.
Lawrence v. Rutland R. Co., 265, 270.
Lawrence v. Southern Pac. R. Co., 504.
Lawrie v. Silsby, 58.
Lawton v. Bedell, 413.
Layden v. Endowment Bank K. P. of the World, 90.
Lea v. Iron Belt Mercantile Co., 471, 474.
Lear v. S. K. Paige Lbr. & Mfg. Co., 362.
Leary v. Columbia River & P. S. Nav. Co., 801.
Leary v. Interstate Nat. Bank, 618.
Leavitt v. Oxford & Geneva S. M. Co., 612, 616, 617.
Leavitt v. Palmer, 238.
Leazure v. Hillegas, 206.
Le Blanc, In re, 421, 434, 701.
Lee v. United States Graphite Co., 160.
Lee & Co.'s Bank, In re, 275.
Leeds Inv. Co. v. Shepherd, 434, 647.
Leeds & Hanley Theatres of Varieties, In re, 140.
Leep v. St. Louis, I. M. & S. R. Co., 276.
Legendre v. New Orleans Brewing Ass'n, 412.
Legg & Co. v. Dewing, 741.
Leggett v. New Jersey Mfg. & Banking Co., 166, 200, 621, 624, 627.
Lehigh Coal & Nav. Co. v. Northampton County, 289.
Lehman-Charley v. Bartlett, 127, 664.
Lehman, Durr & Co. v. Glenn, 744.
Lehman, Durr & Co. v. Warner, 115, 122.
Leigh v. American Brake-Beam Co., 174, 220, 225, 226.
Leinkauf v. Calman, 195.
Leipold v. Marony, 803.
Leitch v. Wells, 549.
Leland v. Hayden, 439.
Leloup v. Port of Mobile, 766.
Lemon v. Imperial Window Glass Co., 84.
Leo v. Union Pac. R. Co., 167.
Leonard v. American Ins. Co., 198.
Le Roy v. Globe Ins. Co., 421, 432, 433, 434, 701.
Lesher v. Karshner, 370.
Leslie v. Lorillard, 163.
Less v. Ghio, 760.
Lester v. Bemis Lumber Co., 183.
Lester v. Howard Bank, 239.
Lester v. Webb, 625.
Leurey v. Bank of Baton Rouge, 542.
Level Land Co. No. 3 v. Hayward, 382.
Levy Court v. Coroner, 33.
L. E. Waterman Co. v. Modern Pen Co., 79.
Lewey's Island R. Co. v. Bolton, 385.
Lewis v. American Sav. & Loan Ass'n, 223.
Lewis v. Brainard, 413.
Lewis v. Hillsboro Roller Mill Co., 339.
Lewis v. Matthews, 479, 489.
Lewis v. Northern Pac. R. Co., 273.
Lewis v. Tilton, 655.
Lexington v. Butler, 172.
Lexington Life, Fire & Marine Ins. Co. v. Page, 9, 424, 435, 631.
Lexington & O. R. Co. v. Bridges, 434, 647, 751.
Lexington & W. C. R. Co. v. Chandler, 402.
Leyson v. Davis, 526, 527, 531.
Libbey v. Atchison, 665.
Libby v. Tobey, 471, 480.
Licensed Trading Ass'n, In re, 141.
Liebke v. Knapp, 467.
Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 150, 203, 204.
Lillard v. Oil, Paint & Drug Co., 668.
Lincoln Bldg. & Sav. Ass'n v. Graham, 119.
Lincoln Park Chapter No. 177 Arch Masons v. Swatek, 120.
Lincoln Shoe Mfg. Co. v. Sheldon, 147, 383.
Lincoln St. R. Co. v. Lincoln, 148.
Linn & Lane Timber Co. v. U. S., 11.
Lipscomb's Adm'r v. Condon, 328, 330, 536.
Liquidators of the Imperial Mercantile Credit Ass'n v. Coleman, 632.
Littelle v. Creek Lumber Co., 195.
Little v. Obrien, 405.
Littledale, Ex parte, 516.
Little Rock & Ft. S. R. Co. v. Perry, 132, 134.
Liverpool & L. Life & F. Ins. Co. v. Massachusetts, 15, 16, 19, 20.
Liverpool & L. Life & F. Ins. Co. v. Oliver, 761, 763.
Livingston County v. First Nat. Bank, 193.
Lloyd v. Preston, 472.
L. Martin Co. v. L. Martin & Wilcke Co., 78.
Loan Soc. of Philadelphia v. Eavenson, 648.
Lockhart v. Troy, 38.
Lockhart v. Van Alstyne, 420, 433, 451, 452.

[The figures refer to pages]

Lockwood v. Roger Williams Nat. Bank, 576.
Lockwood v. United States Steel Corp., 284.
Lockwood v. Wynkoop, 115.
Loewenthal v. Rubber Reclaiming Co., 564.
Logan v. Texas Bldg. & Loan Ass'n, 226.
Logan v. Western & A. R. Co., 46.
Logan County Nat. Bank v. Townsend, 217, 220, 231.
London Cellulofd Co., In re, 459.
London Financial Ass'n v. Kelk, 149, 647.
London India Rubber Co., In re, 453.
London, Paris & American Bank v. Aronstein, 528, 557.
London Trust Co. v. Mackenzie, 502.
London & N. W. R. Co. v. McMichael, 346.
London & N. W. R. Co. v. Price, 158.
Long v. Georgia Pac. R. Co., 206, 215.
Longenecker v. Longenecker Bros., 78.
Long Island R. Co., In re, 394, 574, 575, 577, 594, 606.
Longmont Supply Ditch Co. v. Coffman, 614.
Looker v. Maynard, ex rel. Dusenbury, 271, 276, 571, 599.
Loomis v. People's Const. Co., 779, 788.
Lord v. Equitable Life Assur. Soc. of U. S., 268, 273, 276, 593.
Lord v. Essex Bldg. Ass'n, 64.
Lord v. Yonkers Fuel Gas Co., 167, 168, 170.
Lord Bruce, Case of, 506.
Loring v. Salisbury Mills, 552.
Los Angeles Holiness Band v. Spires, 99.
Los Angeles Trust Co., In re, 81.
Losee v. Bullard, 756.
Lothrop v. Stedman, 270, 271, 277, 691.
Loubat v. Le Roy, 507, 510.
Louden Machinery Co. v. American Mal. Iron Co., 798.
Louisiana Purchase Exposition Co. v. Kuenzel, 386.
Louisville v. Bank of Louisville, 288.
Louisville Banking Co. v. Eisenman, 69, 294, 295.
Louisville C. & C. R. Co. v. Letson, 85.
Louisville, E. & St. L. Con. R. Co. v. Summers, 695.
Louisville Gas Co. v. Citizens' Gaslight Co., 37.
Louisville, N. A. & C. R. Co. v. Boney, 676, 694.
Louisville, N. A. & C. R. Co. v. Carson, 637, 642, 645.
Louisville, N. A. & C. R. Co. v. Flanagan, 230.
Louisville, N. A. & C. R. Co. v. Louisville Trust Co., 87, 89, 172, 174, 198.
Louisville Property Co. v. Nashville, 786.
Louisville School Board v. King, 207.
Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 86, 185.
Louisville Water Co. v. Clark, 271.
Louisville & N. R. Co. v. Biddell, 695.
Louisville & N. R. Co. v. Com., 313.
Louisville & N. R. Co. v. Hart County, 429.
Louisville & N. R. Co. v. Kentucky, 191, 272.
Louisville & N. R. Co. v. Neal, 489.
Louisville & N. R. Co. v. Roth, 248.
Louisville & N. R. Co. v. State, 250.
Louisville & N. R. Co. v. Williams, 263.
Love v. Anchor Raisin Vineyard Co., 629.
Love Mfg. Co. v. Queen City Mfg. Co., 753.
Loverin v. McLaughlin, 59, 106, 124.
Low v. California Pac. R. Co., 176.
Low v. Connecticut & Passumpsic River R. Co., 129, 334.
Lowe v. Pioneer Threshing Co., 189, 190.
Lowe v. Ring, 196, 667.
Lowe v. Yolo County Consol. Water Co., 248.
Lowell v. Boston, 280.
Lowenstein v. Lombard Ayres & Co., 624.
Lowne v. American Fire Ins. Co., 421, 434, 701.
Lowry v. Commercial & Farmers' Bank, 543, 544, 553.
Lowry v. Farmers' Loan & Trust Co., 440.
Lowry v. Inman, 733, 734, 738.
Lowville & B. R. Co. v. Elliott, 343, 394.
Lozier v. Saratoga Gas, Electric Light & Power Co., 418.
Lucas v. Friant, 636.
Lucas v. White Line Transfer Co., 174, 217, 218.
Ludwig v. Western Union Tel. Co., 768.
Luetzke v. Roberts, 361.
Lumsden's Case, 346.
Lund v. Wheaton Roller Mill Co., 531, 536.
Lungren v. Pennell, 139.
Lupton's Sons Co. v. Automobile Club of America, 778, 789.
Lusk v. Riggs, 59, 102, 107.
Luther Lumber Co. v. Sheldahl Sav. Bank, 218.
Luthy v. Ream, 601, 602, 604.
Luxton v. North River Bridge Co., 40.
Lycoming Fire Ins. Co. v. Wright, 779.
Lyell Ave. Lumber Co. v. Lighthouse, 102.
Lynch v. Perryman, 115, 122.
Lyndeborough Glass Co. v. Massachusetts Glass Co., 159, 164.
Lyon v. American Screw Co., 413, 414.
Lyon v. James, 665.
Lyon v. McKeefrey, 311.
Lyons v. Orange, A. & M. R. Co., 53.
Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co., 692.

M

Maben v. Gulf Coal & Coke Co., 166.
Mabon v. Ongley Electric Co., 802.
McAlester Mfg. Co. v. Florence Cotton & Iron Co., 183.

[The figures refer to pages]

McAllen v. Woodcock, 640.
McAllister v. American Hospital Ass'n, 479.
McAllister v. Kuhn, 327.
McAllister v. Plant, 170.
McArthur v. Times Printing Co., 133.
McAuley v. Columbus, C. & I. C. R. Co., 47, 51.
McAuley v. Columbus, C. & Q. C. R. Co., 100.
McCall v. American Freehold Land Mtg. Co., 764, 775.
McCall v. Byram Mfg. Co., 615.
McCall v. California, 766.
McCampbell v. Fountain Head R. Co., 501, 502.
McCanna & Fraser Co. v. Citizens' Trust & Surety Co., 780.
McCartee v. Orphan Asylum Soc., 153, 154.
McCarter v. Firemen's Ins. Co., 32.
McCarter v. Pitman, Glassboro & Clayton Gas Co., 470.
McCarthy v. Lavasche, 113, 121.
McCarthy Portable Elevator Co., In re, 639, 640.
McCaskill Co. v. U. S., 5, 11.
McCauley v. New York, 32.
McClaine v. Rankin, 705, 736, 746.
McClaren v. Franciscus, 533.
McClelland v. Whiteley, 354, 365.
McClinch v. Sturgis, 113.
McCloskey v. Doherty, 29.
McCloud v. Selby, 33.
McCluer v. Manchester & L. Railroad, 783.
McClure v. Central Trust Co. of New York, 551.
McClure v. Law, 639.
McClure v. Peoples' Freight R. Co., 331, 335.
McColgan v. Baltimore Belt R. Co., 677.
McComb v. Barcelona Apartment Ass'n, 641.
McConnell v. Combination Min. & Mill. Co., 489, 494, 666.
McCord Lumber Co. v. Doyle, 797.
McCormick v. Market Nat. Bank, 213, 216, 217.
McCormick v. Unity Co., 172.
McCourt v. Singers-Bigger, 489, 505.
McCoy v. Gas Engine & Power Co., 492.
McCoy v. World's Columbian Exposition, 385, 402, 406.
McCrea v. Robertson, 504.
McCready v. Guardians of Poor of City of Philadelphia, 243.
McCulloch v. Maryland, 40, 41, 286.
McCullough v. Moss, 564, 717.
McCutcheon v. Merz Capsule Co., 186.
McDaniels v. Flower Brook Mfg. Co., 201, 591, 594.
McDermott v. Harrison, 358.
McDonald v. Dewey, 525, 718, 720, 721.
McDonald v. Williams, 435, 683.
McDonnell v. Alabama Gold Life Ins. Co., 113, 705, 710, 713, 741, 745.
McDougald v. Bellamy, 51.
Macdougall v. Gardiner, 495, 496, 498.
McDowall v. Sheehan, 727.
McDowell v. President, etc., of Bank of Wilmington and Brandywine, 576.
McElhenny, Appeal of, 136.
McFadden v. Board of Sup'rs of Los Angeles County, 579.
McFarland v. Carlsbad Hot Springs Sanatorium Co., 246.
Macfarland v. West Side Imp. Ass'n, 384.
McGary v. People, 82.
MacGinniss v. Boston & M. Con. Copper & Silver Min. Co., 185, 787.
McGinty v. Athol Reservoir Co., 54.
McGraw's Estate, In re, 208.
Machias Hotel Co. v. Coyle, 352.
Machinists' Nat. Bank v. Field, 541, 554.
McIntire v. Preston, 165, 173, 219.
McIntyre v. Ajax Min. Co., 635, 640.
Mack, Appeal of, 374, 699, 743.
Mack v. De Bardeleben Coal & Iron Co., 494, 596.
Mack v. Latta, 357, 664.
McKay v. Beard, 54.
Mackay v. New York, N. & H. R. Co., 5, 106.
McKee v. Chautauqua Assembly, 192, 276.
McKee v. Home Sav. & Trust Co., 599.
McKell v. Chesapeake & O. R. Co., 218.
McKendrick v. Western Zinc Min. Co., 84.
McKim v. Glenn, 519, 724.
McKim v. Odom, 35.
McKinley-Lanning Loan & Trust Co. v. Gordon, 786.
McLaran v. Crescent Planing Mill Co., 422, 432, 434, 701.
McLaughlin v. Detroit & M. Ry. Co., 424, 562, 627.
McLaughlin v. O'Neill, 739.
McLeod v. American Freehold Land Mtg. Co., 764.
McLeod v. Lincoln Medical College of Cotner University, 641.
McLennan v. Hopkins, 106.
McLouth v. Hunt, 440, 441.
McMahon v. Macy, 723, 742.
McMillan v. Maysville & L. R. Co., 369, 408.
McNab v. McNab & Harlin Mfg. Co., 426, 427.
McNaught v. Fisher, 334.
McNaughton v. McLean, 328.
McNaughton's Will, In re, 671.
McNeil v. Boston Chamber of Commerce, 625.
McNeil v. Tenth Nat. Bank, 526, 531, 544, 546, 547, 556.
McNulta v. Corn Belt Bank, 215, 443, 513, 668.
Macon Gas Co. v. Richter, 611.
McQuaig v. Gulf Naval Stores Co., 218.
McQueen v. Middletown Mfg. Co., 790.
McQuiddy Printing Co. v. Head, 131.

[The figures refer to pages]

MacRae v. Kansas City Piano Co., 314.
McTighe v. Macon Const. Co., 99, 104.
McWilliams v. New York, 695.
Madden v. Pennsylvania Electric Light Co., 801.
Madison, W. & M. Plank-Road Co. v. Watertown & P. Plank-Road Co., 174.
Maeder v. Buffalo Bill's Wild West Co., 413.
Magee v. Pacific Imp. Co., 226.
Magerstadt v. Schaefer, 534.
Magnola Metal Co. v. Savannah Supply Co., 794, 795.
Magoffin v. Mutual Reserve Fund Life Ass'n, 797.
Magruder v. Colston, 720, 722.
Mahar v. Harrington Park Villa Sites, 778, 781, 789.
Mahomet v. Quackenbush, 40.
Mahoney v. Bank of State, 50.
Mahoney v. Butte Hardware Co., 164.
Mahoney Min. Co. v. Anglo-Californian Bank, 611, 625.
Main v. Mills, 422, 424, 435, 702.
Maine Trust & Banking Co. v. Southern Loan & Trust Co., 717, 734.
Maisenbacker v. Society Concordia, 247, 660.
Mallett v. Simpson, 206.
Mallory v. Hanaur Oil Works, 177, 178.
Man v. Boykin, 532, 533.
Manchester Fire Ins. Co. v. Herriott, 763, 764.
Manchester St. Ry. v. Williams, 327, 330, 348, 349, 391.
Manchester & L. R. Co. v. Concord R. R., 181, 220, 225.
Mandel v. Swan Land & Cattle Co., 383, 397.
Mandlebaum v. North American Min. Co., 531, 554.
Manhattan Beach Co. v. Harned, 555, 659.
Manhattan Brass Co. v. Webster Glass & Queensware Co., 565.
Manhattan Life Ins. Co. v. Fields, 783.
Manhattan Life Ins. Co. v. Forty-Second St. & G. St. Ferry R. Co., 659.
Manistee, The, 781.
Mann, Case of, 719.
Mann v. Pentz, 730, 731.
Mannington v. Hocking Valley R. Co., 167, 171.
Mansfield, C. & L. M. R. Co. v. Brown, 191.
Mansfield v. Neff, 208.
Manship v. New South Bldg. & Loan Ass'n, 115.
Mantle v. Jack White Min. Co., 132.
Manufacturers' Exhibition Bldg. Co. v. Landay, 573, 574.
Manufacturers' Ins. Co. v. Loud, 282, 290.
Manville v. Karst, 748.
Mapleton Bank v. Standrod, 536.
Marbury v. Kentucky Union Land Co., 176, 177, 185.
March v. Eastern R. Co., 428, 520.
Marchand v. Loan & Pledge Ass'n, 129.
Marcy v. Clark, 720.
Marine Bank of Buffalo v. Butler Colliery Co., 580, 626.
Marine Bank of Chicago v. Ogden, 177, 179.
Marine & R. Phosphate Min. & Mfg. Co. v. Bradley, 710, 735.
Marion Bond Co. v. Mexican Coffee & Rubber Co., 99.
Marion Phosphate Co. v. Perry, 803.
Marion Trust Co. v. Blish, 356.
Mariot v. Mascal, 18.
Market St. R. Co. v. Hellman, 151, 184, 192, 600.
Marks v. Merrill Paper Co., 502.
Marlborough Mfg. Co. v. Smith, 532.
Marr v. Marr, 636, 643.
Marseilles Extension R. Co., In re, 614.
Marsh v. Burroughs, 460, 731.
Marsh v. Kaye, 739.
Marsh v. Mathias, 99, 102.
Marshall v. American Exp. Co., 624.
Marshall v. Baltimore & O. R. Co., 85.
Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander, 648, 650, 751.
Marshall v. Keach, 59, 102.
Marshall v. Macon County, 96.
Marshall v. Sherman, 707, 708, 738.
Marshall Foundry Co. v. Killian, 678.
Marshall Nat. Bank v. O'Neal, 219.
Marshalltown Stone Co. v. Des Moines Brick Mfg. Co., 228, 230.
Marson v. Deither, 332, 391.
Martin v. Baltimore & O. R. Co., 89.
Martin v. Deetz, 60, 100, 108.
Martin v. Fewell, 125.
Martin v. New Trinidad Lake Asphalt Co., 795.
Martin v. Niagara Falls Paper Mfg. Co., 175, 236.
Martin v. Remington-Martin Co., 131, 132.
Martin v. South Salem Land Co., 356, 730.
Martin v. Veana Food Co., 361.
Martin Co. v. L. Martin & Wilckes Co., 78.
Martino v. Commerce Fire Ins. Co., 580.
Martyne v. American Union Fire Ins. Co. of Philadelphia, 803.
Marvin v. Anderson, 188, 678, 683.
Marx v. Raley & Co., 94.
Maryland Trust Co. v. National Mechanics' Bank, 187.
Maryland Tube & Iron Works v. West End Imp. Co., 60.
Marysville Electric Light & Power Co. v. Johnson, 334, 336.
Mason v. Alexander, 717.
Mason v. Carrothers, 139.
Mason v. Edward Thompson Co., 789.
Mason v. First Nat. Bank, 479.
Mason v. Harris, 132, 487.
Mason v. Henry, 654.
Mason v. Pewabic Min. Co., 317.

[The figures refer to pages]

Mason v. Stevens, 105.
Masons' Fraternal Acc. Ass'n v. Riley, 791.
Masonic Temple Ass'n of Minneapolis v. Channell, 374, 382, 384.
Massachusetts General Hospital v. State Mut. Life Assur. Co. of Worcester, 275.
Massachusetts Iron Co. v. Hooper, 521.
Masury v. Arkansas Nat. Bank, 527, 536, 537.
Mathez v. Neidig, 706, 735, 748.
Mathis v. Pridham, 477.
Matson v. Alley, 620, 628.
Matteson v. Dent, 718.
Matteson v. United States & Canada Land Co., 625, 627.
Matthews v. Albert, 723.
Matthews v. Associated Press of State of New York, 575, 578, 579.
Matthews v. Columbia Nat. Bank, 583.
Matthews v. Hoagland, 527.
Matthews v. Massachusetts Nat. Bank, 550.
Matthews v. Patterson, 754.
Maund v. Canal Co., 242, 243, 244.
Maxwell v. Akin, 71.
May v. Cleland, 534, 536.
May v. McQuillan, 722.
May v. Ullrich, 402.
Mayben v. Gulf Coal & Coke Co., 167.
Mayer v. Child, 327.
Mayfield v. Alton Ry., Gas & Electric Co., 191, 192.
Mayor, etc., of Baltimore v. Baltimore & O. R. Co., 283.
Mayor, etc., of City of Norwich v. Norfolk Ry. Co., 201.
Mayor, etc., of New York v. New York & S. I. Ferry Co., 255.
Mayor, etc., of Wilmington v. Addicks, 99.
Mayor, etc., of Worcester v. Norwich & W. R. Co., 275.
Mayor of Ludlow v. Charlton, 195.
Mead v. New Haven, 32.
Mead v. New York, H. & N. R. Co., 191, 193.
Mechanics' Bank v. Merchants' Bank, 576.
Mechanics' Bank v. Seton, 557.
Mechanics' Foundry & Mach. Co. v. Hall, 392.
Mechanics' Sav. Bank v. Fidelity Ins. Trust & Safe Deposit Co., 725, 727.
Mechanics' & Farmers' Bank v. Smith, 580.
Mechanics' & Traders' Branch of State Bank v. Debolt, 258, 287.
Mechanics' & Workingmen's Mut. Sav. Bank & Bldg. Ass'n of New Haven v. Meriden Agency Co., 183.
Mecke v. Valleytown Mineral Co., 793.
Medical Inst. of Geneva College v. Patterson, 35.
Medill v. Collier, 124.
Medlin Milling Co. v. Boutwell, 244.
Medway Cotton Manufactory v. Adams, 82.
Meehan v. Sharp, 327, 338, 349.
Meeker v. Winthrop Iron Co., 505, 563, 643, 644.
Megrue's Estate, In re, 440.
Meholin v. Carlson, 223, 355.
Meinhard, Schaul & Co. v. Bedingfield Mercantile Co., 131.
Melhado v. Ry. Co., 129, 132.
Melvin v. Lamar Ins. Co., 377, 378, 404.
Memphis Grain & Package Elevator Co. v. Memphis & C. R. Co., 174, 217.
Memphis & C. R. Co. v. Alabama, 89.
Memphis & C. R. Co. v. Gaines, 288.
Memphis & C. R. Co. v. Woods, 597.
Memphis & L. R. Co. v. Dow, 167, 476.
Menier v. Hooper's Telegraph Works, 487, 498.
Mercantile Library Hall Co. v. Pittsburg Library Ass'n, 616.
Mercantile Nat. Bank v. New York, 286.
Mercantile Trust Co. v. Baltimore & O. R. Co., 451.
Mercer v. Buchanan, 437.
Merchants' Bank v. Bliss, 755.
Merchants' Bank of Canada v. Livingston, 546.
Merchants' Bank of Macon v. Central Bank of Georgia, 623.
Merchants' Bank of New Haven v. Bliss, 745.
Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 163.
Merchants' Fund Ass'n, Appeal of, 437.
Merchants' Life Ass'n v. Yoakum, 267.
Merchants' Mut. Adjusting Agency v. Davidson, 456.
Merchants' Nat. Bank v. Hanson, 210.
Merchants' Nat. Bank v. State Nat. Bank, 242, 623.
Merchants' Nat. Bank v. Wehrmann, 183.
Merchants' Nat. Bank of Chicago v. Northwestern Mfg. & Car Co., 755.
Merchants' Nat. Bank of Gardiner v. Citizens' Gaslight Co., 622, 628.
Merchants' Nat. Bank of Kansas City v. Lovitt, 631.
Merchants' & Mnfrs.' Bank v. Stone, 120.
Merchants' & Planters' Line v. Waganer, 296.
Meredith v. New Jersey Zinc & Iron Co., 496.
Meredith Village Sav. Bank v. Marshall, 531.
Merges v. Altenbrand, 92, 293.
Merrick v. Reynolds Engine & Governor Co., 64.
Merrick v. Van Santvoord, 83, 760, 761, 786.
Merrifield v. Barrows, 311.
Merrills v. Tariff Mfg. Co., 245.
Merrimac Min. Co. of Lake Superior v. Bagley, 518.
Merriman v. Magiveny, 102, 119,
Mersey Docks & Harbour Board Trustees v. Gibbs, 242, 244.
Messenger v. Pennsylvania R. Co., 181.
Messersmith v. Sharon Sav. Bank, 519.

[The figures refer to pages]

Metal Constituents, In re, 358.
Metcalf v. American School Furniture Co., 186, 487, 496, 561.
Methodist Church v. Remington, 152.
Methodist Episcopal Union Church v. Pickett, 102, 108, 114.
Metropolitan Bank v. Godfrey, 783.
Metropolitan Elevated R. Co. v. Manhattan Elevated R. Co., 638.
Metropolitan, etc., Ass'n, In re, 358.
Metropolitan Stock Exch. v. Lyndonville Nat. Bank, 213.
Metropolitan Street R. Co. v. State Board of Tax. Com'rs, 288.
Metropolitan Tel. & Tel. Co. v. Domestic Tel. & Tel. Co., 641.
Metropolitan Telephone & Telegraph Co. v. Metropolitan Tel. & Tel. Co., 78.
Metropolitan Trust Co. v. McKinnon, 215.
Metropolitan West Side Elevated R. Co. v. Chicago, 147.
Meyer v. Blair, 378.
Meyer v. Bristol Hotel Co., 498.
Miami Powder Co. v. Hotchkiss, 107.
Michelson v. Pierce, 751.
Middle Branch Mut. Tel. Co. v. Jones, 117.
Middlecoff Hotel Co. v. Yeomans, 353.
Middlesex Turnpike Corp. v. Locke, 406, 566.
Middleton v. Arastraville Min. Co., 597.
Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co., 738.
Midland City Hotel Co. v. Gibson, 338, 354.
Midwood Park Co. v. Baker, 138.
Milbank v. New York, L. E. & W. R. Co., 183.
Milford Sav. Bank v. Joslyn, 727.
Milford & Chillicothe Turnpike Co. v. Brush, 348, 405, 567.
Millen v. Guerrard, 436.
Miller v. American Mut. Acc. Ins. Co., 55, 213.
Miller v. Bradish, 422.
Miller v. Crown Perfumery Co., 489.
Miller v. Ewer, 56, 585.
Miller v. Flemingsburg & Fox Springs Turnpike Co., 207.
Miller v. Great Republic Ins. Co., 721.
Miller v. Hanover Junction & S. R. Co., 374.
Miller v. Lancaster, 193.
Miller v. Newburg Orrel Coal Co., 101, 293.
Miller v. New York, 269.
Miller v. New York & E. R. Co., 275.
Miller Pittsburgh & C. R. Co., 370.
Miller v. Quincy, 801.
Miller v. Ratterman, 451, 452, 453, 454, 593.
Miller v. Rutland & W. R. Co., 169.
Miller v. Smith, 739.
Miller v. White, 742, 755.
Miller v. Wild Cat Gravel Road Co., 58, 391, 393.
Miller & Lux v. East Side Canal & Irr. Co., 73.
Milliken v. Caruso, 456, 461, 467.
Milliken v. Southern Nat. Life Ins. Co., 84.
Mills, In re, 544.
Mills v. Central R. Co., 192, 567.
Mills v. Northern Ry. of Buenos Ayres Co., 684, 685.
Mills v. St. Clair County, 148.
Mills v. Stewart, 396, 397, 725.
Millville Gaslight Co. v. Vineland Light & Power Co., 148.
Millward-Cliff Cracker Co.'s Estate, In re, 622, 626.
Milwaukee Smelting & Refining Co. v. Lindenberger, 408.
Milton v. Crawford, 207.
Milwaukee Cold-Storage Co. v. Dexter, 139.
Milwaukee Trust Co. v. Germania Ins. Co., 790.
Miner v. Belle Isle Ice Co., 311, 487, 562, 618, 637, 640, 668.
Mineral Point R. Co. v. Keep, 26, 676.
Miners' Bank of Dubuque v. U. S. Morris, 31, 277.
Miners' Ditch Co. v. Zellerbach, 166, 168, 213, 217.
Miners' & Merchants' Bank of Lanaconing v. Snyder, 714.
Minneapolis Baseball Co. v. City Bank, 727.
Minneapolis Paper Co. v. Swinburne Printing Co., 735.
Minneapolis Threshing Mach. Co. v. Davis, 341, 378, 380, 381.
Minneapolis Times Co. v. Nimocks, 617.
Minneapolis & St. L. R. Co. v. Bassett, 388.
Minneapolis & St. L. R. Co. v. Beckwith, 26.
Minnehaha Driving Park Ass'n v. Legg, 394.
Minnesota Gaslight Economizer Co. v. Denslow, 114, 121.
Minnesota Rate Cases, 767.
Minnesota Thresher Mfg. Co. v. Langdon, 435.
Minnesota Loan & Trust Co. v. Beebe, 39, 48, 155.
Minor v. Erie R. Co., 171.
Minor v. Mechanics' Bank, 60, 649.
Minot v. Curtis, 80.
Mioton v. Del Corral, 5, 6, 8, 295.
Mississippi Building & Loan Ass'n v. McElveen, 270.
Mississippi Lumber Co. v. Joice, 138.
Mississippi, O. & R. R. R. Co. v. Cross, 405.
Mississippi & R. R. Boom Co. v. Prince, 39.
Missouri P. R. Co. v. Fitzgerald, 642.
Missouri Pac. R. Co. v. Meeh, 87, 89.
Mitchell, Case of, 346.
Mitchell v. Beckman, 391.
Mitchell v. Deeds, 51.

[The figures refer to pages]

Mitchell v. Hotchkiss, 756.
Mitchell v. Vermont Copper Min. Co., 395.
Mobile, J. & K. C. R. Co. v. Owen, 670.
Mobile School Com'rs v. Putnam, 32.
Mobile & O. R. Co. v. Moseley, 287.
Mobile & O. R. Co. v. Nicholas, 601, 603.
Mobile & O. R. Co. v. Tennessee, 425, 436.
Moch v. Virginia Fire & M. Ins. Co., 791.
Moffitt v. Chicago Chronicle Co., 799.
Mohawk Nat. Bank of Schenectady v. Schenectady Bank, 522, 577.
Mohawk & H. R. Co., In re, 588.
Mohr v. Minnesota Elevator Co., 712.
Mokelumne Hill Canal & Min. Co. v. Woodbury, 59, 64.
Monarch Corp., In re, 478.
Monroe County Sav. Bank v. Rochester, 281.
Monroe Mercantile Co. v. Arnold, 614.
Montague v. Hotel Gotham Co., 693.
Montana Tonopah Min. Co. v. Dunlap, 666.
Monterey & S. V. R. Co. v. Hildreth, 350.
Montgomery v. Forbes, 58, 68, 106, 109, 119, 123.
Montgomery Light Co. v. Lahey, 500, 653.
Montgomery Mut. Building & Loan Ass'n v. Robinson, 38.
Montgomery Traction Co. v. Harmon, 494, 505.
Montgomery Web Co. v. Dienelt, 678, 687.
Montpelier & W. R. Co. v. Langdon, 113, 369, 372, 388.
Monument Nat. Bank v. Globe Works, 202, 218, 219.
Moore v. Bank of Commerce, 513, 523, 576.
Moore v. Charles E. Morrell Co., 236.
Moore v. Fitchburg R. Corp., 244.
Moore v. Jones, 722.
Moore v. Marshalltown Opera House Co., 328.
Moore v. Moore Mica Paint Co., 564.
Moore v. Mutual Reserve Fund Life Ass'n, 797.
Moore v. Swanton Tanning Co., 220.
Moore v. Warrior Coal & Land Co., 137.
Moores v. Citizens' Nat. Bank, 554, 555, 659.
Moore's Heirs v. Moore's Devisees, 152, 154.
Moore & Handley Hardware Co. v. Towers Hardware Co., 7, 134.
Morey v. Fish Bros. Wagon Co., 426.
Morgan v. Bank of North America, 557, 576.
Morgan v. East Tennessee & V. R. Co., 89.
Morgan v. Hedstrom, 756.
Morgan v. King, 638, 645.
Morgan v. Landstreet, 384.
Morgan v. Lewis, 187.
Morgan v. Skiddy, 127, 664.
Morgan v. Struthers, 378.
Morgan & Co. v. Hall & Lyon Co., 176, 218.
Morisette v. Howard, 165, 168.
Morley v. Thayer, 292, 298, 707, 733, 741, 742.
Morrill v. Little Falls Mfg. Co., 498, 573, 588, 594.
Morrill v. Smith County, 191.
Morris v. Elyton Land Co., 186, 487, 504.
Morris v. Glenn, 519.
Morris v. Hall, 210.
Morris v. Hussong Dyeing Mach. Co., 390.
Morris & E. R. Co. v. Commissioners of Railroad Taxation, 288.
Morris & E. R. Co. v. Sussex R. Co., 179.
Morrisey v. Williams, 356.
Morrison v. American Snuff Co., 695.
Morrison v. Forman, 100.
Morrison v. Gold Mountain Gold Min. Co., 131.
Morrison v. Wilder Gas Co., 201, 614.
Morrow v. Nashville Iron & Steel Co., 376, 377, 456, 467.
Morton v. Grafflin, 328.
Morville v. American Tract Soc., 158, 220.
Moses v. Ocoee Bank, 751.
Moses v. Scott, 601, 602.
Moses v. Soule, 188, 189.
Moses v. Tompkins, 399, 400.
Moshannon Land & Lumber Co. v. Sloan, 620
Moss, Appeal of, 439, 440.
Moss v. Averell, 164, 173.
Moss v. McCullough, 742.
Moss v. Oakley, 717.
Mott v. Hicks, 173, 196.
Mott v. Pennsylvania R. Co., 287.
Moulin v. Trenton Mut. Life & Fire Ins. Co., 791, 793.
Moulton v. Scarborough, 33.
Mount v. Radford Trust Co., 490, 504.
Mt. Holly Lumberton & Medford Turnpike Co. v. Ferree, 544.
Mt. Pleasant v. Beckwith, 695.
Mt. Sterling Coal Road Co. v. Little, 344, 345.
Mountain Timber Co. v. Case, 398.
Mowbray v. Antrim, 647, 751.
Mower v. Staples, 567.
Mowrey v. Indianapolis & C. R. Co., 567.
Mozley v. Alston, 490, 491.
Mugler v. Kansas, 268.
Mulrey v. Shawmut Mut. Fire Ins. Co., 582.
Muller v. Dows, 85, 87.

[The figures refer to pages]

Mulholland v. Washington Match Co., 357.
Mumford v. Ecuidor Development Co., 563.
Mumma v. Potomac Co., 262, 296, 31[illegible] 694.
Muncie Pulp Co., In re, 11, 73.
Muncy Traction Engine Co. v. De La Green, 335, 339.
Munich Reinsurance Co. v. United Surety Co., 60.
Munn v. Commission Co., 158, 173.
Munn v. Illinois, 267.
Munson v. Syracuse, G. & C. R. Co., 131, 634, 641, 643, 644.
Munson v. Warren, 706.
Murphy, Ex parte, 605.
Murphy v. Arkansas & L. Land & Improvement Co., 175, 236.
Murtey v. Allen, 733.
Muscatine Water Co. v. Muscatine Lumber Co., 196.
Muskingum Valley Turnpike Co. v. Ward, 404.
Mutual Fire Ins. Co. v. Farquhar, 577, 584.
Mutual Guaranty Fire Ins. Co. v. Barker, 238.
Mutual Life Ins. Co. of New York v. Board, Armstrong & Co., 160.
Mutual Reserve Fund Life Ass'n v. Phelps, 797.
Mutual Reserve Fund Life Ass'n v. Tuchfeld, 797.
Mutual Reserve Life Ins. Co. v. Birch, 797.
Mutual Trust Co. v. Stern, 227.
Myatt v. Ponca City Land & Imp. Co., 786.
Myers v. Knickerbocker Trust Co., 714.
Myers v. McGavock, 786.
Myers v. Manhattan Bank, 35, 37.
Myers v. Sierra Val. Stock & Agricultural Ass'n, 727.
Myers v. Sturgis, 382.
Myers Mfg. Co. v. Wetzel, 779.

N

Nabring v. Bank of Mobile, 327.
Naglee v. Pacific Wharf Co., 534.
Nantasket Beach Steamboat Co. v. Shea, 166, 207.
Nappanee Canning Co. v. Reid, Murdoch & Co., 693, 753.
Narragansett Bank v. Atlantic Silk Co., 113, 173, 622.
Nashua Sav. Bank v. Anglo-American Land Mortgage & Agency Co., 392, 396, 400, 401, 739.
Nashua & L. R. Corp. v. Boston & L. R. Corp., 87, 89, 220.
Nassau Bank v. Jones, 183, 215, 228, 237.
Nassau Gaslight Co. v. Brooklyn, 71.
Natal Land Co. v. Pauline, etc., Syndicate, 131, 132.
Nathan v. Tompkins, 487, 592, 670.
Nathan v. Whitlock, 720.
National Bank v. Matthews, 238.
National Bank of Auburn v. Dillingham, 734.
National Bank of Commerce v. Allen, 175, 595, 693.
National Bank of Commerce v. Shumway, 617.
National Bank of Cynthiana v. Mattingly, 175.
National Bank of Genesee v. Whitney, 238, 239.
National Bank of Jefferson v. Texas Inv. Co., 60, 73.
National Bank of Merrill v. Illinois & W. Lumber Co., 471.
National Bank of Redemption v. Boston, 286.
National Bank of Republic v. George M. Scott & Co., 753.
National Bank of Republic v. Young, 171, 174, 219.
National Bank of the Republic of New York v. Rochester Tumbler Co., 523.
National Building Society, In re, 171.
National Car Advertising Co. v. Louisville & N. R. Co., 212.
National Cash-Register Co. v. Wilson, 788.
National Commercial Bank v. McDonnell, 346, 365, 717, 722.
National Exch. Bank v. Gay, 92.
National Financial Co., In re, 668.
National Foundry & Pipe Works v. Oconto City Water Supply Co., 696.
National Funds Assur. Co., In re, 648.
National Home Bldg. & Loan Ass'n v. Home Sav. Bank, 164, 176, 202, 213, 225.
National Loan & Bldg. Ass'n v. Lichtenwalner, 709.
National Loan & Inv. Co. v. Rockland Co., 173, 666, 667.
National Mut. Fire Ins. Co. v. Pursell, 779, 782.
National Parafine Oil Co. v. Chappellet, 399.
National Park Bank v. German-American Mut. Warehouse & Security Co., 173, 174, 175, 219.
National Pemberton Bank v. Porter, 165, 210.
National Permanent Benefit Bldg. Soc., In re, 222.
National Power & Paper Co. v. Rossman, 494, 498.
National Safe Deposit Savings & Trust Co. v. Hibbs, 533, 540, 544, 545, 547, 660.
National Security Bank v. Cushman, 629.
National Shutter Bar Co. v. G. S. F. Zimmerman & Co., 60, 107, 120.
National State Bank of Terre Haute v. Sanford Fork & Tool Co., 614, 625.
National Surety Co. v. Hall-Miller Decorating Co., 223.

[The figures refer to pages]

National Tube Works Co. v. Ballou, 740.
National Tube-Works Co. v. Gilfillan, 471.
National Wall Paper Co. v. Columbia Nat. Bank, 753.
Natoma Water & Mining Co. v. Clarkin, 206.
Natusch v. Irving, 571.
Naylor Mfg. Co., In re, 782.
Neal v. Moultrie, 756.
Neal v. New Orleans Loan, Bldg. & Sav. Ass'n, 775.
Neale v. Turton, 172.
Neall v. Hill, 311, 648, 651, 669, 670.
Nebraska Chicory Co. v. Lednicky, 335, 342.
Nebraska Nat. Bank v. Walsh, 755.
Nebraska Nat. Bank of York v. Ferguson, 115.
Nebraska Shirt Co. v. Horton, 183, 215.
Neiler v. Kelley, 327.
Nellegan v. Campbell, 655.
Nelms v. Edinburg-American Land Mtg. Co., 764.
Nelson v. Eaton, 171, 194.
Nelson v. Hubbard, 477.
Nelson v. Vermont & C. R. Co., 266.
Nelson, Norris & Co. v. E. K. Rehkopf & Sons, 777.
Nenny v. Waddill, 475.
Neubert v. Armstrong Water Co., 413.
Neuchatel Asphalte Co. v. Mayor, etc., of New York, 778, 789.
Neustadt v. Illinois Cent. R. Co., 287.
Nevada Bank of San Francisco v. Portland Nat. Bank, 246.
Nevitt v. Bank of Ft. Gibson, 678, 698.
New Albany v. Burke, 405.
New Albany & S. R. Co. v. Fields, 360.
New Albany & S. R. Co. v. McCormick, 369, 391.
New Albany & S. R. Co. v. Pickens, 398.
Newark Library Ass'n, In re, 571.
New Bedford R. Co. v. Old Colony R. Co., 694.
New Bern Banking & Trust Co. v. Duffy, 116.
Newberry v. Detroit & L. S. Iron Mfg. Co., 534, 535.
Newby v. Oregon Cent. R. Co., 78.
Newby v. Van Oppen, 83.
New Castle Northern R. Co. v. Simpson, 220, 475, 476.
Newcomb v. New York Central & H. R. R. Co., 799.
Newcomb v. Reed, 63.
Newcomb-Endicott Co. v. Fee, 102, 103, 110, 111, 117.
Newell v. Great Western Ry. Co., 793.
New England Fire Ins. Co. v. Haynes, 398, 744.
New England Mtg. Security Co. v. Ingram, 764.
New England Trust Co. v. Abbott, 188, 514.
Newhall v. Western Zinc Min. Co., 301.
New Hampshire Cent. R. R. v. Johnson, 382.
New Hampshire Sav. Bank v. Richey, 435.
New Haven, M. & W. R. Co. v. Chatham, 629.
New Haven Pulp & Board Co. v. Downingtown Mfg. Co., 776.
New Haven Trust Co. v. Doherty, 650, 751.
New Haven Trust Co. v. Gaffney, 379.
New Haven Trust Co. v. Nelson, 405.
New Haven & D. R. Co. v. Chapman, 260, 276.
New Jersey R. & Transp. Co. v. Hancock, 289.
New Jersey Sheep & Wool Co. v. Traders' Deposit Bank, 329.
New Jersey Trust & Safe Deposit Co. v. Bodine, 543.
New Memphis Gaslight Co., In re, 636, 640.
New Mexico ex rel. Caledonian Coal Co. v. Naker, 775.
New Orleans v. Houston, 287, 290.
New Orleans Auxiliary Sanitary Ass'n, In re, 676.
New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co., 37, 193, 261.
New Orleans, J. & G. N. R. Co. v. Harris, 168, 260.
New Orleans, S. F. & L. R. Co. v. Delamore, 170.
New Orleans Waterworks Co. v. Rivers, 37, 261.
Newport Cotton Mill Co. v. Mims, 443.
Newport & C. Bridge Co. v. Wooley, 87.
New Sombrero Phosphate Co. v. Erlanger, 490.
New Thought Church v. Chapin, 79.
Newton Mfg. Co. v. White, 295.
Newton Nat. Bank v. Newbegin, 355, 356.
New York v. Roberts, 763.
New York Architectural Terra-Cotta Co. v. Williams, 777.
New York Airbrake Co. v. International Steam Pump Co., 9.
New York Cable Co. v. New York, 100.
New York Cent. & H. R. Co. v. City of New York, 273.
New York Cent. & H. R. Co. v. U. S. 250, 251, 252.
New York Cent. & H. R. Co. v. Williams, 265.
New York Exch. Co. v. De Wolf, 370, 385.
New York Elevated R. Co., In re, 42, 46.
New York ex rel. Metropolitan Street R. Co. v. New York State Board of Tax Commissioners, 280.
New York ex rel. Schurz v. Cook, 171.
New York ex rel. Williams v. Weaver, 286.
New York Firemen's Ins. Co. v. Ely, 163.
New York Institution for Blind v. How's Ex'rs, 82.

[The figures refer to pages]

New York, H. & N. R. Co. v. Hunt, 386.
New York, L. E. & W. R. Co. v. Com., 761.
New York, L. E. & W. R. Co. v. Haring, 242, 244, 663.
New York, L. E. & W. R. Co. v. Pennsylvania, 769.
New York, L. E. & W. R. Co. v. Nickals, 426, 452, 453.
New York Life Ins. Co. v. Beard, 735.
New York Life Ins. Co. v. Cravens, 766.
New York Life Ins. Co. v. Deer Lodge County, 86, 761, 764, 766.
New York Motion Picture Co. v. Universal Film Mfg. Co., 74.
New York Nat. Exch. Bank v. Crowell, 125.
New York Protective Ass'n v. McGrath, 506.
New York & Eastern Telegraph & Telephone Co. v. Great Eastern Tel. Co., 390.
New York & G. L. R. Co. v. State, 249, 250.
New York & Long Island Bridge Co. v. Smith, 300.
New York & N. H. R. Co. v. Ketchum, 129, 666.
New York & N. H. R. Co. v. Schuyler, 443, 444, 531, 534, 554, 555, 556, 626, 657, 659.
New York & O. M. R. Co. v. Van Horn, 388.
New York & S. Canal Co. v. Fulton Bank, 153, 179.
New York & S. Const. Co. v. Winton, 777.
Niagara County Bank v. Baker, 165.
Nicholai v. Maryland Agricultural & Mechanical Ass'n, 301.
Nichols v. New Haven & Northampton Co., 287, 288.
Nickalls v. Merry, 719.
Nickals v. New York, L. E. & W. R. Co., 453.
Nickerson v. Warren City Tank & Boiler Co., 774.
Nickum v. Burckhardt, 410.
Nicolai v. Maryland Agricultural & Mechanical Ass'n, 294.
Nicoll v. New York & E. R. Co., 151, 152, 164.
Nicollet Nat. Bank v. Frisk-Turner Co., 161, 162, 712.
Niles v. Ludlow Valve Mfg. Co., 451.
Niles v. New York Cent. & H. R. Co., 485.
Nims v. Mt. Hermon Boys' School, 242, 243, 244, 661, 662.
Nix v. Miller, 751.
Noble v. Euler, 671.
Noble State Bank v. Haskell, 264.
Nockels v. Crosby, 129.
Norfolk & W. R. Co. v. Sims, 766.
Norfolk & W. R. Co. v. Pennsylvania, 762, 763, 766.
Norris v. Staps, 573.
North v. Forest, 326.
North v. State, 98, 102.
North Anson Lumber Co. v. Smith, 132.
North Chicago City R. Co. v. Gastka, 660.
North Hudson Mut. Bldg. & Loan Ass'n v. Childs, 633, 650, 651.
North Hudson Mut. Bldg. & Loan Ass'n v. First Nat. Bank of Hudson, 171.
North Mercer Natural Gas Co. v. Smith, 778.
North Milwaukee Town Site Co. No. 2, v. Bishop, 400, 401, 573.
North River Boom Co. v. Smith, 48.
North Texas State Bank v. Crowley-Southerland Commission Co., 176.
Northern Bank of Kentucky v. Stone, 271, 288.
Northern Cent. Mich. R. Co. v. Eslow, 367.
Northern Cent. R. Co. v. Com., 250.
Northern Cent. R. Co. v. Maryland, 288, 289.
Northern Pacific R. Co. v. Minnesota, 258.
Northern Securities Co. v. U. S., 73, 181.
Northrop v. Bushnell, 378, 460.
Northrop v. Newton & B. Turnpike Co., 534, 535.
North State Copper & Gold Min. Co. v. Field, 801.
Northumberland Hotel Co., In re, 132.
Northwestern Fertilizing Co. v. Hyde Park, 148, 265.
Northwestern Mut. Life Ins. Co. v. Cotton Exch. Real Estate Co., 471.
Northwestern Mut. Life Ins. Co. v. Elliott, 779.
Northwestern Mut. Life Ins. Co. v. Overholt, 780.
Northwestern Union Packet Co. v. Shaw, 164, 165, 213, 220, 221.
Northwestern University v. Illinois ex rel. Miller, 287, 289.
North & S. St. R. Co. v. Spullock, 398.
Norton v. Shelby County, 104.
Norwich Gaslight Co. v. Norwich City Gas Co., 37.
Norwich Lock Mfg. Co. v. Hockaday, 352.
Norwood & Butterfield Co. v. Andrews, 160.
Nowack v. Metropolitan St. R. Co., 248, 657, 658.
Noyes Bros., In re, 723.
Nugent v. Putnam County, 191, 192, 407.
Nulton v. Clayton, 348.
No. 9, Bamare Road, In re, 315.
Nunnamaker v. Smith, 245.
Nute v. Hamilton Mut. Ins. Co., 575.
Nutter v. Lexington & W. C. R. Co., 383, 384.
Nutting v. Massachusetts, 766.
Nye v. Storer, 106, 644.

[The figures refer to pages]

O

Oakdale Mfg. Co. v. Garst, 770.
Oakes v. Cattaraugus Water Co., 132, 619, 621.
Oakes v. Turquand, 355.
Oakland County Sav. Bank v. State Bank of Carson City, 523.
Oakland R. Co. v. Oakland, B. & F. V. R. Co., 300.
O'Bear Jewelry Co. v. Volfer, 678.
O'Bear-Nester Glass Co. v. Antiexplo Co., 480.
Occum Co. v. A. & W. Sprague Mfg. Co., 207.
O'Connor v. International Silver Co., 595.
O'Connor v. Virginia Passenger & Power Co., 491.
O'Donald v. Evansville, I. & C. Straight Line R. Co., 374.
Oelberman v. New York & N. R. Co., 595.
Offield v. New York, N. H. & H. R. Co., 269.
Ogden v. St. Joseph, 282, 284.
Ogilvie v. Knox Ins. Co., 363, 459, 698, 730, 731.
O'Hara v. National Biscuit Co., 614.
O'Herron v. Gray, 541, 543.
Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co., 325, 678.
Ohio Tax Cases, 285.
Ohio Valley Nat. Bank v. Hulitt, 521, 525, 721.
Ohio & I. R. Co. v. Ridge, 94.
Ohio & M. R. Co. v. McCarthy, 159.
Ohio & M. R. Co. v. McClelland, 266.
Ohio & M. R. Co. v. McPherson, 56, 114, 586.
Ohio & M. R. Co. v. Wheeler, 85, 87.
Oklahoma v. Kansas Natural Gas Co., 767.
Olcott v. Tioga R. Co., 173.
Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co., 755.
Old Colony R. Corp. v. Evans, 164.
Old Dominion Copper Mining & Smelting Co. v. Bigelow, 137, 139, 140, 391, 490, 639.
Old Dominion Copper Min. & Smelting Co. v. Lewisohn, 138, 139, 639.
Oldham v. Mt. Sterling Imp. Co., 358, 383, 406.
Olds v. City Trust, Safe Deposit & Surety Co., 803.
Oldtown & L. R. Co. v. Veazie, 261, 571.
Old Wayne Mut. Life Ass'n of Indianapolis, Ind., v. McDonough, 792, 796.
O'Leary v. Cook County, 39.
Oler v. Baltimore & R. R. R., 388.
Oliver v. Bank of England, 554.
Oliver v. Liverpool & L. Life & Fire Ins. Co., 25.
Oliver v. Oliver, 673.
Oliver v. Rahway Ice Co., 189.
Oliver v. Worcester, 32, 33.
Olney v. Conanicut Land Co., 752.
O. L. Packard Mach. Co. v. Laev, 328.
Olson v. Buffalo Hump. Min. Co., 83, 795.
Olson v. Cook, 717.
Olson v. State Bank, 356.
Olympia, In re, 136.
Olyphant Sewage-Drainage Co. v. Borough of Olyphant, 308.
Omaha Hotel Co. v. Wade, 645.
Oneida Bank v. Ontario Bank, 241.
O'Neal v. King, 371.
O'Neile v. Ternes, 673.
Ooregum Gold Min. Co. of India v. Roper, 456, 459.
Opening of Hamilton Avenue, In re, 261.
Opinion of Justices, 263.
Oregon Gold Min. Co. v. Schmidt, 696.
Oregonian R. Co. v. Oregon R. & Nav. Co., 115, 119.
Oregon R. & Nav. Co. v. Oregonian R. Co., 148, 161, 214, 216.
Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho, 100.
O'Reilly v. Bard, 749.
O'Reiley v. Draining Co., 58.
Orient Ins. Co. v. Daggs, 267, 761, 762.
Ormsby v. Vermont Copper Min. Co., 586, 587, 615.
Oroville & V. R. Co. v. Supervisors of Plumas County, 47, 61.
Orr v. Bank of U. S., 253.
Orr v. Bracken County, 276.
Orr v. Mercer Co. Mut. Fire Ins. Co., 171, 173.
Orrick School Dist. v. Dorton, 100.
Osage City Cemetery Ass'n v. Hanslip, 187.
Osborn v. Bank of U. S., 40.
Osborn v. New York & N. H. R. Co., 282.
Osborne, Matter of, 323, 438, 439, 441, 442.
Osborne v. Florida, 766.
Osgood v. Ogden, 747.
O'Shields v. Union Iron Foundry, 423.
Oskaloosa Agri. Works v. Parkhurst, 385.
Oswald v. Minneapolis Times Co., 704, 727.
Otis v. Gardner, 533, 544.
Otter View Land Co.'s Receiver v. Bolling's Ex'x, 744.
Ottinger v. Bennett, 361.
Otto v. Journeymen Tailors' Protective & Benevolent Union, 506, 509, 510.
Ottumwa Screen Co. v. Stodghill, 535.
Oudin & Bergman Fire Clay Min. & Mfg. Co. v. Conlan, 607.
Overend & Gurney Co. v. Gibb, 632.
Overholser v. Oklahoma Interurban Traction Co., 147.
Overseers of Poor of City of Boston v. Sears, 28, 29, 33.
Overstreet v. Citizens' Bank, 191.
Overton Bridge Co. v. Means, 676.

[The figures refer to pages]

Ovid Elevator Co. v. Secretary of State, 91.
Owen v. Purdy, 55.
Owen v. Shepard, 95.
Owensboro Wagon Co. v. Bliss, 107, 110.
Oxford Turnpike Co. v. Bunnel, 534, 535.
Ozan Lumber Co. v. Biddie, 53.

P

Pacific Bank v. De Ro, 46.
Pacific Bank v. Stone, 621.
Pacific Drug Co. v. Hamilton, 95, 96.
Pacific Elevator Co. v. Whitbeck, 709, 745.
Pacific Nat. Bank v. Eaton, 390, 391.
Pacific R. Co. v. Seely, 165.
Pacific R. R. v. Hughes, 568.
Pacific R. R. v. Renshaw, 568.
Pacific Vinegar & Pickle Works v. Smith, 641.
Packard v. Old Colony R. Co., 95.
Packard Mach. Co. v. Laev, 328.
Paducah & M. R. Co. v. Parks, 370, 375, 377, 379.
Page v. Fall River, W. & P. R. Co., 625, 628.
Page v. Heineberg, 152, 153.
Page v. Whittenton Mfg. Co., 495.
Painesville & H. R. Co. v. King, 424.
Palatka & I. R. Co. v. State, 250.
Palmer v. Bank of Zumbrota, 444, 726.
Palmer v. Lawrence, 38.
Palmer v. Ridge Mining Co., 519.
Palmer v. Ring, 8, 295, 484.
Palmetto Lodge No. 5, I. O. O. F., v. Hubbell, 575, 579.
Pancoast v. Travelers' Ins. Co., 226, 784.
Pangburn v. American Vault, Safe & Lock Co., 753.
Pape v. Capitol Bank of Topeka, 99, 102, 110, 122.
Paragon Paper Co. v. State, 250.
Parish v. New York Produce Exchange, 578, 581.
Parish v. Wheeler, 210, 225.
Park v. Grant Locomotive Works, 422, 609.
Park v. Modern Woodmen of America, 131.
Park v. Zwart, 61.
Park Hotel Co. v. Fourth Nat. Bank, 175.
Parker v. Bethel Hotel Co., 7, 8, 298.
Parker v. Boyle, 139, 140.
Parker v. Carolina Sav. Bank, 710, 735, 748.
Parker v. May, 313.
Parker v. Metropolitan R. Co., 269, 276.
Parker v. Nickerson, 634, 639, 641, 642.
Parker v. Northern Cent. M. R. Co., 113, 367.
Parker v. R. Co., 147.
Parker v. Thomas, 360, 361, 369, 375.
Parkinson v. West End St. R. Co., 695.
Parmele Co. v. Haas, 790.
Parmelee v. Associated Physicians & Surgeons, 621, 622.
Parmelee v. Price, 456, 740, 744.
Parrot v. Lawrence, 148.
Parrott v. Colby, 709, 745.
Parsons v. Hayes, 458, 502.
Parsons v. Joseph, 458, 500, 502.
Parsons v. Tacoma Smelting & Refining Co., 184, 595, 640.
Passenger R. Co. v. Young, 660.
Patch v. Wabash R. Co., 87, 89.
Patch Mfg. Co. v. Capeless, 23.
Patent File Co., In re, 166, 171.
Patterson v. Farmington St. Ry. Co., 550.
Patterson v. Lynde, 803.
Patterson v. Minnesota Mfg. Co., 755.
Patterson v. Portland Smelting Works, 643.
Patterson v. Robinson, 194.
Patterson v. Thompson, 755.
Patterson, to Use of Brower, v. Lynde, 730.
Patton & Gibson Co. v. Shreve & Kelso, 93.
Patty v. Hillsboro Roller Mill Co., 339.
Paul v. Virginia, 86, 761, 762, 763, 764, 765, 766.
Pauly v. State Loan & Trust Co., 521, 721, 723.
Paxton Cattle Co. v. First Nat. Bank, 134.
Payne v. Bullard, 404, 405, 460, 698, 699, 730, 732, 743.
Payne v. Elliot, 327.
Payne & Co., In re, 218.
Payne & Joubert v. East Union Lbr. Co., 794.
Payson v. Withers, 775.
Peabody v. Flint, 487, 501, 505.
Peabody v. Speyers, 327.
Peake v. Wabasha Co., 95.
Pearce v. Madison & I. R. Co., 157, 161, 164, 191, 213, 214.
Pearsall v. Great Northern R. Co., 148, 191, 272.
Pearsall v. Western Union Telegraph Co., 579.
Pearson v. Concord R. Corp., 183, 184, 185, 641, 643.
Peck v. Elliott, 444.
Peck v. San Antonio, 40.
Peckham v. Inhabitants of North Parish in Haverhill, 790.
Peckham v. Van Wagenen, 433.
Peek v. Gurney, 127.
Peirce v. Morse Oliver Bldg. Co., 614.
Peirce v. New Orleans Bldg. Co., 583.
Pellio v. Bulls Head Coal Co., 492.
Pembina Con. Silver Min. & Mill. Co. v. Pennsylvania, 26, 762, 763.
Pencille v. State Farmers' Mut. Hail Ins. Co., 494, 653.
Pender v. Lushington, 594, 596.
Peninsular Ry. Co. v. Duncan, 350.

[The figures refer to pages]

Penn Collieries Co. v. McKeever, 774, 776, 777.
Penn Match Co. v. Hapgood, 131, 132.
Pennell v. Lothrop, 131.
Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Franklin Fire Ins. Co., 541.
Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 774, 795, 799.
Pennsylvania R. Co. v. Pennsylvania Co. for Ins. on Lives & Granting Annuities, 595.
Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 89, 90, 161, 216.
Pennsylvania R. Co., Appeal of, 544.
Pennypacker v. Capital Ins. Co., 781.
Penobscot Boom Corp. v. Lamson, 69.
Penobscot R. Co. v. Dummer, 334, 382, 386, 607.
Penobscot R. Co. v. White, 367, 382, 385, 400.
Penobscot & K. R. Co. v. Bartlett, 383.
Pensacola Tel. Co. v. Western Union Tel. Co., 766.
People v. Albany & V. R. Co., 255.
People v. Assessors of Watertown, 4, 6, 15.
People v. Badlam, 282.
People v. Ballard, 167, 297.
People v. Barker, 84.
People v. Batchelor, 584.
People v. Board of Trustees of Schools, 99.
People v. Borden's Condensed Milk Co., 251.
People v. Boston & A. R. Co., 266.
People v. Bowen, 49.
People v. Buffalo Stone & Cement Co., 305.
People v. Campbell, 159, 161, 290.
People v. Carter, 93, 112.
People v. Central Car & Mfg. Co., 433.
People v. Chambers, 59, 60, 65.
People v. Cheeseman, 58, 61.
People v. Chicago Gas Trust Co., 74, 180, 183, 185, 304.
People v. Chicago Live Stock Exchange, 507.
People v. Coleman, 281, 283, 290, 324.
People v. Commissioners of Taxes, 288, 323.
People v. Consolidated Fire Alarm Co., 412.
People v. Consolidated Gas Co., 36.
People v. Cook, 171.
People v. Cowan, 75.
People v. Crockett, 558, 576.
People v. Crossley, 574, 599.
People v. Cummings, 583.
People v. Dashaway Ass'n, 303.
People v. Detroit, G. H. & M. R. Co., 51.
People v. Duffy-McInnerney Co., 327, 349.
People v. East Buffalo Live Stock Ass'n, 509.
People v. England, 665.
People v. Equitable Trust Co. of New London, Conn., 764.
People v. Farnham, 51.
People v. Fire Ass'n of Philadelphia, 761, 773.
People v. Fire Department of City of Detroit, 506.
People v. Globe Mut. Life Ins. Co., 316.
People v. Golden Gate Lodge No. 6, 58, 62.
People v. Goss & Phillips Mfg. Co., 328.
People v. Green, 91.
People v. Hamill, 40.
People v. Home Life Assur. Co., 83.
People v. Horn Silver Min. Co., 774.
People v. Hurlbut, 32.
People v. Illinois Cent. R. Co., 143.
People v. John H. Woodbury Dermatological Institute, 75, 163, 251.
People v. Kankakee River Imp. Co., 305.
People v. Keeseville, A. C. & L. C. R. Co., 415.
People v. Kingston & M. Turnpike Road Co., 11, 51.
People v. Knapp, 5.
People v. Knickerbocker Ice Co., 71.
People v. Lake Shore & M. S. R. Co., 414.
People v. La Rue, 99, 151.
People v. Lihme, 607.
People v. Ludwig & Co., 415.
People v. Mackey, 35, 59.
People v. Mahaney, 38.
People v. Marshall, 37.
People v. Matthiessen, 585.
People v. Mauran, 152.
People v. Maynard, 37.
People v. Medical Society of Erie County, 507.
People v. Metropolitan Surety Co., 316.
People v. Milk Exch., 74.
People v. Miller, 764.
People v. Montecito Water Co., 58, 62, 65.
People v. Moss, 163, 647.
People v. Nelson, 72.
People v. New York, C. & St. L. R. Co., 88.
People v. New York Produce Exchange, 507, 510.
People v. North River Sugar-Refining Co., 11, 74, 179, 180, 191, 302, 304.
People v. O'Brien, 152, 153, 272, 273.
People v. Old Guard of City of New York, 509.
People v. Ottawa Hydraulic Co., 40.
People v. Pacific Mail S. S. Co., 416.
People v. Parker Vein Coal Co., 802.
People v. Payn, 42.
People v. Peck, 585, 588.
People v. Perrin, 51.
People v. Phillips, 606.
People v. Phœnix Bank, 307.
People v. Plainfield Ave. Gravel Road Co., 304.
People v. Powell, 632, 633, 669, 670.

[The figures refer to pages]

People v. Pullman's Palace Car Co., 159, 164, 166, 183, 307.
People v. River Raisin & L. E. R. Co., 163.
People v. Raymond, 270.
People v. Roberts, 764, 774.
People v. Robinson, 531.
People v. Rochester R. & Light Co., 251, 254, 255.
People v. Rose, 23, 70, 79.
People v. Rosenstein Cohn Cigar Co., 303.
People v. St. Louis, A. & T. H. R. Co., 451.
People v. San Francisco Sav. Union, 423.
People v. Selfridge, 58, 65.
People v. Shedd, 75, 307, 784.
People v. Star Co., 252, 254.
People v. State Board of Tax Com'rs, 423, 425.
People v. Stevens, 423, 425.
People v. Stilwell, 301.
People v. Stockton & V. R. Co., 61.
People v. Throop, 413.
People v. Township Board of Overyssel, 637.
People v. Troy House Co., 71.
People v. Twaddell, 599.
People v. Tyson & Co., 254.
People v. Union Gas & Electric Co., 180, 183, 298.
People v. Utica Ins. Co., 26.
People v. Wayman, 16.
People v. Wemple, 71, 764, 765, 774.
People v. Westchester Traction Co., 317, 318.
People v. Young Men's Father Matthew T. A. B. Soc., 575, 576.
People ex rel. Barney v. Whalen, 42, 147, 297.
People ex rel. Britton v. American Press Ass'n, 417, 418.
People ex rel. Browne v. Koenig, 453, 503.
People ex rel. Haberman v. James, 91.
People ex rel. Rottenberg v. Utah Gold & Copper Mines Co., 558.
People ex rel. Tetragon Co. v. Sohmer, 281.
People ex rel. Ward v. Uptown Ass'n, 507.
People ex rel. Winchester v. Coleman, 23, 24.
People's Bank of Bloomington v. Gridley, 530, 534.
People's Bldg. Loan & Sav. Ass'n v. Berlin, 775.
People's Ferry Co. v. Balch, 370, 372, 382.
People's Home Sav. Bank v. Rickard, 720.
People's Home Sav. Bank v. Sadler, 573.
People's Mut. Ins. Co. v. Westcott, 399, 400, 584.
People's Nat. Bank v. Cleveland, 796.
People's Pleasure Park Co. v. Rohleder, 7.
Peoria & S. R. Co. v. Thompson, 477.
Percival v. Wright, 673.
Perine v. Grand Lodge A. O. U. W., 113.
Perkins v. Coffin, 271, 278.
Perkins v. Lyons, 532, 535.
Perkins v. Sanders, 53, 60.
Perkins v. Savage, 366.
Perkins v. Trinity Realty Co., 175, 236.
Perrin v. Granger, 394.
Perrine v. Levin, 107.
Perry v. Hayes, 485.
Perry v. Little Rock & Ft. S. R. Co., 135.
Perry v. Turner, 735.
Perry v. Tuskaloosa Cotton Seed Oil Mill Co., 458, 592, 634, 647, 670.
Person & Riegel Co. v. Lipps, 324.
Persse & Brooks Paper Works v. Willett, 112.
Peru Plow & Implement Co. v. Harker, 210.
Peruvian Co., In re, 172.
Peter v. Union Mfg. Co., 465, 720, 721.
Peters v. Waverly Water Front Imp. & Development Co., 166, 167.
Peterson v. New York, 196.
Pettis v. Atkins, 125.
Peyton v. Minong Lumber & Lath Co., 59.
Pfohl v. Simpson, 735.
Phelan v. Hazard, 470.
Phelps v. Farmers' & Mechanics' Bank, 420, 428.
Phenix Ins. Co. v. Burdett, 761, 764, 770.
Philadelphia Fire Ass'n v. New York, 766.
Philadelphia Nat. Bank v. Smith, 554.
Philadelphia Trust, etc., Co. v. Philadelphia Trust Co., 785.
Philadelphia Trust, Safe-Deposit & Ins. Co., Appeal of, 439.
Philadelphia, W. & B. R. Co. v. Cowell, 432.
Philadelphia, W. & B. R. Co. v. Quigley, 242, 245, 657.
Philadelphia, W. & B. R. Co. v. Woelper, 170.
Philadelphia & B. C. R. Co.'s Appeal, 677.
Philadelphia & D. C. R. Co. v. Conway, 374.
Philadelphia & M. R. Co., In re, 299.
Philadelphia & R. Co. v. Fidelity Ins. Trust & Safe Deposit Co., 172.
Philadelphia & R. Co. v. Smith, 172.
Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 285, 767.
Philadelphia & S. R. Co. v. Lewis, 220.
Philadelphia & T. R. Co., In re, 37.
Philadelphia & W. C. R. Co. v. Hickman, 369, 370, 382, 389.
Philadelphia & W. R. Co. v. Maryland, 288.
Philips v. Wickham, 294, 599.

[The figures refer to pages]

Phillips v. Albany, 40.
Phillips v. Baltimore, 30.
Phillips v. Covington & C. Bridge Co., 40, 384, 386.
Phillips v. Insley, 198.
Phillips v. Providence Steam Engine Co., 168, 297.
Phinizy v. Augusta & K. R. Co., 115.
Phinizy v. Murray, 429.
Phipps v. Jones, 339.
Phœnix Ins. Co. of New York v. Welch, 761.
Phœnix Iron Co. v. Com., 412, 414.
Phœnix Mut. Life Ins. Co. v. McMaster, 761, 765, 768.
Phœnix Warehousing Co. v. Badger, 114, 398, 405, 408.
Picard v. Hughey, 570, 571.
Pickard v. Pullman Southern Car Co., 765.
Pier v. Hanmore, 754.
Pierce v. Com., 598.
Pierce v. Emery, 168, 169.
Pierce v. Milwaukee Construction Co., 731.
Pierce v. Old Dominion Copper Min. & Smelting Co., 642.
Pierce v. Topeka Commercial Security Co., 748.
Pietsch v. Krause, 475.
Pietsch v. Milbrath, 137.
Pike v. Bangor & C. S. L. R. Co., 400.
Pine v. Western Nat. Bank, 533.
Pingree v. Michigan Cent. R. Co., 192, 276.
Pink v. Metropolitan Milk Co., 614.
Pinkerton v. Manchester & L. R. R. Co., 538, 557.
Pinkerton v. Pennsylvania Traction Co., 99.
Pinkus v. Minneapolis Linen Mills, 186.
Pinney v. Nelson, 736.
Piser v. Serota & Gans, 175.
Pitcher v. Board of Trade, 507, 508, 509.
Pitcher v. Lone Pine Surprise Consol. Min. Co., 503.
Pitman v. Chicago-Joplin Lead & Zinc Co., 753.
Pittsburg, C. C. & St. L. R. Co. v. Dodd, 487, 505.
Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co., 212, 220.
Pittsburg, F. W. & C. R. Co. v. Com., 281.
Pittsburg, J., E. & E. R. Co. v. Altoona & B. C. R. Co., 224.
Pittsburg Min. Co. v. Spooner, 136, 137.
Pittsburgh & Allegheny Bridge Co. v. Com., 250.
Pittsburgh & C. R. Co. v. Clarke, 519, 523.
Pittsburg & C. R. Co. v. Southwest Pennsylvania R. Co., 266.
Pittsburgh & C. R. Co. v. Stewart, 369.
Pittsburgh & S. R. Co. v. Biggar, 373.
Pittsburg & T. Copper Min. Co. v. Quintrell, 132, 133.
Pixley v. Western Pac. R. Co., 195, 196, 197.
Plank's Tavern Co. v. Burkhard, 339.
Plant v. Macon Oil & Ice Co., 166.
Planters' Bank v. Sharp, 268.
Planters' & Merchants' Bank of Mobile v. Andrews, 26.
Planters' & Merchants' Independent Packet Co. v. Webb, 321, 334, 339, 340, 341, 342, 349, 353, 393.
Planters' & Merchants' Mut. Ins. Co. v. Selma Sav. Bank, 576.
Planters' & Miners' Bank v. Padgett, 124.
Plaquemines Tropical Fruit Co. v. Buck, 136.
Platner v. Kirby, 311.
Platt v. New York & S. B. R. Co., 170.
Platt v. Philadelphia & R. [illegible] Co., 731.
Platt v. Wilmot, 746.
Plimpton v. Bigelow, 328.
Plymouth R. Co. v. Colwell, 676.
Polk v. Mutual Reserve Fund Life Ass'n of N. Y., 271, 272, 571.
Polk v. Plummer, 29, 33.
Pollard v. Bailey, 734.
Polleys v. Ocean Ins. Co., 8.
Pollitz v. Gould, 458, 500, 502, 503.
Pollitz v. Wabash R. Co., 466, 475, 476, 478, 487, 488, 489, 490, 653.
Pollock v. National Bank, 540, 541.
Pomona v. Sunset Tel. & Tel. Co., 286, 766.
Pond v. Framingham & L. R. Co., 684, 685, 686.
Poock v. Lafayette Bldg. Ass'n, 226.
Poole, Jackson & Whyte's Case, 754.
Pope v. Brandon, 9.
Pope v. Terre Haute Car & Mfg. Co., 794.
Port Edwards, C. & N. R. Co. v. Arpin, 383.
Porter v. Bank of Rutland, 347.
Porter v. Lassen County Land & Cattle Co., 641, 642.
Porter v. Plymouth Gold Min. Co., 188.
Porter v. Rockford, etc., R. Co., 281.
Porter v. State, 95.
Portland Consol. Min. Co. v. Rossiter, 753.
Portland Lumbering & Mfg. Co. v. East Portland, 223.
Portland, S. & P. R. Co. v. Graham, 394.
Portland & F. R. Co. v. Spillman, 382, 384, 385.
Portland & G. Turnpike Co. v. Bobb, 64.
Portsmouth Livery Co. v. Watson, 788.
Post v. Beacon Vacuum Pump & Electric Co., 165, 501.
Post v. Southern R. Co., 179, 181.
Postal Tel. Cable Co. v. Oregon Short Line R. Co., 100.
Potter v. Dear, 732.
Potter v. Mortimer, 725.
Potter v. Necedah Lumber Co., 476.

[The figures refer to pages]

Potter v. Stevens Machine Co., 727.
Potwin v. Grunewald, 300.
Potts v. Wallace, 404, 405, 612, 620, 621.
Poughkeepsie & S. Plank Road Co. v. Griffin, 349.
Poulton v. London R. Co., 661.
Powder River Cattle Co. v. Com'rs of Custer County, 775.
Powell v. Murray, 162.
Powell v. Oregonian R. Co., 711.
Powell Bros. v. McMullan Lumber Co., 391.
Powelson v. Tennessee Eastern Electric Co., 412, 413, 414, 416, 417.
Powers v. Schlicht Heat, Light & Power Co., 626.
Prairie Slough Fishing & Hunting Club v. Kessler, 150, 209, 233.
Prall v. Tilt, 544.
Pratt v. Pratt, Read & Co., 426, 427, 433, 486.
Pratt v. Short, 240.
Pratt v. Taunton Copper Mfg. Co., 541.
Pratt v. Trustees of Baptist Soc. of Elgin, 339.
Pray v. Mitchell, 326.
Precious Blood Soc. v. Elsythe, 83, 200.
Prefontaine v. Grenier, 647, 650, 651.
Prenatt v. Messenger Printing Co., 210.
Presbyterian Mut. Assur. Fund v. Allen, 577.
President, Directors & Co. of Mechanics' Bank v. New York & N. H. R. Co., 541.
President, etc., of Bank of Manchester v. Allen, 94.
President, etc., of Bank of Michigan v. Niles, 164, 165.
President, etc., of Bank of Mutual Redemption v. Hill, 648.
President, etc., of Bank of Vincennes v. State, 303.
President, etc., of Berks & Dauphin Turnpike Road v. Myers, 82.
President, etc., of Bridge over River Lehigh v. Lehigh Coal & Nav. Co., 294.
President, etc., of Centre & K. Turnpike Road Co. v. President, etc., of McConaby, 410.
President, etc., of Commercial Bank v. French, 82.
President, etc., of Hibernia Turnpike Road v. Henderson, 387, 388.
President, etc., of Highland Turnpike Co. v. McKean, 95, 388.
President, etc., of Lincoln & Kennebec Bank v. Richardson, 53, 55, 91, 695.
President, etc., of Manhattan Co. v. Kaldenberg, 671, 755.
President, etc., of Merchants' Bank v. Cook, 9, 594.
President, etc., of Middletown Bank v. Magill, 717.
President, etc., of Mt. Palatine Academy v. Kleinschnitz, 82.
President, etc., of Northampton Bank v. Pepoon, 610, 612.
President, etc., of Port Gibson v. Moore, 91, 92, 293, 296, 315.
President, etc., of Union Turnpike Road v. Jenkins, 388.
President, etc., of Village of Kilbourn City v. Southern Wisconsin Power Co., 237.
President, etc., of Washington & B. Turnpike Road v. Baltimore & O. R. Co., 261.
President & Directors of State Bank v. Brown, 31.
Preston v. Cincinnati, C. & H. V. R. Co., 472.
Preston v. Loughran, 636.
Preston v. Northwestern Cereal Co., 175.
Price v. Holcomb, 168, 297, 597.
Price v. Minot, 576.
Price v. Pine Mountain Iron & Coal Co., 189, 219.
Price v. Price's Heirs, 326.
Price v. Whitney, 718.
Price v. Wilson, 756.
Pride v. Pride Lumber Co., 311.
Prince Investment Co. v. St. Paul & S. C. Land Co., 523, 557.
Pritchett v. Nashville Trust Co., 439.
Pritz, Ex parte, 47, 49.
Pronick v. Spirits Distributing Co., 450.
Proprietors of Cabot & West Springfield Bridge v. Chapin, 382.
Proprietors of Canal Bridge v. Gordon, 196.
Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 260, 261.
Proprietors of City Hotel in Worcester v. Dickinson, 60, 63.
Proprietors of Jeffries Neck Pasture v. Ipswich, 26.
Proprietors of Union Locks & Canals v. Towne, 406, 566.
Prospect Park & C. I. R. Co., In re, 191.
Protection Life Ins. Co. of Chicago v. Foote, 606.
Prouty v. Michigan Southern & N. I. R. Co., 801.
Providence Bank v. Billings, 149, 266, 279.
Puget Sound Nat. Bank v. Mather, 328, 329.
Puget Sound Nat. Bank v. Fisher, 207.
Pugh & Sharman, Case of, 346.
Pullis v. Pullis Bros. Iron Co., 199.
Pullman v. Upton, 518, 521.
Pullman Co. v. Kansas ex rel. Coleman, 767, 768.
Pullman's Palace Car Co. v. Adams, 766.
Pullman's Palace Car Co. v. Central Transp. Co., 216, 217, 221.
Pullman's Palace Car Co. v. Missouri Pac. Co., 695.
Pumphrey v. Threadgill, 170.
Purdy v. Bankers' Life Ass'n, 505, 579.
Puster v. Parker Mercantile Co., 793.
Pyle v. Gallaher, 420.

[The figures refer to pages]

Q

Quackenboss v. Globe & Rutgers Fire Ins. Co., 200, 201.
Quality Shoe Shop, In re, 132.
Quee Drug Co. v. Plaut, 620.
Queen, The, v. Arnaud, 6.
Queenan v. Palmer, 709, 734.
Quesenberry v. People's Bldg., L. & Sav. Ass'n, 89.
Quick v. Lemon, 344.
Quincy Railroad Bridge Co. v. Adams County, 88.
Quinlan v. Houston & T. C. R. Co., 54.
Quinn v. Safe Deposit & Trust Co., 438.

R

R. v. Hughes, 54.
Rabe v. Dunlap, 501, 645.
Rachels v. Stecher Cooperage Works, 164.
Racine & M. R. Co. v. Farmers' Loan & Trust Co., 87.
Ragland v. Doolittle, 59.
Railroad v. Barnhill, 87.
R. Co. v. Smith, 453.
Railroad Tax Cases, 285.
Raisch v. M., K. & T. Oil Co., 394.
Ralli v. White, 625.
Ralston v. Bank of California, 327.
Ramsey v. Gould, 500.
Ramsey v. Thompson Mfg. Co., 355.
Ramsey County v. Chicago, M. & St. P. R. Co., 289.
Rand v. Hubbell, 439.
Randall v. Dudley, 484.
Randall v. Rhode Island Lbr. Co., 628.
Ranger v. Railway Co., 357.
Rankin v. Cooper, 649.
Rankine v. Elliott, 729, 731.
Rappleye, Matter of, 801.
Rathbone v. Ayer, 469, 472.
Rathbone v. Parkersburg Gas Co., 490, 491.
Rathbone, Sard & Co. v. Frost, 782.
Rathbun v. Snow, 580, 620, 624, 626.
Ratterman v. Western Union Tel. Co., 766.
Ravenswood, S. & G. R. Co. v. Woodyard, 667, 668.
Rawlings v. New Memphis Gaslight Co., 642.
Raynolds v. Diamond Mills Paper Co., 427.
Read v. Frankfort Bank, 262.
Read v. Memphis Gayoso Gas Co., 382, 383, 399, 400, 615.
Reagan v. Farmers' Loan & T. Co., 267.
Real Estate Trust Co. v. Bird, 445, 557.
Rece v. Newport News & M. V. Co., 87.
Receivers of Bank of Circleville v. Renick, 299.
Reciprocity Bank, In re, 725.
Rector, etc., of Christ Church v. Philadelphia County, 287.
Redditt v. Singer Mfg. Co., 245.
Redhead v. Iowa Nat. Bank, 426, 428, 432.
Redhead v. Parkway Driving Club, 635, 639.
Redington v. Cornwell, 749.
Redkey Citizens' Natural Gas, Light, Fuel & Petroleum Co. v. Orr, 697.
Redmond v. Enfield Mfg. Co., 802.
Red Polled Cattle Club of America v. Red Polled Cattle Club of America, 78.
Red Wing Hotel Co. v. Friedrich, 334, 376.
Reed v. Boston Mach. Co., 444.
Reed v. Copeland, 530.
Reed v. Head, 438.
Reed v. Helois Carbide Specialty Co., 201.
Reed v. Home Sav. Bank, 245.
Reed v. Richmond St. R. Co., 58.
Reed v. Sampson, 299, 301.
Reed v. Walker, 775.
Reed Bros. Co. v. First Nat. Bank of Weeping Water, 688.
Reel v. Brammer, 474.
Reeves v. Harper, 775.
Reeves v. Southern R. Co., 798.
Regener v. Hubbard, 358.
Regents of University of Maryland v. Williams, 31, 67, 277.
Regents of University of Michigan v. Detroit Young Men's Soc., 151, 164, 194, 196, 199.
Regina v. Great North of England R. Co., 250.
Regina v. Railways Co., 249.
Regina v. Registrar, 76, 81.
Reichwald v. Commercial Hotel Co., 132, 166, 171, 298, 611, 627, 691, 760.
Reid v. Detroit Ideal Paint Co., 369.
Reid v. Eatonton Mfg. Co., 424, 436, 578, 697, 698, 702.
Reid v. Owensboro Sav. Bank & Trust Co., 357.
Reisner v. Strong, 100.
Relfe v. Rundle, 217.
Reliance Mut. Ins. Co. v. Sawyer, 778, 779.
Remington v. Central Pac. R. Co., 795.
Remington & Sons v. Samana Bay Co., 740.
Renn v. United States Cement Co., 574.
Rensselaer & Washington Plank Road Co. v. Barton, 393.
Republican Mountain Silver Mines v. Brown, 783, 803.
Republic Life Ins. Co. v. Swigert, 188.
Reus Permanent Loan & Savings Co. v. Conrad, 650.
Rex v. Amery, 53, 54.
Rex v. Gardner, 27.
Rex v. Governor, etc., of Bank of England, 433.
Rex v. Richardson, 506.
Rex v. Westwood, 53.
Reynolds v. Bank of Mt. Vernon, 523.
Reynolds v. Bridenthal, 606.

[The figures refer to pages]

Reynolds v. New York & Eastern Telegraph & Telephone Co., 390.
Reynolds' Heirs v. Stark County Com'rs, 166.
R. Frank Williams Co. v. United States Baking Co., 195.
Rhey v. Ebensburg & S. Plank Road Co., 345.
Rialto Co. v. Miner, 102.
Rice v. Gilbert, 534.
Rice v. Rockefeller, 503, 516, 557.
Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co., 139, 217.
Richards v. Ernst Wiener Co., 188, 190.
Richards v. Haliday, 752.
Richards v. Merrimack & C. R. R., 167.
Richards v. Minnesota Sav. Bank, 81, 104, 118, 299.
Richards v. New Hampshire Ins. Co., 753.
Richards v. Northwestern Coal & Min. Co., 153.
Richardson v. Buhl, 74, 180.
Richardson v. Clinton Wall Trunk Mfg. Co., 801.
Richardson v. Graham, 140.
Richardson v. Merritt, 747.
Richardson v. Sibley, 168, 169.
Richardson v. Swift, 802.
Richardson v. Treasure Hill Min. Co., 469, 473.
Richardson v. United States Mortgage & Trust Co., 780.
Richardson v. Vermont & M. R. Co., 585, 590.
Richelieu Hotel Co. v. International Military Encampment Co., 162, 334, 341, 360.
Richlands Oil Co. v. Morriss, 126, 140.
Richmond v. Hill, 412.
Richmond v. Irons, 708, 718, 724, 725, 746.
Richmond v. Richmond, 442.
Richmond Factory Ass'n v. Clarke, 117, 352, 353.
Richmond, F. & P. R. Co. v. Richmond, 266.
Richmond, F. & P. R. Co. v. Snead, 173.
Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery, 162, 221.
Richmond St. R. Co. v. Reed, 354.
Rickart v. People, 23.
Rickerson Roller Mill Co. v. Farrell Foundry & Mach. Co., 462, 473.
Ricord v. Central Pac. R. Co., 160.
Riddle v. Proprietors of Merrimack River Locks and Canals, 33, 244.
Rider v. Fritchey, 711.
Ridgefield & N. Y. R. Co. v. Brush, 386.
Ridgway v. Farmers' Bank of Bucks County, 219.
Rieger, Kapner & Altmark, In re, 4, 11, 688.
Riggs v. Commercial Mut. Ins. Co., 6.
Riker & Son Co. v. United Drug Co., 191.
Rikhoff v. Brown's Rotary Shuttle Sewing Mach. Co., 117.
Ring v. Long Island Real Estate Exchange & Investment Co., 626.
Ringler & Co., Matter of, 608, 611.
Rio Grande & W. R. Co. v. Telluride Power & Transmission Co., 192, 784.
Ripin v. United States Woven Label Co., 669.
Risdon Iron & Locomotive Works v. Citizens' Traction Co. of San Diego, 677.
Risdon Iron & Locomotive Works v. Furness, 736.
Rising Sun Ins. Co. v. Slaughter, 739, 782.
Ritchie v. McMullen, 129, 485.
Rivanna Nav. Co. v. Dawson, 151, 152, 154, 188.
Rivers v. Yazoo & M. R. Co., 245.
Riverside & Dan River Cotton Mills v. Menefee, 793, 794, 795.
Rives v. Bartlett, 665.
Rives v. Dudley, 152.
Roach v. Atchison, T. & S. F. R. Co., 763.
Roane v. Union Pac. Life Ins. Co., 225.
Roaring Springs Townsite Co. v. Paducah Tel. Co., 99, 100, 102.
Robbins v. Butler, 24.
Robbins v. Shelby County Taxing Dist., 765.
Roberts v. Anderson, 23.
Roberts v. P. A. Deming Woodworking Co., 198.
Roberts Mfg. Co. v. Schlick, 125, 131.
Robertson v. Bullions, 29, 509, 669.
Robertson v. De Brulatour, 442.
Robinson v. Brown, 748.
Robinson v. National Bank of New Berne, 429.
Robinson v. Oceanic Steam Nav. Co., 798.
Robinson v. Pittsburgh & C. R. Co., 378.
Robinson v. Smith, 486, 632, 647, 648, 653.
Robinson v. Turrentine, 347, 725.
Robinson v. Yates City Lodge No. 448, A. F. & A. Masons, 509.
Robotham v. Prudential Ins. Co. of America, 183, 644.
Rochester & C. Turnpike Road Co. v. Joel, 272.
Rochester & C. Turnpike Road Co. v. Paviour, 628.
Rochester & K. F. Land Co. v. Raymond, 393, 394, 518, 519, 720.
Rockford Ins. Co. v. Rogers, 778.
Rockford, R. I. & St. L. R. Co. v. Sage, 129.
Rockford, R. I. & St. L. R. Co. v. Shunick, 355, 364.
Rockford Wholesale Grocery Co. v. Standard Grocery & Meat Co., 754.
Rock Island Plow Co. v. Peterson, 775.
Rockland, Mt. D. & S. Steamboat Co. v. Sewall, 382.

Rocky Mountain Nat. Bank of Central City v. Bliss, 741.
Rodgers v. Adriatic Fire Ins. Co., 803.
Rogers, In re, 425, 437.
Rogers v. Danby Universalist Soc., 9, 61.
Rogers v. Jewell Belting Co., 174.
Rogers v. Nashville, C. & St. L. Ry. Co., 207, 492, 494, 595, 597.
Rogers v. New York & T. Land Co., 134.
Rogers v. Pell, 168, 610.
Rogers v. Vicksburg, S. & P. R. Co., 246.
Rogers Co. v. Wm. Rogers Mfg. Co., 78.
Rogers Locomotive & Mach. Works v. Southern R. Ass'n, 176.
Rogers & Co. v. Simmons, 778, 788.
Rollins v. Denver Club, 427.
Roman Catholic Orphan Asylum v. Abrams, 61.
Rome Mach. & Foundry Co. v. Davis Foundry & Mach. Works, 78.
Roosevelt Hospital v. Mayor, etc., of City of New York, 288.
Root v. Sinnock, 705, 717.
Rorke v. Thomas, 434, 755.
Roseboom v. Whittaker, 642, 753.
Rose Hill & E. R. Co. v. People, 96.
Rosemond v. Northwestern Autographic Register Co., 620.
Rosenbaum v. United States Credit System Co., 316.
Rosenthal v. Madison & I. Plank Road Co., 46.
Rosevelt v. Brown, 722.
Ross v. Western Land & Irr. Co., 671.
Ross-Meehan Brake-Shoe Foundry Co. v. Southern Malleable Iron Co., 148, 444.
Rothchild v. Hoge, 389.
Rothchild v. Memphis & C. R. Co., 632.
Rothrock v. Dwelling House Ins. Co., 791.
Rough v. Breitung, 7.
Rounds v. Delaware, L. & W. R. Co., 660.
Rountree v. Adams Exp. Co., 25.
Rouse v. Merchants' Nat. Bank, 692.
Royal Bank of Liverpool v. Grand Junction R. & Depot Co., 199.
Rubino v. Pressed Steel Car Co., 184.
Rue v. Missouri Pac. Railway Co., 783.
Ruggles v. People, 258, 267.
Ruggles, Attorney General ex rel., v. Buckley & Douglas Lumber Co., 307.
Rule v. Omega Stove & Grate Co., 733.
Rumsey Mfg. Co. v. Kaime, 478.
Rundle v. Delaware & R. Canal, 32.
Runner v. Dwiggins, 727.
Runyan v. Coster, 152.
Runyan v. Coster's Lessee, 784.
Ruse v. Bromberg, 398.
Russell v. American Bell Tel. Co., 540, 544, 545, 547, 660.
Russell v. American Gas & Electric Co., 451.
Russell v. Easterbrook, 530, 532.
Russell v. McLellan, 54, 294, 295, 298.
Russell v. Pacific Ry. Co., 738.
Russell v. Rock Run Fuel Gas Co., 498, 597.
Russell v. Sebastian, 261.
Russell v. Temple, 9, 326.
Russell v. Wakefield Waterworks Co., 487, 490, 505.
Rust Owen Lumber Co. v. Wellman, 117.
Rutherford v. Hill, 124.
Rutland Electric Light Co. v. Bates, 634.
Rutland & B. R. Co. v. Lincoln's Estate, 365.
Rutland & B. R. Co. v. Proctor, 210.
Rutland & B. R. Co. v. Thrall, 385, 394, 396, 399, 401, 407, 449, 567.
Rutledge, Ex parte, 441.
Rutter v. Chapman, 53.
Rutter v. Kilpatrick, 391.
R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 78.
Ryan v. Dunlap, 623.
Ryan v. Seaboard & R. R. Co., 600.
Ryan v. Williams, 643.
Ryder v. Alton, & S. R. Co., 428.
Ryers v. South Australian Banking Co., 210.
Rylander v. Sheffield, 643.

S

Sabin v. Bank of Woodstock, 530.
Sabine Tram Co. v. Bancroft, 178.
Sadler v. Boston & Bolivia Rubber Co., 794, 800.
Saffold v. Barnes, 360.
Sage v. Culver, 503.
Sage v. Dillard, 271.
Sage v. Lake Shore & M. S. R. Co., 414.
Saint v. Wheeler & Wilson Mfg. Co., 630.
St. Clair v. Cox, 762, 790, 791, 793, 795, 799.
St. Clair v. Rutledge, 621, 624.
St. John v. Erie R. Co., 451, 452.
St. John v. Iowa Business Men's, etc., Ass'n, 271, 275.
St. Johns Mfg. Co. v. Munger, 358.
St. Joseph & G. I. R. Co. v. Steele, 86.
St. Joseph & I. R. Co. v. Shambaugh, 46, 54, 64.
St Louis, A. & C. R. Co. v. Dalby, 244.
St. Louis, A. & T. R. Co. v. Fire Ass'n, 775, 788, 790.
St. Louis, A. & T. R. Co. v. State, 250.
St. Louis Carriage Mfg. Co. v. Hilbert, 187.
St. Louis Expanded Metal Fireproofing Co. v. Beilharz, 790.
St. Louis, Ft. S. & W. R. Co. v. Chenault, 635.
St. Louis, Ft. S. & W. R. Co. v. Tiernan, 141.
St. Louis, I. M. & S. R. Co. v. Newcom, 85, 89.

[The figures refer to pages]

St. Louis, I. M. & S. R. Co. v. Paul, 276.
St. Louis Perpetual Ins. Co. v. Goodfellow, 576.
St. Louis R. Co. v. Northwestern St. L. R. Co., 51.
St. Louis Southwestern Ry. Co. of Texas v. Alexander, 777, 792, 795.
St. Louis, V. & T. H. R. Co. v. Terre Haute, & I. R. Co., 169, 217.
St. Louis & I. M. R. Co. v. Paul, 271.
St. Louis & S. F. R. Co. v. James, 85, 86, 90.
St. Louis & S. F. R. Co. v. Mathews, 266.
St. Louis & S. F. R. Co. v. Southwestern Tel. & T. Co., 761.
St. Paul Fire & Marine Ins. Co. v. Allis, 46.
St. Paul Gaslight Co. v. Sandstone, 210.
St. Paul Nat. Bank v. Life Ins. Clearing Co., 523.
St. Paul, S. & T. F. R. Co. v. Robbins, 332, 443, 444.
Salem First Nat. Bank v. Almy, 124.
Salem Iron Co. v. Lake Superior Consol. Iron Mines, 644.
Salem Iron Factory Co. v. Inhabitants of Danvers, 282.
Salem Milldam Corp. v. Ropes, 364, 365, 382, 384, 385, 401.
Salina Nat. Bank v. Prescott, 641.
Salmon v. Richardson, 664.
Salomon v. Salomon & Co., 8, 69.
Salomons v. Laing, 505.
Salt Lake City v. Hollister, 203, 290, 657, 663.
Saltmarsh v. Spaulding, 610, 615, 636, 642.
Salvation Army in United States v. American Salvation Army, 79.
Sampson v. Camperdown Cotton Mills, 165.
Samuels v. Evening Mail Ass'n, 248.
San Antonio Hardware Co. v. Sanger, 188.
Sanborn v. Lefferts, 754, 755.
San Buenaventura Commercial Min. & Mfg. Co. v. Vassault, 584.
Sanders v. Proctor, 332.
Sanford v. Rhoads, 704.
Sanford Fork & Tool Co. v. Howe, B. & Co., 645, 688.
San Francisco Oyster House v. Mihich, 79.
Sanger v. Upton, 678, 680, 681.
San Joaquin Land & Water Co. v. West, 343.
San Luis Water Co. v. Estrada, 49.
San Pedro Lumber Co. v. Reynolds, 652.
Sant v. Perronville Shingle Co., 505.
Santa Clara County v. Southern P. R. Co., 285, 763.
Santa Clara Female Academy v. Sullivan, 71, 760, 772.
Saranac & L. P. R. Co. v. Arnold, 295.
Sarbach v. Kansas Fiscal Agency Co., 378.
Sargent v. Essex Marine Ry. Corp., 531.
Sargent v. Franklin Ins. Co., 431, 521, 557, 575, 576.
Sargent v. Stetson, 769.
Sargent v. Webster, 591, 608, 610, 616, 617.
Sarmiento v. Davis Boat & Oar Co., 199.
Sault Ste. Marie v. International Transit Co., 765, 767, 768.
Saunders v. Bank of Mecklenburg, 299.
Saunders v. Bluefield Waterworks & Imp. Co., 761.
Savage v. Bartlett, 355, 363.
Savage v. People's Bldg., L. & Sav. Ass'n, 89.
Savannah Cotton Exchange v. State, 510.
Savannah Electric Co. v. Wheeler, 249, 657, 659, 660.
Savannah F. & W. R. Co. v. State, 251.
Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 202, 236, 295.
Savings Bank of Hannibal v. Hunt, 574.
Savings Bank of Louisville's Assignee v. Caperton, 648, 651, 752.
Savings & Trust Co., of Cleveland, Ohio, v. Bear Valley Irr. Co., 215.
Sawyer v. Hoag, 459, 696, 729, 747.
Sawyer v. Methodist Episcopal Soc. in Royalton, 9.
Sayles v. Bates, 530, 717, 718, 724, 725.
Sayles v. Brown, 444, 583, 588, 706, 708, 726, 736, 749.
Saylor v. Commonwealth Investment & Banking Co., 743.
Sayre v. Louisville Union Benev. Ass'n, 575.
Sayre v. Northwestern Turnpike Road, 32.
Scadden Flat Gold Min. Co. v. Scadden, 132.
Scammon v. Kimball, 696.
Scarsdale Pub. Co. v. Carter, 81.
Schaeffer v. Missouri Home Ins. Co., 334, 391.
Schalucky v. Field, 710, 735, 741, 745.
Scheidel Coil Co. v. Rose, 60, 192.
Schell v. Alston Mfg. Co., 426.
Schenck v. Andrews, 469.
Schenectady & Saratoga Plank-Road Co. v. Thatcher, 64, 114, 382, 383, 402, 407, 519, 567, 570.
Scherer & Co. v. Everest, 218, 219.
Scheufler v. Grand Lodge A. O. U. W. of Minnesota, 113.
Schleider v. Dielman, 316.
Schley v. Dixon, 664, 752.
Schlitz Brewing Co. v. Ester, 790.
Schloss v. Montgomery Trade Co., 110, 114, 116, 117, 120, 383.
Schmidt v. Mitchell, 595, 596, 599, 600, 608.
Schnittger v. Old Home Consol. Min. Co., 632, 641, 643, 644.
Schoening v. Schwenk, 487, 494, 666.

[The figures refer to pages]

Schoff v. Town of Bloomfield, 591.
School Directors of Carlisle Borough v. Carlisle Bank, 26.
School Dist. No. 56 v. St. Joseph F. & M. Ins. Co., 48.
School Dist. No. 61 v. Alderson, 115.
Schreyer v. Turner Flouring Mills Co., 132, 133, 134.
Schufeldt v. Smith, 692.
Schultze v. Van Doren, 198.
Schumm v. Seymour, 614.
Schwab v. E. G. Potter Co., 167, 497.
Schwab v. Frisco Min. & Mill Co., 394, 400, 611.
Schwartz v. State, 599.
Schwarzwaelder v. German Mut. Fire Ins. Co., 260.
Scofield v. Lake Shore & M. S. R. Co., 181.
Scollans v. Rollins, 541, 546.
Scott v. Armstrong, 696.
Scott v. Baltimore & O. R. Co., 447, 450, 451.
Scott v. Central R. & Banking Co., of Georgia, 430.
Scott v. Depeyster, 650.
Scott v. Deweese, 444.
Scott v. Eagle Fire Co., 420, 424, 427, 433, 434, 701.
Scott v. Farmers' & Merchants' Nat. Bank, 639.
Scott v. Houpt, 537.
Scott v. Neely, 690.
Scott v. Pequonnock Nat. Bank, 526, 530, 536, 538.
Scott v. Stockholders' Oil Co., 793.
Scottish Security Co.'s Receiver v. Starks, 404.
Scovill v. Thayer, 444, 456, 458, 460, 726, 729, 744.
Scripture v. Francestown Soapstone Co., 535, 557.
Scruggs v. Cotterill, 517.
Scruggs v. Scottish Mtg. Co., 775.
Seaboard Air Line Ry. v. Leader, 688.
Seagraves v. Alton, 197.
Seamans v. Temple Co., 789.
Seamless Pressed Steel & Mfg. Co. v. Monroe, 223, 225, 227, 230.
Searles v. Gebbie, 421, 432.
Searsburgh Turnpike Co. v. Cutler, 9, 99.
Seaton v. Grant, 500, 501, 503.
Seaton v. Grimm, 61.
Seattle Nat. Bank v. Pratt, 745.
Seattle Trust Co. v. Pitner, 402.
Seaverns v. Presbyterian Hospital, 631.
Security Co. v. Bennington Monument Ass'n, 129.
Security Co. v. Panhandle Nat. Bank, 777.
Security Mut. Life Ins. Co. v. Prewitt, 768, 769.
Security Nat. Bank v. St. Croix Power Co., 225.
Security Savings & Loan Ass'n v. Elbert, 778, 780, 789.
Sedalia, W. & S. R. Co. v. Wilkerson, 339, 350.
Sedgwick City Bank v. Sedgwick Milling & Elevator Co., 706.
See v. Heppenheimer, 467, 471.
Seeber v. Commercial Nat. Bank, 224.
Seeberger v. McCormick, 124, 655.
Sellers v. Greer, 7, 564.
Seeley v. New York Nat. Exch. Bank, 425.
Sells v. Rosedale Grocery & Com. Co., 693.
Selma, M. & M. R. Co. v. Anderson, 358.
Selma & T. R. Co. v. Tipton, 99, 338, 396, 404, 410.
Semple v. Glenn, 95, 715.
Senn v. Union Premium Mercantile Co., 516.
Senour Mfg. Co. v. Church Paint & Mfg. Co., 217, 712.
Seven Star Grange, No. 73, Patrons of Husbandry v. Ferguson, 114.
Seventeenth Ward Bank v. Smith, 653.
Severn-Wye & Severn Bridge Co., In re, 421.
Severn & W. & S. Bridge R. Co., In re, 433.
Sewall v. Boston Water Power Co., 540, 541.
Seymour v. Chicago Guaranty Fund Life Soc., 225, 230.
Seymour v. Slide & Spur Gold Mines, 785.
Seymour v. Spring Forest Cemetery Ass'n. 635, 640.
Seymour v. Sturgess, 398, 399.
Seymour Opera-House Co. v. Wooldridge, 71.
Shadford v. Detroit, Y. & A. A. R., 191, 687.
Shaffer v. McCulloch, 451.
Shakopee Mfg. Co., In re, 59, 64.
Sharood Shoe Corp., In re, 360, 365.
Sharpe v. Dawes, 588.
Shattuck v. American Cement Co., 541, 544.
Shaw v. Covington, 192, 193.
Shaw v. Hollister Land & Imp. Co., 166.
Shaw v. Mining Co., 246, 555, 659.
Shaw v. Quincy Min. Co., 83, 85.
Shaw v. Spencer, 540, 543, 552.
Shaw v. Staight, 460.
Shawmut Commercial Paper Co. v. Auerbach, 123.
Shayne v. Evening Post Pub. Co., 153, 317.
Shea v. Mabry, 632, 651.
Sheffield Corporation v. Barclay, 542, 554.
Shelby County v. Union & Planters' Bank, 283, 288.
Shelby County R. Co. v. Crow, 336, 339, 404.
Sheldon v. Chappell, 155.
Shellington v. Howland, 533, 742.
Shelton v. Banks, 50.
Shenandoah Val. R. Co. v. Griffith, 535.

[The figures refer to pages]

Shepard & Morse Lumber Co. v. Burleigh, 84.
Shepang Voting Trust Cases, 494, 601, 604.
Sheridan Electric Light Co. v. Chatham Nat. Bank, 612.
Sherman v. Fitch, 196.
Sherman v. Smith, 275, 571.
Sherman Center Town Co. v. Morris, 239.
Sherman Center Town Co. v. Swigart, 607, 624.
Sherman Nursery Co. v. Aughenbaugh, 789.
Sherrod v. Duffy, 372.
Sherwood v. Alvis, 782.
Sherwood v. American Bible Soc., 151.
Sherwood v. Illinois Trust & Savings Bank, 715.
Sherwood v. Meadow Val. Min. Co., 541.
Shick v. Citizens' Enterprise Co., 61.
Shickel v. Berryville Land & Improvement Co., 733.
Shickle v. Watts, 747.
Shields v. Clifton Hill Land Co., 115.
Shields v. Hobart, 753.
Shields v. Ohio, 192, 272, 276.
Shinney v. North American Sav., Loan & Bldg. Co., 802.
Shipman v. Treadwell, 732, 733, 736, 739.
Shively v. Eureka Tellurium Gold-Min. Co., 498, 668.
Shober's Adm'rs v. Lancaster County Park Ass'n, 335.
Shoemaker v. Washburn Lumber Co., 188, 687.
Short v. Stevenson, 136.
Shortz v. Unangst, 53.
Shreveport Traction Co. v. Kansas City, S. & G. R. Co., 37.
Shurtz v. Schoolcraft & Three Rivers R. Co., 367.
Sibley v. Penobscot Lumbering Ass'n, 50.
Sibley v. Quinsigamond Nat. Bank, 535, 537.
Sicardi v. Keystone Oil Co., 753.
Sidway v. Missouri Land & Live Stock Co., 802.
Siegman v. Maloney, 495.
Sigel-Campion Live Stock Commission Co. v. Haston, 777.
Sigua Iron Co. v. Brown, 518, 715, 732.
Sigua Iron Co. v. Greene, 715.
Silsby v. Barlow, 29.
Silver Hook Road v. Greene, 399.
Silver Lake Bank v. North, 238, 785, 788.
Simm v. Telegraph Co., 554.
Simmons v. Hill, 716.
Simmons v. Worthington, 677.
Simmons Nat. Bank v. Dilley Foundry Co., 158, 175.
Simon v. Southern Ry. Co., 791, 792, 796.
Simons v. Vulcan Oil Min. Co., 136, 137.
Simplex Dairy Co. v. Cole, 789.
Simpson v. Hotel Co., 158, 166, 487.
Simpson v. Millsaps, 439.
Sims v. Brooklyn Street R. Co., 348.
Sims v. Petaluma Gaslight Co., 641.
Sinclair v. Fuller, 608, 720.
Singer v. Hutchinson, 678.
Singer v. Salt Lake City Copper Mfg. Co., 642.
Singer Mfg. Co. v. Heppenheimer, 282, 283.
Singer Mfg. Co. v. Peck, 60.
Singer Sewing Mach. Co. v. Brickell, 765, 767.
Sinking Fund Cases, 271.
Sioux City Terminal R. & Warehouse Co. v. Trust Co. of North America, 168, 239.
Sioux Remedy Co. v. Cope, 799.
Sisters of Charity of St. Elizabeth v. Morris R. Co., 100.
Skaneateles Waterworks Co. v. Skaneateles, 261.
Skelly v. Jefferson Branch Bank of Ohio, 258, 287.
Skinner v. Garnett Gold Min. Co., 276.
Skinner v. Wilhelm, 40.
Skowhegan Bank v. Cutler, 534.
Skrainka v. Allen, 467.
Slack v. Northwestern Nat. Bank, 753.
Slater Woollen Co. v. Lamb, 220.
Slattery v. North End Sav. Bank, 622, 624.
Slattery v. St. Louis & N. O. Transp. Co., 487, 504.
Slaughter v. Com., 763.
Slauson v. Schwabacher, 780.
Slaymaker v. Bank of Gettysburg, 325.
Slaytor-Jennings Co. v. Specialty Paper Box Co., 789.
Slee v. Bloom, 298, 397, 405, 678, 680, 698, 710, 742.
Sleeper v. Goodwin, 707, 712, 713, 722.
Sleeper v. Norris, 298.
Slipher v. Earhart, 374.
Slocum v. Head, 62, 110, 117.
Slocum v. Providence Steam & Gas Pipe Co., 107, 113.
Slocum v. Warren, 113.
Small v. Herkimer Mfg. & Hydraulic Co., 396.
Smathers v. Western Carolina Bank, 727.
Smith v. Burns Boiler & Mfg. Co., 352.
Smith v. Chesapeake & O. Canal Co., 694.
Smith v. Cleveland, C., C. & St. L. R. Co., 100.
Smith v. Dana, 438.
Smith v. Eastwood Wire Mfg. Co., 91.
Smith v. Empire State-Idaho Mining & Development Co., 791, 795.
Smith v. Ft. Scott, H. & W. R. Co., 690.
Smith v. Havens Relief Fund Soc., 49, 50, 51.
Smith v. Hurd, 6, 484, 653, 672.
Smith v. Kellogg, 337.
Smith v. Law, 591.
Smith v. Long Island R. Co., 667.

[The figures refer to pages]

Smith v. Los Angeles Immigration & Land Co-Operative Ass'n, 618, 640.
Smith v. Martin, 659.
Smith v. Moore, 11.
Smith v. Mosby, 748.
Smith v. Mutual Life Ins. Co. of New York, 802.
Smith v. Nelson, 581.
Smith v. Pacific Vinegar & Pickle Works, 639.
Smith v. Poor, 752.
Smith v. Prattville Co., 426.
Smith v. St. Louis Mut. Life Ins. Co., 803.
Smith v. San Francisco & N. P. R. Co., 594, 595, 596, 601, 602.
Smith v. Silver Valley Min. Co., 53, 56.
Smith v. Smith, 580.
Smith v. Tallassee Branch of Central Plank Road Co., 80.
Smith v. Warden, 125.
Smith v. Wortham, 73.
Smith-Dimmick Lumber Co. v. Teague, 686.
Smith Lumber Co., In re, 175.
Smith, Case of, 299.
Smith's Estate, In re, 437, 439, 441.
Smolik v. Philadelphia & Reading Coal & Iron Co., 764, 792, 796.
Smyth v. Ames, 763.
Snediker v. Ayers, 636, 640.
Snell v. Chicago, 51.
Snelling v. Richard, 445.
Snider's Sons Co. v. Troy, 110, 115, 118, 119, 123.
Snow v. Church, 602.
Snyder v. President, etc., of State Bank of Illinois, 121.
Snyder v. Studebaker, 45, 120.
Society for Propagating the Gospel v. Young, 80, 82.
Society for the Propagation of the Gospel v. New Haven, 31.
Society for Propagation of Gospel in Foreign Parts v. Pawlet, 51, 96.
Society of Middlesex Husbandmen & Mfrs. v. Davis, 53, 54.
Society of War of 1812 v. Society of War of 1812 in State of New York, 80.
Society Perum v. Cleveland, 102, 110, 111.
Socorro Mountain Min. Co. v. Preston, 597.
Sokoloski v. New South Bldg. & Loan Ass'n, 784.
Solomon v. Bates, 752.
Solomon Solar Salt Co. v. Barber, 236.
Somerset Nat. Banking Co.'s Receiver v. Adams, 327, 338, 349.
Somerville Water Co. v. Somerville, 148.
South Bay Meadow Dam Co. v. Gray, 113, 115, 275, 571.
South Buffalo Natural Gas Co. v. Bain, 350, 389.
South Carolina Mut. Ins. Co. v. Price, 81.
Southern Elec. Securities Co. v. State, 206.
Southern Exp. Co. v. Platten, 244, 660.
Southern Gum Co. v. Laylin, 764.
Southern Hotel Co. v. Newman, 354.
Southern Ins. Co. v. Milligan, 357, 360, 361.
Southern Life Ins. & Trust Co. v. Cole, 327.
Southern Life Ins. & Trust Co. v. Lanier, 197, 389.
Southern Loan Co. v. Morris, 219.
Southern Lumber Co. v. Holt, 210.
Southern Pac. R. Co. v. Orton, 22, 46, 47.
Southern Pac. R. Co. v. W. T. Meadors & Co., 178.
Southern Plantations Co. v. Kennedy Heading Co., 200.
Southern R. Co. v. Allison, 87, 90.
Southern R. Co. v. Greene, 763.
Southern R. Co. v. State, 249.
Southern States Fire & Casualty Ins. Co. v. De Long, 364.
Southern Trust & Deposit Co. v. Yeatman, 393.
South Georgia & F. R. Co. v. Ayres, 409.
South of Ireland Colliery Co. v. Waddle, 195.
South Joplin Land Co. v. Case, 136, 138.
South Nashville St. R. Co. v. Morrow, 280, 282, 284.
South School Dist. v. Blakeslee, 80.
Southwestern Slate Co. v. Stephens, 344.
Southworth v. Morgan, 456, 461, 467, 678.
South Yorkshire Ry. & River Dun Co. v. Great Northern R. Co., 144.
South & N. A. R. Co. v. Highland Ave. & B. R. Co., 208.
Spangler v. Indiana & Q. C. R. Co., 398, 401.
Spargo's Case, 467.
Sparks v. National Masonic Acc. Ass'n, 781.
Sparks v. Woodstock Iron & Steel Co., 64.
Spaulding v. North Milwaukee Town Site Co., 139, 639.
Spear v. Bach, 326, 327.
Spear v. Crawford, 164, 331, 391, 393.
Spear v. Grant, 730.
Speirs v. Union Drop-Forge Co., 196.
Spellissy v. Cook & Bernheimer Co., 553.
Spence v. Mobile & M. R. Co., 217.
Spencer v. Alki Point Transp. Co., 175.
Spencer v. Lowe, 565, 614.
Spencer v. Smith, 451.
Spering's Appeal, 632, 633, 646, 650, 651, 654, 751.
Spiller v. Skating Rink Co., 132.
Spilman v. Supreme Council of the Home Circle, 508, 509.
Spokane Merchants' Ass'n v. Clere Clothing Co., 11.
Spokane & I. Lumber Co. v. Loy, 96.
Spooner v. Phillips, 438.
Sprague v. Cocheco Mfg. Co., 549, 559.
Sprague v. Hosie, 327, 328.

[The figures refer to pages]

Sprague v. National Bank of America, 468, 475. 477, 480, 680.
Spring Valley Waterworks v. Schottler, 276.
Sproul v. Standard Plate Glass Co., 523.
S. P. Smith Lumber Co., In re, 175.
Squire & Co. v. Portland, 84.
Stacy v. Glen Ellyn Hotel & Springs Co., 163.
Stafford v. American Mills Co., 84, 801.
Stafford v. St. John, 754.
Stafford Nat. Bank v. Palmer, 124.
Stahn v. Catawaba Mills, 494.
Stamford Trust Co. v. Yale & Towne Mfg. Co., 323.
Standard Distilling & Distributing Co. v. Springfield Coal Min. & Tile Co., 80.
Standard Fashion Co. v. Siegel-Cooper Co., 166.
Standard Oil Co. v. Com., 251.
Standard Oil Co. v. Scofield, 177.
Standard Oil Co. v. U. S., 179, 182, 304.
Standard Sewing Mach. Co. v. Frame, 780.
Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co., 273, 276.
Stanley v. Luse, 644.
Stanley v. Stanley, 266.
Stannard v. Robert H. Reid & Co., 316.
Stanton v. New York & E. R. Co., 132, 133.
Stanwood v. Sterling Metal Co., 103, 421.
Starbuck v. Mercantile Trust Co., 494.
Starkey v. Bank of England, 554.
Starkweather v. American Bible Soc., 153, 154, 208, 785.
Star Mills v. Bailey, 171.
Starr v. Heald, 504.
Starr v. Shipherd, 492.
State v. American Book Co., 778, 787, 789.
State v. Atchison, 252.
State v. Atchison & N. R. Co., 305.
State v. Bailey, 192, 306.
State v. Baltimore, O. & C. R. Co., 250.
State v. Baltimore & O. R. Co., 426, 432, 433.
State v. Bank of New England, 722.
State v. Beck, 58.
State v. Belle Springs Creamery Co., 250.
State v. Bergenthal, 413, 416.
State v. Bienville Oil Works Co., 416.
State v. Birmingham Waterworks Co., 303.
State v. Board of Trust of Vanderbilt University, 43, 68.
State v. Bonnell, 584.
State v. Bull, 54.
State v. Capital City Dairy Co., 305.
State v. Carey, 770, 787.
State v. Carpenter, 558.
State v. Central Ohio Mut. Relief Ass'n, 58, 62, 65.
State v. Central R. Co. of New Jersey, 251.
State v. Chamber of Commerce, 506, 507, 508, 510.
State v. Chicago, M. & St. P. R. Co., 250.
State v. Chilhowee Woolen Mills Co., 296.
State v. Chute, 589, 605.
State v. Citizens' Bank of Jennings, 416.
State v. Citizens' Bank of Louisiana, 91.
State v. Citizens' Light & Power Co., 468.
State v. Commercial Bank of Manchester, 304, 305, 691.
State v. Commercial State Bank, 678.
State v. Commissioner of Railroad Taxation, 270.
State v. Creamery Package Mfg. Co., 74.
State v. Critchett, 58, 68, 103.
State v. Cronan, 591.
State v. Cumberland Telephone & Telegraph Co., 303.
State v. Cumberland & P. R. Co., 283.
State v. Curtis, 40, 41.
State v. Dawson, 45, 53.
State v. Debenture Guarantee & L. Co., 303.
State v. District Court of Ramsey County, 793.
State v. Eastern Coal Co., 253.
State v. Einstein, 414.
State v. Fidelity & Casualty Co., 786.
State v. Fidelity & Casualty Ins. Co., 786, 787.
State v. Fourth New Hampshire Turnpike Road, 299, 300, 306.
State v. French Lick Springs Hotel Co., 304.
State v. Great Works Mill. & Mfg. Co., 250.
State v. Habib, 93, 95.
State v. Hammond Packing Co., 764.
State v. Hancock, 45.
State v. Hannibal & St. J. R. Co., 281.
State v. Higby Co., 155.
State v. Hitchcock, 49.
State v. Hudson Land Co., 207.
State v. Hunton, 596.
State v. Illinois Cent. R. Co., 38, 49.
State v. Insurance Co., 773, 786, 787.
State v. International Inv. Co., 70, 72.
State v. Jessup & Moore Paper Co., 413.
State v. Lebanon & N. Turnpike Co., 268.
State v. Leete, 608.
State v. Louisville & N. R. Co., 250.
State v. McCullough, 802.
State v. McGrath, 77, 78.
State v. McIver, 516, 558.
State v. Marion Light & Heating Co., 32.

[The figures refer to pages]

State v. Maryland Institute for Promotion of Mechanic Arts, 31.
State v. Mayor, 49.
State v. Merchants' Ins. & Trust Co., 310.
State v. Middlesex Banking Co., 415.
State v. Milwaukee Gaslight Co., 37.
State v. Miner, 69.
State v. Minnesota Cent. R. Co., 302.
State v. Minnesota Thresher Mfg. Co., 71, 302, 712.
State v. Mitchell, 298.
State v. Monida & Yellowstone Stage Co., 417.
State v. Monongahela River R. Co., 250.
State v. Montgomery Light Co., 54.
State v. Morris & E. R. Co., 253, 657.
State v. Morristown Fire Ass'n, 323, 324.
State v. Murphy, 95.
State v. Nebraska Distilling Co., 74, 180, 304.
State v. Newark, 49.
State v. New Orleans Gaslight Co., 417.
State v. New Orleans Warehouse Co., 772.
State v. New Orleans Waterworks Co., 303.
State v. Northern Pac. R. Co., 303, 309.
State v. Noyes, 277.
State v. Oberlin Bldg. & Loan Ass'n, 171, 187, 302.
State v. Overton, 575, 580.
State v. Pacific Brewing & Malting Co., 412, 413, 415.
State v. Park & Nelson Lumber Co., 304.
State v. Passaic County Agr. Soc., 250, 251, 253.
State v. Pennsylvania & Ohio Canal Co., 301.
State v. Phœnix Fire Ins. Co., 761.
State v. Phœnix Ins. Co., 770.
State v. Pittam, 96.
State v. Pittsburg, C., C. & St. L. R. Co., 160.
State v. Portland Gas Co., 303.
State v. Portland General Electric Co., 147.
State v. Portland Natural Gas Co., 180, 304.
State v. President, etc., of Bank of Maryland, 298, 693.
State v. President, etc., of Ohio & M. R. Co., 250.
State v. President & Directors of Bank of Maryland, 26.
State v. Real-Estate Bank, 299, 305, 306.
State v. Roanoke Railroad & Lumber Co., 250.
State v. Roosa, 45.
State v. Rowland Lumber Co., 254.
State v. Rusk, 712.
State v. Rutland Ry., Light & Power Co., 104.
State v. Sibley, 322.
State v. Simmons, 42.
State v. Smith, 187, 188, 189, 365, 445, 516, 595, 611, 616.
State v. Southern Building & L. Ass'n, 303.
State v. Spartanburg, C. & G. R. Co., 299.
State v. Standard Oil Co., 4, 12, 74, 179, 304, 768, 787.
State v. Sterling, 283.
State v. Stevens, 105.
State v. Stockley, 599.
State v. Tacoma Ry. & Power Co., 7.
State v. Tampa Waterworks Co., 303.
State v. Taylor, 42.
State v. Topeka Water Co., 303, 771.
State v. Travellers' Ins. Co., 346.
State v. Trustees of Vincennes University, 94.
State v. Tudor, 599.
State v. Turnpike Co. of Middletown, 676.
State v. Twin Village Water Co., 64, 303.
State v. United States Endowment & T. Co., 303.
State v. U. S. Exp. Co., 257.
State v. Virginia-Carolina C. Co., 761.
State v. Warren R. Co., 251.
State v. Webb, 47, 51, 308.
State v. Western Irrigating Canal Co., 45, 166.
State v. Western Union Mut. Life Ins. Co., 773, 786.
State v. White, 251, 254.
State v. Whited & Wheless, 412.
State v. Young, 9.
State v. U. S. Endowment & Trust Co., 302.
State Bank of Indiana v. Cook, 359.
State Bank of Indiana v. State, 315.
State Bank of Virginia v. Richmond, 282.
State Board of Agriculture v. Citizens' St. R. Co., 226.
State Electro-Medical Institute v. State, 75, 163.
State ex inf. Hadley v. Delmar Jockey Club, 305, 306.
State ex inf. Hadley v. Missouri Pac. R. Co., 183, 185.
State ex inf. Hadley v. Standard Oil Co., 304.
State ex inf. Wear v. Business Men's Athletic Club, 304.
State ex rel. v. Neff, 272.
State ex rel. Attorney General v. Wood, 61.
State ex rel. Brown Contracting & Bldg. Co. v. Cook, 771.
State ex rel. Burke v. Citizens' Bank of Jennings, 574.
State ex rel. Circuit Attorney of Tenth Judicial Circuit v. Cape Girardeau & S. L. R. Co., 46.
State ex rel. Crow v. Lincoln Trust Co., 142.

[The figures refer to pages]

State ex rel. Donnell v. Foster, 311.
State ex rel. English v. Lazarus, 412, 415.
State ex rel. Hadley v. Bankers' Trust Co., 237.
State ex rel. Hadley v. Delmar Jockey Club, 303, 306.
State ex rel. Haeusler v. German Mutual Life Ins. Co. of St. Louis, 416.
State ex rel. Haeussler v. Greer, 258, 259, 268, 599.
State ex rel. Henderson v. Boone County Court, 49.
State ex rel. Hines v. Scott County Macadamized Road Co., 16.
State ex rel. Houck v. Lesueur, 192.
State ex rel. Jackson v. Newman, 183, 186.
State ex rel. Johnson v. St. Louis Transit Co., 416.
State ex rel. Kilbourn v. Tudor, 574, 599.
State ex rel. Page v. Smith, 385.
State ex rel. Philips v. Fidelity & Casualty Co., 773.
State ex rel. St. Louis, K. C. & C. R. Co. v. Cook, 772, 784.
State ex rel. Walker v. Corkins, 72.
State ex rel. Walker v. Equitable Loan & L. Ass'n of Sedalia, 302.
State ex rel. Walker v. Payne, 147.
State ex rel. Watkins v. North American Land & Timber Co., 792, 801.
State ex rel. Wear v. Business Men's Ass'n, 35.
State ex rel. Wear v. Business Men's Athletic Club, 303.
State Freight Tax Case, 285.
State Ins. Co. v. Gennett, 535.
State Ins. Co. v. Sax, 328, 535.
State Ins. Co. of Despoines v. Farmers' Mut. Ins. Co., 210.
State Life Ins. Co. v. Nelson, 221.
State Mut. Fire Ins. Co. v. Brinkley Stave & Heading Co., 775.
State Nat. Bank of St. Joseph v. Union Nat. Bank, 615, 693.
Staten Island M. R. Co. v. Hinchliffe, 754.
State of Illinois v. Illinois Cent. R. Co., 38.
State of Indiana v. Woram, 28.
State Railroad Tax Cases, 279.
State Tax on Foreign-Held Bonds, Case of, 280.
State Treasurer v. Auditor General, 288.
State Tax on Railway Gross Receipts, 285.
State Trust Co. v. Turner, 469, 473, 474, 478, 682.
Steacy v. Little Rock & Ft. S. R. Co., 480, 519.
Steam Nav. Co. v. Weed, 226, 784.
Steamship Co. v. Murphy, 335.
Steamship Dock Co. v. Heron's Adm'x, 521.
Stearns v. Minnesota ex rel. Marr, 271, 288.
Stebbins v. Jennings, 50.
Stebbins v. Merritt, 583, 585, 588, 590.
Steel v. Island Milling Co., 430.
Steele v. Fraternal Tribunes, 226.
Steele v. Harmer, 173.
Steffins v. Gurney, 742.
Steger v. Davis, 225, 611.
Stegmaier v. Keystone Coal Co., 172.
Stein v. Howard, 89, 457, 463, 465, 477.
Stein v. Marks, 575.
Steiner v. Steiner Land & Lumber Co., 175, 235, 577.
Steinfeld v. Zeckendorf, 505.
Steinway, In re, 412, 413.
Steinway v. Steinway & Sons, 164, 166.
Stemple v. Bruin, 323.
Stephens v. Follett, 716.
Stephens v. Fox, 742, 743.
Stephens v. Louisiana Long Leaf Lbr. Co., 308.
Stern v. Kirby Lbr. Co., 362.
Stern v. McKee, 352.
Sternberger v. Brock, 450, 451.
Stetson v. Northern Inv. Co., 645.
Stevens v. Carp River Iron Co., 622.
Stevens v. Corbitt, 371.
Stevens v. Davison, 573, 581.
Stevens v. Episcopal Church History, 107.
Stevens v. Episcopal Church History, Co., 103, 105, 479.
Stevens v. Pratt, 772.
Stevens v. Rutland & B. R. Co., 486, 567.
Stevens v. United States Steel Corp., 426.
Steward Mfg. Co. v. Steward, 639.
Stewart, In re, 803.
Stewart v. Erie & W. Transp. Co., 179, 181, 501.
Stewart v. Harris, 674.
Stewart v. Jones, 168.
Stewart v. Lehigh Valley R. Co., 640, 644.
Stewart Paper Mfg. Co. v. Rau, 113.
Stewary v. Wright, 246.
Stickel v. Atwood, 664.
Stickney's Will, In re, 208.
Stilling v. Thorp, 33.
Stockley v. Thomas, 801.
Stockton v. Baltimore & N. Y. R. Co., 768.
Stockton v. Central R. Co. of New Jersey, 75.
Stockton Sav. Bank v. Staples, 151, 164.
Stoddard v. Lum, 732.
Stoddard v. Shetucket Foundry Co., 428.
Stoehlke v. Hahn, 610.
Stoffiet v. Strome, 120.
Stokes v. Continental Trust Co., 445.
Stolze v. Manitowoc Terminal Co., 299.
Stone v. Cleveland, C., C. & St. L. R. Co., 10.
Stone v. Farmers' Loan & Trust Co., 267.

[The figures refer to pages]

Stone v. Kellogg, 413, 417.
Stone v. Rottman, 751.
Stone v. United States Title Guaranty & Indemnity Co., 623.
Stone v. Wisconsin, 278.
Stoneham Branch R. Co. v. Gould, 382, 383, 395.
Storrow v. Texas Consol. Compress & Mfg. Ass'n, 427, 453.
Story v. Furman, 726.
Story v. Jersey City & B. P. Plank Road Co., 269.
Stourbridge Canal Co. v. Wheeley, 148.
Stout v. City & Pac. R. Co., 86.
Stout v. Security Trust & Life Ins. Co., 667.
Stout v. Sioux City & Pac. R. Co., 85.
Stout v. Zulick, 103.
Stout v. Zulick, 99, 102, 123.
Stoutimore v. Clark, 115.
Stow v. Wyse, 584.
Stowe v. Flagg, 35, 344.
Stoystown & Greensburg Turnpike Road Co. v. Craver, 614.
Stradley v. Pailthorp, 498.
Strang v. Edson, 494.
Strasburg R. Co. v. Echternacht, 335.
Stratford v. Mallory, 591.
Straus v. Eagle Ins. Co. of Cincinnati, 213.
Strause v. Richmond Woodworking Co., 131.
Strauss v. Denny, 748.
Straw & Ellsworth Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co., 713, 726, 738.
Strawn v. Edward J. Brandt-Dent Co., 798.
Streator Independent Tel. Co. v. Continental Tel. Const. Co., 133, 134.
Stribbling v. Bank of Valley, 94.
Stringer's Case, 434.
Strodl v. Farish-Stafford Co., 379.
Strom v. Montana Central Ry. Co., 796.
Strong v. Brooklyn Crosstown R. Co., 425.
Strong v. McCagg, 310.
Strong v. Repide, 674.
Stuart v. Hayden, 720.
Stuart v. Mechanics' & Farmers' Bank, 9.
Stuart v. Valley R. Co., 351, 388.
Stufflebeam v. De Lashmutt, 356.
Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville, 147, 174.
Sturges v. Carter, 282, 284.
Sturges v. Vanderbilt, 101, 104, 292, 314, 740.
Sturtevant Co. v. Fireproofing Film Co., 625.
Stutz v. Handley, 467, 474.
Sullivan v. Beck, 778.
Sullivan v. Central Land Co., 497.
Sullivan v. Parkes, 602.
Sullivan v. Sheehan, 775.
Summers v. Sleeth, 391.
Symonds v. Lewis, 753.
Sun Life Assur. Co. of Canada v. Bailey, 245.
Sun Printing & Pub. Ass'n v. Moore, 158, 619, 627.
Supreme Council v. Perry, 577.
Supreme Council of Royal Arcanum v. Green, 733.
Supreme Court I. O. of F. of Canada v. Supreme Court of United Foresters, 99.
Supreme Lodge of Knights of Pythias v. Weller, 91, 292.
Susquehanna Canal Co. v. Bonham, 168.
Susquehanna Mut. Fire Ins. Co. v. Elkins, 581.
Sussex R. Co. v. Morris & E. R. Co., 179.
Sutherland-Innes Co. v. Chaney, 789.
Sutphin v. New York Times Co., 247.
Sutton Mfg. Co. v. Hutchinson, 680, 687.
Sutton's Hospital Case, 15, 16, 36, 41, 573.
Swan Land & Cattle Co. v. Frank, 292, 740.
Swann v. Mutual Reserve Fund Life Ass'n, 797.
Swartwout v. Michigan Air Line R. Co., 110, 114, 119.
Swartz v. Wickersham, 589.
Sweney v. Talcott, 59.
Swentzel v. Penn Bank, 650, 651.
Swift v. Pacific Mail S. S. Co., 159.
Swift v. Smith, 8, 69, 295.
Swift v. State, 413.
Swift & Co. v. Platte, 789.
Swofford Bros., In re, 492.
Swofford Bros. Dry Goods Co. v. Owen, 99, 102, 114, 120, 123.
Sykes v. Holloway, 721.
Sykes v. People, 80, 81.
Symonds v. Board of Sup'rs of Clay County, 33.
Symonds v. Lewis, 753.
Symons, Case of, 719.
Synnott v. Cumberland Bldg. Loan Ass'n, 585.
Syracuse City Bank v. Davis, 47.

T

Tabor v. Goss & Phillips Mfg. Co., 777.
Taft v. Hartford, P. & F. R. Co., 451. 452.
Taft v. Presidio & F. R. Co., 541, 551.
Taft v. Ward, 24.
Taggart v. Western Maryland R. Co., 334, 369, 388, 405, 407, 567.
Talbot v. Scripps, 485.
Talbot v. Talbot, 325.
Talbot J. Taylor & Co. v. Southern Pac. Co., 593.
Talbott v. Fidelity & Casualty Co. of New York, 773.
Talmage v. Pell, 150, 165, 186.
Tanner v. Lindell R. Co., 167, 192, 296.
Tanner v. Nichols, 114.
Tapley Co. v. Keller, 318.

[The figures refer to pages]

Tappan v. Bailey, 24.
Tappan v. Merchants' Nat. Bank, 283, 284.
Tappan v. Warren Five Cents Sav. Bank, 622.
Tarbell v. Page, 115.
Tar River Nav. Co. v. Neal, 396.
Tate v. Bates, 752.
Tatem v. Wright, 762, 764.
Tatum v. Leigh, 298, 299.
Tatum v. Rosenthal, 743.
Taunton v. Royal Ins. Co., 163.
Taussig v. St. Louis & K. R. Co., 666.
Tawas & B. C. R. Co. v. Iosco Circuit Judge, 684, 690.
Taylor v. Bowker, 745.
Taylor v. Commercial Bank, 624.
Taylor v. Cummings, 469.
Taylor v. Fanning, 753.
Taylor v. Griswold, 574, 598, 599.
Taylor v. Interstate Inv. Co., 316.
Taylor v. Miami Exporting Co., 187.
Taylor v. Mutual Reserve Fund Life Ass'n, 801.
Taylor v. South & North Alabama R. Co., 458.
Taylor v. Thomas, 361.
Taylor's Agreement Trusts, In re, 315.
Taylor & Co. v. Southern Pac. Co., 593.
Telegraph, The, v. Lee, 639.
Telegraph, The, v. Loetscher, 126, 136, 639.
Telegram Newspaper Co. v. Com., 253, 255.
Telfair v. Howe, 153.
Tempel v. Dodge, 578, 612.
Temple v. Lemon, 383.
Temple Street Cable Ry. v. Hellman, 162.
Templin v. Chicago, B. & P. Ry. Co., 621.
Ten Eyck v. Pontiac, O. & P. A. R. Co., 458, 618, 642, 667.
Tenison v. Patton, 643.
Tennessee v. Whitworth, 281, 282.
Tennessee Automatic Lighting Co. v. Massey, 61, 99.
Tenney v. New England Protective Union, Div. No. 172, 24.
Tepfer v. Rival Gas & Electric Fixture Supply Co., 423.
Terre Haute & P. R. Co. v. Robbins, 100.
Terrett v. Taylor, 29.
Terry v. Little, 734.
Terry v. Tubman, 734, 742, 745.
Tevis v. Hammersmith, 494.
Texas & P. R. Co. v. Davis, 765, 774, 789.
Texas & Pacific Ry. Co. v. Eastin & Knox, 796.
Texas & P. R. Co. v. Southern Pac. R. Co., 181.
Thacher v. King, 754.
Thayer v. Nehalem Mill Co., 199, 200, 620.
Thayer v. Union Tool Co., 727.
Thebus v. Smiley, 747.
Third Nat. Bank v. Buffalo German Ins. Co., 523, 578.
Thomas v. Board of Com'rs of Clay County, 49.
Thomas v. Board of Trustees of Ohio State University, 25.
Thomas v. Brownville, 641.
Thomas v. Brownsville, Ft. K. & P. R. Co., 543, 646.
Thomas v. Dakin, 15, 16, 19, 20, 21, 22, 38, 42, 50.
Thomas v. Matthiessen, 738.
Thomas v. Railroad Co., 238.
Thomas v. Richmond, 241.
Thomas v. Wabash, St. L. & P. R. Co., 48.
Thomas v. Wentworth Hotel Co., 738.
Thomas v. West Jersey R. Co., 142, 144, 157, 161, 169, 194, 213, 216, 235, 237.
Thomas v. Wilcox, 61.
Thompkins v. Blakey, 738, 739.
Thompson v. Abbott, 695.
Thompson v. Candor, 99, 102, 107.
Thompson v. Huron Lumber Co., 692.
Thompson v. Knight, 378.
Thompson v. Lambert, 166.
Thompson v. Meisser, 710, 735, 748.
Thompson v. National Mut. Bldg. & Loan Ass'n, 778.
Thompson v. Pfeiffer, 740.
Thompson v. Reno Sav. Bank, 747.
Thompson v. Swoope, 154.
Thompson v. Universal Salvage Co., 173
Thompson v. Waters, 151, 772.
Thompson Co. v. Whitehed, 789.
Thompson-Starrett Co. v. E. B. Ellis Granite Co., 601.
Thomson v. Union Pac. R. Co., 40.
Thorne v. Travelers' Ins. Co., 780.
Thornton v. Balcom, 61.
Thornton v. Marginal Freight R. Co., 51, 262, 293, 314.
Thorpe v. Rutland & B. R. Co., 263, 264, 265, 266.
Thrasher v. Pike County R. Co., 332, 344, 345.
Tichenor-Grand Co., In re, 378.
Ticonic Water Power & Mfg. Co. v. Lang, 352, 365, 371.
Tierney v. Butler, 189.
Tierney v. Ledden, 167.
Tierney v. Parker, 356, 368.
Tiffany v. Giesen, 718.
Tiffin Glass Co. v. Stoehr, 316.
Tift v. Quaker City Nat. Bank, 131, 134.
Tiger v. Rogers Cotton Cleaner & Gin Co., 189.
Tillis v. Brown, 494.
Times Pub. Co. v. Carlisle, 247.
Timm v. Grand Rapids Brewing Co., 176.
Tinsman v. Belvidere Delaware R. Co., 31.
Tisdale v. Harris, 326.
Titcomb v. Kennebunk Mut. Fire Ins. Co., 318.

[The figures refer to pages]

Titcomb v. Union Marine & Fire Ins. Co., 328.
Titus v. Cairo & F. R. Co., 621.
Titus v. President, etc., of Great Western Turnpike Road, 555, 659.
Tobin v. Roaring Creek & C. R. Co., 618.
Todd v. Birdsall, 33.
Todd v. Ferguson, 75.
Todd v. Kentucky Union Land Co., 176, 185.
Toledo, A. A. & G. T. Ry. v. Dunlap, 193.
Toledo Commercial Co. v. Glass Mfg. Co., 775.
Toledo Computing Scale Co. v. Young, 116.
Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 99, 104, 110, 114, 453.
Toledo Tie & Lbr. Co. v. Thomas, 779.
Toledo & A. A. R. Co. v. Johnson, 64, 307.
Tolford v. Church, 39.
Tome v. Parkersburg Branch R. Co., 246, 555, 659.
Tomkinson v. R. Co., 158, 161, 162.
Tomkinson v. Southeastern R. Co., 487, 488.
Tomlinson v. Bricklayers' Union No. 1 of Indiana, 7, 484.
Tomlinson v. Jessup, 288.
Tompkins v. Augusta Southern R. Co., 695.
Tompkins v. Sperry, Jones & Co., 138, 585.
Tonica & P. R. Co. v. McNeely, 334, 338.
Tooker v. National Sugar Refining Co. of New Jersey, 471, 489, 640.
Topeka Paper Co. v. Oklahoma Pub. Co., 191.
Topping v. Bickford, 195, 197.
Torras v. Raeburn, 113.
Torrey v. Dustin Monument Ass'n, 622.
Torrey v. Toledo Portland Cement Co., 140.
Totten v. Tison, 446, 449, 454.
Tourtelot v. Whithed, 184, 186.
Towers v. African Tug Co., 502, 653.
Towers Excelsior & Ginnery Co. v. Inman, 226.
Town of Andes v. Ely, 51.
Town of Hinckley v. Kettle River R. Co., 742.
Town of Lake View v. Rose Hill Cemetery Corp., 264, 265.
Town of McGregor v. Baylies, 47.
Town of New Athens v. Thomas, 196.
Town of North Hempstead v. Hempstead, 33, 50.
Town of St. Albans v. National Car Co., 281, 284.
Townsend v. Susquehannah Turnpike Co., 244.
Tracy v. Talmage, 241.
Traer v. Lucas Prospecting Co., 183.
Train v. Marshall Paper Co., 741, 742.
Travis v. Knox Terpezone Co., 801, 802.
Treadwell v. Salisbury Mfg. Co., 168, 186, 297.
Trenton Potteries Co. v. Oliphant, 180, 184.
Trester v. Missouri Pac. R. Co., 193.
Trevor v. Whitworth, 187.
Trimble v. American Sugar Refining Co., 413, 426, 427, 496, 502.
Tripp v. Northwestern Nat. Bank, 610.
Tri-State Amusement Co. v. Forest Park Highlands Amusement Co., 779.
Trotter v. Lisman, 798.
Trowbridge v. Scudder, 124.
Troy Min. Co. v. White, 617, 642.
Troy & B. R. Co. v. Tibbits, 350, 373.
Troy & G. R. Co. v. Newton, 370, 382, 386.
Troy & R. Co. v. Kerr, 567, 570.
Trust Co. of Georgia v. State, 184, 313.
Trustees of Christian Church of Wolcott v. Johnson, 196.
Trustees of Cincinnati Tp. v. Ogden, 197.
Trustees of Congregational Church & Society of Cutchogue, Matter of, 308.
Trustees of Dartmouth College v. Woodward, 30, 31, 36, 258, 259.
Trustees of Free Schools in Andover v. Flint, 578.
Trustees of Phillips Academy v. King, 30, 155.
Trustees of School Dist. No. 3 v. Gibbs, 605.
Trustees of Schools v. Tatman, 32.
Trustees of Soldier's Orphans Home v. Shaffer, 580.
Trustees of University of Alabama v. Winston, 32.
Trustees, etc., of M. E. Church of Newark v. Clark, 117.
Trustees of Vernon Soc. v. Hills, 299, 307.
Tryber v. Girard Creamery & Cold Storage Co., 135.
Tuckahoe Canal Co. v. Tuckahoe & J. R. Co., 261, 268.
Tucker v. Ferguson, 287.
Tucker v. Russell, 260.
Tulane Imp. Co. v. S. A. Chapman & Co., 122.
Tulare Irr. Dist. v. Shepard, 100, 103.
Tunesma v. Schuttler, 735.
Tunis v. Hestonville, M. & F. Pass. R. Co., 591, 596, 600.
Turnbull v. Payson, 715.
Turnbull v. Prentiss Lumber Co., 690, 691.
Turner v. Grangers' Life & Health Ins. Co., 355, 356.
Turner v. Kingston Lumber & Mfg. Co., 199.
Turner v. Phœnix Ins. Co., 245.
Tuttle v. George A. Tuttle Co., 131, 132, 133.
Tuttle v. Iron Nat. Bank, 413.

[The figures refer to pages]

Tuttle v. National Bank of Republic, 707, 738.
Twin-Lick Oil Co. v. Marbury, 636, 637, 642, 643, 644, 645.
Tyng v. Corporation Trust Co., 802.
Tyrrell v. Washburn, 24.

U

Ulmer v. Lime Rock Co., 8, 205.
Ulmer v. Maine Real Estate Co., 491.
Umsted v. Buskirk, 730.
Unckles v. Colgate, 191.
Underhill v. Santa Barbara Land, Bldg. & Imp. Co., 581, 582.
Underwood v. Smith, 505.
Union Bank v. Jacobs, 158, 173.
Union Bank v. Laird, 522, 523, 530, 532.
Union Bank & Trust Co. v. Wright, 155.
Union Cent. Life Ins. Co. v. Thomas, 779.
Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 171.
Union Hardware Co. v. Plume & Atwood Mfg. Co., 225.
Union Hotel Co. v. Hersee, 369, 370, 382, 567.
Union Iron Co. v. Pierce, 756.
Union Loan & Trust Co. v. Southern California Motor-Road Co., 463.
Union Mut. Life Ins. Co. v. Frear Stone Mfg. Co., 377, 456, 460.
Union Mut. Life Ins. Co. v. McMillen, 779, 781.
Union Nat. Bank v. Hill, 751.
Union Nat. Bank v. Hunt, 360.
Union Nat. Bank v. Matthews, 207, 238.
Union Nat. Bank of Chicago v. Bryam, 328.
Union Pac. R. Co. v. Chicago, M. & St. P. R. Co., 170.
Union Pac. R. Co. v. Chicago, R. I. & P. R. Co., 212, 612, 627.
Union Pac. R. Co. v. Colorado Postal Tel. Cable Co., 100.
Union Pac. R. Co. v. Lincoln County, 40.
Union P. R. Co. v. Peniston, 286.
Union Pac. R. Co. v. U. S., 276.
Union Passenger R. Co. v. Philadelphia, 289.
Union Sav. Ass'n v. Seligman, 723.
Union Sav. Bank of San Jose v. Leiter, 744.
Union & New Haven Trust Co. v. Taintor, 431, 438.
United Glass Co. v. Vary, 741, 742.
United Growers Co. v. Eisner, 113, 405.
United Mines Co. v. Hatcher, 91.
United Society of Shakers v. Underwood, 648, 751.
U. S. v. Alaska Packers' Ass'n, 250.
U. S. v. American Tobacco Co., 304.
U. S. v. Ames Mercantile Co., 251.
U. S. v. Braun & Fitts, 254.
U. S. v. City Bank of Columbus, 623.
U. S. v. Delaware & H. Co., 74.
U. S. v. E. C. Knight Co., 180, 304.
U. S. v. John Kelso Co., 253.
U. S. v. Joint-Traffic Ass'n, 181.
U. S. v. Lehigh Valley R. Co., 11, 74.
U. S. v. Lynah, 269.
U. S. v. MacAndrews & Forbes Co., 253, 254.
U. S. v. Memphis & L. R. Co., 255.
U. S. v. Milwaukee Refrigerator Transit Co., 13, 73.
U. S. v. New York Herald Co., 253.
U. S. v. Northern Securities Co., 73.
U. S. v. Smith, 11.
U. S. v. Stanford, 704.
U. S. v. Trans-Missouri Freight Ass'n, 181.
U. S. v. Union P. R. Co., 273.
U. S. v. United States Steel Corp., 182.
U. S. v. Van Schaick, 251.
U. S. v. Vaughan, 538.
United States ex rel. Citizens' Nat. Bank v. Knox, 705.
United States ex rel. De Yturbide v. Metropolitan Club of City of Washington, 506, 508.
United States Asphalt Refining Co. v. Comptoir Nat. D' Escompte De Paris, 798.
United States Bank v. Stearns, 94.
United States Brewing Co. v. Dolese Shepard Co., 214, 221, 226.
United States Capsule Co. v. Isaacs, 695.
U. S. Exp. Co. v. Minnesota, 285.
United States Fidelity & Guaranty Co. v. Dothan, 215.
United States Fire Apparatus Co. v. G. W. Baker Mach. Co., 614.
United States Ins. Co. v. Shriver, 629.
United States Light & Heating Co. v. United States Light & Heating Co. of New York, 79.
United States Mercantile Reporting & Collecting Agency, In re, 81.
United States Min. Co. v. Camden & Driscoll, 188.
United States Mortgage & Trust Co. v. Eastern Iron Co., 167.
United States Radiator Corp. v. State, 325, 330.
United States Rolling Stock Co. v. Atlantic & G. W. R. Co., 638, 641, 645.
United States Rubber Co. v. American Oak Leather Co., 692, 693.
United States Rubber Co. v. Butler Bros. Shoe. Co., 779.
United States Saving & Loan Co. v. Miller, 774.
United States Steel Corp. v. Hodge, 503, 561, 597, 644.
United States Trust Co. of New York v. United States Fire Ins. Co., 722, 723, 748.
United States Vinegar Co. v. Foehrenbach, 385, 406.
United States Vinegar Co. v. Schlegel, 94, 771.
United Surety Co. v. Meenan, 200, 201.

[The figures refer to pages]

Unity Ins. Co. v. Cram, 58.
University of Vermont v. Baxter's Estate, 193.
Uphoff v. Chicago, St. L. & N. O. R. Co., 89.
Upton v. Englehart, 362, 363.
Upton v. Hansbrough, 99, 113.
Upton v. Tribilcock, 360, 363, 378, 393, 404, 459, 699.
Urner v. Sollenberger, 363, 644.
Usher v. New York Cent. & H. R. Co., 223.
Utah, N. & C. R. Co. v. Utah & C. R. Co., 299, 301.
Utica Nat. Brewing Co., In re, 694.
Utica Fire Alarm Tel. Co. v. Waggoner Watchman Clock Co., 480.
Utley v. Clark-Gardner Lode Min. Co., 775.
Utley v. Hill, 665.
Utley v. Union Tool Co., 58, 62, 106.

V

Vail v. Hamilton, 188, 595.
Vail v. Jameson, 693.
Valley R. Co. v. Lake Erie Iron Co., 183.
Van Aernam v. Bleistein, 25.
Van Allen v. Assessors, 290.
Vance v. Erie R. Co., 245.
Vance v. McNabb Coal & Coke Co., 678, 687.
Vance v. Phœnix Ins. Co., 651.
Van Cleve v. Berkey, 469, 478.
Van Cott v. Van Brunt, 89, 463, 466, 468, 477.
Vandagrift v. Rich Hill Bank, 184.
Vanderbilt v. Bennett, 602.
Vanderpoel v. Gorman, 610, 692.
Vanderwerken v. Glenn, 744.
Van Dyck v. McQuade, 434, 647, 751.
Van Dyke v. Railway Mail Ass'n, 801.
Van Houten v. McKelway, 29.
Vankirk v. Clark, 33.
Vanneman v. Young, 59.
Van Norman v. Jackson Circuit Judge, 327, 328.
Vansands v. Middlesex County Bank, 576.
Van Schaick v. Mackin, 345, 388.
Van Steuben v. Central R. Co., 770, 772.
Van Tuyl v. Schwab, 705.
Varney v. Baker, 412, 413, 414, 415, 416.
Vater v. Lewis, 115.
Vaughn v. Alabama Nat. Bank, 460.
Vaught v. Ohio County Fair Co., 617.
Vawter v. Griffin, 326.
Veeder v. Mudgett, 444, 706, 726.
Venable Bros. v. Southern Granite Co., 26, 100, 101, 314.
Venner v. Atchison, T. & S. F. R. Co., 55.
Venner v. Chicago City R. Co., 158, 273, 417, 602.
Venner v. New York Cent. & H. R. Co., 502.
Vent v. Duluth Coffee & Spice Co., 189, 379.
Vermillion Sugar Co. v. Vallee, 339.
Vermont Cent. R. Co. v. Clayes, 388.
Vermont Farm Machinery Co. v. De Sota Co-operative Creamery Co., 215, 228, 230.
Vermont Marble Co. v. Declez Granite Co., 460, 463, 465.
Verplanck v. Mercantile Ins. Co., 310.
Vestry of St. Luke's Church v. Mathews, 575, 577.
Vicksburg & Y. C. Tel. Co. v. Citizens' Tel. Co., 687.
Victor G. Bloede Co. v. Bloede, 513.
Vidal v. Girard, 155, 156.
Vilas v. Milwaukee & P. du C. R. Co., 696.
Villamil v. Hirsch, 596.
Vincennes University v. Indiana, 41.
Vineland Grape Juice Co. v. Chandler, 467.
Vinton's Appeal, 437.
Visalia Gas & Electric Light Co. v. Sims, 231, 238.
Vogeler v. Punch, 494.
Vokes v. Eaton, 78.
Von Arnim v. American Tube Works, 502.
Von Cotzhausen v. Johns Mfg. Co., 695.
Von Lengerse v. New York, 108.
Von Phul v. Hammer, 49.
Voorhis v. Terhune, 328.
Voris v. Star City Bldg. & Loan Ass'n, 229.
Vought v. Eastern Building & Loan Ass'n, 225, 227.
Vowell v. Thompson, 594.
Vreeland v. New Jersey Stone Co., 348, 349, 355.

W

Wadesboro Cotton Mills Co. v. Burns, 113.
Wagner v. Atchison, T. & S. F. R. Co., 192.
Wahlig v. Standard Pump Mfg. Co., 622, 628.
Wakefield v. Fargo, 712.
Wakeman v. Dalley, 665.
Walburn v. Chenault, 470.
Walker v. Detroit Transit Ry. Co., 542, 544, 557.
Walker v. Devereau, 348.
Walker v. Johnson, 573, 599.
Walker v. Mobile & O. R. Co., 355, 357, 360, 361.
Walker v. Taylor, 75, 207, 784.
Wall v. Mines, 58, 60, 108.
Wallace v. Carpenter Electric Heating Mfg. Co., 468, 471, 474, 480.
Wallace v. Lincoln Sav. Bank, 654.
Wallace v. Loomis, 46.
Wallace v. Pierce-Wallace Pub. Co., 313.
Wallace v. Townsend, 339.
Wallamet Falls C. & L. Co. v. Kittridge, 299.

[The figures refer to pages]

Wallerstein v. Ervin, 215.
Walsh v. Goulden, 673.
Walstab v. Spottiswoode, 129.
Walter A. Wood Harvester Co. v. Jefferson, 331.
Walter A. Wood Harvester Co. v. Robbins, 331, 338, 390.
Walter A. Zeinicker Supply Co. v. Mississippi Cotton Oil Co., 795.
Walton v. Riley, 59.
Walworth v. Brackett, 63.
Walworth County Bank v. Farmers' Loan & Trust Co., 621.
Ward v. Brigham, 124.
Ward v. Davidson, 670.
Ward v. Farwell, 264, 267, 306.
Ward v. Johnson, 173.
Ward v. Joslin, 174, 711, 738, 742.
Ward v. Minnesota & N. W. R. Co., 100.
Ward Sav. Bank v. First Nat. Bank, 173.
Wardell v. Union P. R. Co., 634, 638, 641, 646.
Wardens of Christ Church v. Pope, 605.
Wardle v. Townsend, 39.
Ware v. Hamilton Brown Shoe Co., 765.
Ware Cattle Co. v. Anderson, 789.
Waring v. Catawba Co., 9.
Warner v. Beers, 2, 17, 19, 20, 22, 24.
Warner v. Mower, 584, 591.
Warner v. Penoyer, 649, 650, 651.
Warner v. Southern Pac. Co., 247.
Warren v. Davenport Fire Ins. Co., 6.
Warren v. First Nat. Bank, 783.
Warren v. King, 451, 452.
Warren v. Pim, 601, 603, 604.
Warren v. Queen & Co., 451, 452.
Warren v. Robison, 502, 650.
Washburn v. Green, 467.
Washburn v. National Wall-Paper Co., 458, 467, 473.
Washburn Mill Co. v. Bartlett, 778, 782, 788.
Washington Gaslight Co. v. Lansden, 245.
Washington Ins. Co. of City of New York v. Price, 9.
Washington Liquor Co. v. Alladio Cafe Co., 692.
Washington Nat. Bldg. Loan & Inv. Ass'n v. Stanley, 105.
Washington Sav. Bank v. Butchers' & Drovers' Bank, 732, 744.
Washington-Virginia Ry. Co. v. Real Estate Trust Co. of Philadelphia, 777.
Wason v. Buzzell, 802.
Waterbury v. Merchants' Union Exp. Co., 311, 503.
Waterbury v. United Tel. Co., 173.
Waterman Co. v. Modern Pen Co., 79.
Waters v. Horace Waters & Co., 494.
Waters-Pierce Oil Co. v. Bridewell, 245.
Waters-Pierce Oil Co. v. State, 768.
Waters-Pierce Oil Co. v. Texas, 761.
Watertown Fire Ins. Co. v. Rust, 781.
Watertown Paper Co., In re, 11, 13.
Wathen v. Jackson Oil & Refining Co., 487, 491, 494, 499, 500, 501.
Watkins v. North American Land & T. Co., 487.
Watkins Land Mtg. Co. v. Elliott, 791, 800.
Watson v. Jones, 29.
Watson v. Le Grand Roller-Skating Rink Co., 503.
Watson Seminary v. Pike County Court, 270.
Watts v. Gantt, 785.
Watt's Appeal, 501, 636, 646, 751.
Watts Mercantile Co. v. Buchanan, 226.
W. A. Wood Harvester Co. v. Jefferson, 391.
Way v. American Grease Co., 445.
Wayne Pike Co. v. Hammons, 487, 633, 653.
W. B. Conkey Co. v. Goldman, 21.
W. C. Bowman Lbr. Co. v. Pierson, 231.
W. E. A. Legg & Co. v. Dewing, 741.
Weatherly v. Capital City Water Co., 316.
Weatherford, M. W. & N. W. R. Co. v. Granger, 131, 133, 134, 135.
Webb v. Baltimore & E. S. R. Co., 326, 349, 369, 370, 371, 388, 391.
Webb v. Ridgely, 596.
Webber v. President, etc., of Williams College, 622.
Webre v. Christ, 478.
Webster v. Bowers, 713.
Webster v. Susquehanna Pole Line Co., 270.
Webster v. Upton, 404, 518.
Wechselberg v. Flour City Nat. Bank, 125.
Weckler v. First Nat. Bank of Hagerstown, 157, 163, 628, 659, 661.
Weeks v. Love, 735.
Weidenfeld v. Northern Pac. R. Co., 445.
Weidenfeld v. Sugar Run R. Co., 612.
Weihenmayer v. Bitner, 417.
Weinburgh v. Union Street-Ry. Advertising Co., 598.
Weinman v. Wilkinsburg & E. L. P. R. Co., 48, 113, 121.
Weiss v. Mauch Chunk Iron Co., 332.
Weiss v. Musical Mut. Protective Union, 509, 510.
Welch v. Importers' & Traders' Nat. Bank, 645.
Welch v. Sargent, 720.
Weld v. Board of Gas & Electric Light Com'rs, 169.
Welland Canal Co. v. Hathaway, 117.
Welles v. Cowles, 326.
Welles v. Larrabee, 721, 722, 723.
Wellington & P. R. Co. v. Cashie & C. R. & Lumber Co., 100.
Wells v. Black, 574.
Wells v. Gates, 23, 24.
Wells v. Price, 328.
Wells v. Rodgers, 402.
Wells Co. v. Gastonia Cotton Mfg. Co., 60, 65.

Wells' Estate, In re, 828.
Wells Fargo & Co. v. Northern Pac. R. Co., 71, 72.
Wells Fargo & Co. Express v. Sobel, 243, 653, 660.
Welsh v. First Division of St. Paul & P. R. Co., 694.
Welton v. Saffery, 456.
Wemple v. St. Louis, 390.
Wemple v. St. Louis, J. & S. R. Co., 349, 391.
Wendover Athletic Ass'n, In re, 43, 68.
Wenlock v. River Dee Co., 171, 222.
Wentworth Co. v. French, 594.
Werle v. Northwestern Flint & Sandpaper Co., 168, 297.
Werner v. Hearst, 70, 242, 244.
Wert v. Crawfordsville & A. Turnpike Co., 360.
West v. Bullskin Prairie Ditching Co., 58.
West v. Camden, 602.
West v. Crawford, 383.
West v. Dyson, 167.
West v. Topeka Sav. Bank, 744.
West Chester & P. R. Co. v. Jackson, 432, 448.
West Coast Safety Faucet Co. v. Wulff, 535.
West End Real Estate Co. v. Nash, 352, 358, 566.
Westerlund v. Black Bear Min. Co., 213.
Western Bank of Scotland v. Addie, 357.
Western Bank & Trust Co., In re, 122.
Western Imp. Co. v. Des Moines Nat. Bank, 615.
Western Maryland R. Co. v. Blue Ridge Hotel Co., 174.
Western Nat. Bank v. Lawrence, 707, 736.
Western Nat. Bank v. Reckless, 713, 735.
Western News Co. v. Wilmaith, 245.
Western Screw & Mfg. Co. v. Cousley, 131.
Western Union Tel. Co. v. Davenport, 541, 542, 551.
Western Union Tel. Co. v. Frear, 769.
Western Union Tel. Co. v. Kansas ex rel. Coleman, 766, 767, 768.
Western Union Tel. Co. v. Mexican Agr. Land Co., 122.
Western Union Tel. Co. v. Shaw, 798.
Western Union Telegraph Co. v. Texas, 286, 766.
Westervelt v. Demarest, 664.
Westinghouse v. German Nat. Bank, 543, 544.
West Jersey Traction Co., In re, 201.
Westman v. Krumweide, 381.
West Missouri Land Co. v. Kansas City Suburban Belt R. Co., 115.
West Nashville Planing Mill Co. v. Nashville Sav. Bank, 519.
Weston v. Bear River & Auburn Water & Mining Co., 535.
Weston v. Citizens' Nat. Bank, 794.
Weston v. Hunt, 29.
Weston's Case, 513, 719.
West River Bridge Co. v. Dix, 268.
West St. Louis Bank v. Parmalee, 623.
West Virginia Transp. Co. v. Standard Oil Co., 246.
West Wisconsin R. Co. v. Board of Sup'rs of Trempealeau County, 287, 288.
Wetherbee v. Baker, 471, 730, 731, 732.
Wetumpka Bridge Co. v. Kidd, 557.
Weyer v. Second Nat. Bank of Franklin, 543, 544.
Whaley v. Bankers' Union of the World, 104.
Whaley Bridge Calico Printing Co. v. Green, 126.
Wheeler v. Abilene Nat. Bank Bldg. Co., 490, 563, 632.
Wheeler v. Millar, 748.
Wheeler v. Northwestern Sleigh Co., 421, 429, 436.
Wheeler v. Pullman Iron & S. Co., 311.
Wheeler, Osgood & Co. v. Everett Land Co., 175.
Wheeler & Wilson Mfg. Co. v. Boyce, 244, 248, 660.
Wheelock v. Kost, 113, 722.
Wheelock v. Moulton, 7, 8.
Whetherbee v. Baker, 731, 732.
Whipple v. Parker, 125.
Whitaker v. Delaware & Hudson Canal Co., 149.
Whitaker v. Masterton, 754.
Whitbeck v. Mercantile Nat. Bank, 286.
White v. American Nat. Life Ins. Co., 355.
White v. Elgin Creamery Co., 621.
White v. Green, 519.
White v. G. W. Marquardt & Sons, 183, 184.
White v. Howard, 154, 784, 785.
White v. President, etc., of Franklin Bank, 220, 238, 241.
White v. Rice, 155.
White v. Salisbury, 527, 539.
White v. Syracuse & U. R. Co., 570.
White v. Thomas Inflatable Tire Co., 601.
White v. Vermont & M. R. Co., 172.
Whitechurch v. Cavanaugh, 556.
White, Corbin & Co. v. Jones, 520.
Whitehead v. Hamilton Rubber Co., 616.
Whitehill v. Jacobs, 470, 473.
White Mountains R. Co. v. Eastman, 377, 404, 460.
White River Lbr. Co. v. Southwestern Imp. Ass'n, 789.
White River Sav. Bank v. Capital Sav. Bank & Trust Co., 523.
White River Turnpike Co. v. Vermont Cent. R. Co., 261, 268.
White Water Valley Canal Co. v. Boden, 94.
White Water Valley Canal Co. v. Vallette, 172.
Whitlock v. Alexander, 471.

[The figures refer to pages]

Whitman v. National Bank of Oxford, 736, 737.
Whitman v. Oxford Nat. Bk., 707, 708.
Whitman Agricultural Co. v. Strand, 780.
Whitney v. Butler, 718, 719.
Whitney v. Madison, 283.
Whitney v. Robinson, 99, 115.
Whitney v. Wyman, 118, 132.
Whitney Arms Co. v. Barlow, 162, 223, 225, 227, 754, 755.
Whittaker v. Amwell Nat. Bank, 425.
Whittemore v. Gibbs, 326.
Whittenton Mills v. Upton, 177, 178.
Wickersham v. Chicago Zinc Co., 631.
Wicomico County Com'rs v. Bancroft, 287.
Wiggin v. Elder, etc., of First Free Will Baptist Church, 584.
Wight v. Ileublein, 412, 417.
Wight v. Shelby R. Co., 360, 374, 380, 388.
Wight v. Springfield & N. L. R. Co., 607.
Wignet v. Quincy Bldg. & Homestead Ass'n, 104.
Wikle v. Avary, 60.
Wilcox v. Supreme Council Royal Arcanum, 508, 509, 510, 511.
Wilcox v. Trenton Potteries Co., 448.
Wild v. Bank of Passamaquoddy, 623.
Wilde v. Jenkins, 294.
Wiles v. Suydam, 745, 755.
Wilhite v. Convent of Good Shepherd, 81.
Wilkins v. Thorne, 801.
Wilkinson v. Bauerle, 610, 643, 647, 691, 692, 751, 752.
Wilkinson v. Bertock, 747.
Will v. United Lankat Plantations Co., Ltd., 447, 451.
Willamette Freighting Co. v. Stannus, 383.
Willard v. Holmes, Booth & Haydens, 246.
Willcocks, Ex parte, 589, 594.
William B. Riker & Son Co. v. United Drug Co., 191.
William Co. v. United States Baking Co., 195.
William Gilligan Co. v. Casey, 80.
Williams v. Bank of Michigan, 23.
Williams v. Brewster, 755.
Williams v. Cheney, 782.
Williams v. East Tennessee, V. & G. R. Co., 84.
Williams v. East Wareham, O. B. & P. I. St. R. Co., 677.
Williams v. Enterprise Co., 334.
Williams v. Evans, 475, 477.
Williams v. Halliard, 654.
Williams v. Hewitt, 106, 118, 125.
Williams v. Ingersoll, 536.
Williams v. Johnson, 143, 177.
Williams v. McDonald, 647, 751.
Williams v. McKay, 650.
Williams v. Matthews, 744.
Williams v. Mechanics' Bank, 530, 534.
Williams v. Montgomery, 516.
Williams v. Nall, 275.
Williams v. Savage Mfg. Co., 187.
Williams v. Taylor, 398, 744.
Williams v. Traphagen, 747.
Williams v. Union Bank, 51, 94.
Williams v. Western Union Telegraph Co., 323, 426, 430, 431.
Williamson v. Kokomo Bldg. & Loan Fund Ass'n, 102, 110.
Williamson v. Smoot, 759.
Williamson's Syndics v. Smoot, 7.
Williamsport & H. Turnpike Co. v. Startzman, 203.
Willis v. Chapman, 24, 53.
Willis v. Mabon, 705, 707, 709.
Williston v. Michigan S. & N. I. R. Co., 433, 451, 452.
Willmott v. London Road Car Co., 27.
Willoughby v. Chicago Junction Rys. & Union Stockyards Co., 504.
Wills v. Nehalem Coal Co., 139, 140, 311, 404.
Wills v. Porter, 501.
Wilmington City R. Co. v. Wilmington & B. S. R. Co., 270.
Wilmington & W. R. Co. v. Alsbrook, 287, 288.
Wimington & W. R. Co. v. Reid, 287.
Wilson v. Aeolian Co., 687.
Wilson v. Carter Oil Co., 179.
Wilson v. Leary, 153, 315, 316, 318.
Wilson v. Martin-Wilson Automatic Fire-Alarm Co., 791.
Wilson v. Metropolitan Electric R. Co., 667.
Wilson v. Meyer, 360.
Wilson v. Proprietors of Central Bridge, 595.
Wilson v. Southern R. Co., 87.
Wilson v. Stevens, 751, 753.
Winch v. R. Co., 169.
Wincham Ship Building, Boiler & Salt Co., In re, 754.
Winchester v. Howard, 707, 751.
Winchester & L. Turnpike Co. v. Wickliffe's Adm'r, 433.
Wincock v. Turpin, 735, 749.
Windmuller v. Standard Distilling & Distributing Co., 499, 597, 632.
Windsor Electric Light Co. v. Tandy, 392, 393.
Wineburgh v. United States Steam & Street Ry. Advertising Co., 653, 799.
Wing v. Slater, 708, 711.
Winget v. Quincy Bldg. & Homestead Ass'n, 104, 115, 121.
Winn v. Wabash R. Co., 86.
Winsor v. Bailey, 500.
Winston v. Brooks, 379.
Winter v. Baldwin, 416, 417.
Winter v. Montgomery Gaslight Co., 533, 543.
Winterfield v. Cream City Brewing Co., 175.
Winters v. Armstrong, 383.
Wintner v. Rosemont Realty Co., 129, 135.
Wisconsin Lumber Co. v. Greene & W. Tel. Co., 188, 189.

[The figures refer to pages]

Wisconsin Tel. Co. v. Oshkosh, 72.
Wiser v. Lawler, 128.
Wishard v. Hansen, 468.
Witherbee v. Bowles, 488.
Withers v. Edmonds, 602.
Witte v. Fishing Co., 197.
Witters v. Sowles, 725.
Wittmer Lumber Co. v. Rice, 175.
W. L. Wells Co. v. Gastonia Cotton Mfg. Co., 60, 65.
Wolf v. Lancaster, 773.
Wolf v. Pennsylvania R. Co., 491, 563.
Wolfe v. Underwood, 426.
Wolff Dryer Co. v. Bigler, 775.
Wolford v. Crystal Lake Cemetery Ass'n, 169.
Wolters v. Henningsan, 749.
Wonderly v. Booth, 68, 109.
Wood v. Chamber of Commerce of City of Milwaukee, 507, 511.
Wood v. Dummer, 424, 678, 680, 702.
Wood v. Hammond, 208.
Wood's Sons Co. v. Schaefer, 666.
Woodberry v. McClurg, 183.
Woodbridge v. Pratt & Whitney Co., 583.
Woodbury v. Allegheny & K. R. Co., 172.
Woodbury Heights Land Co. v. Loudenslager, 136, 141.
Wood Harvester Co. v. Jefferson, 331, 374, 385, 391,
Wood Harvester Co. v. Robbins, 331, 338, 390.
Woodroof v. Howes, 597.
Woodrough & Hanchett Co. v. Witte, 83.
Woodruff v. Dubuque & S. C. R. Co., 600, 602.
Woodruff v. McDonald, 352.
Woods Motor Vehicle Co. of Buffalo v. Brady, 352, 566.
Woodson v. State, 761.
Woodward v. Central Vermont R. Co., 274.
Woodward v. Mutual Reserve Life Ins. Co., 797.
Woodworth v. Bowles, 707, 714, 733.
Woodworth v. Old Second Nat. Bank, 412.
Wooten v. Wilmington & W. R. Co., 553.
Worcester Medical Inst. v. Harding, 115.
Worcester Turnpike Corp. v. Willard, 338, 396.
World's Fair Excursion & Transportation Boat Co. v. Gasch, 382, 405, 698, 699, 729.
Wormser v. Metropolitan St. R. Co., 502.
Wrexham, etc., L. R., In re, 222.
Wright v. Agelasto, 374.
Wright v. Central California C. W. R. Co., 591, 598, 670.
Wright v. Hughes, 160, 166, 171, 203, 225, 230.
Wright v. Lee, 100, 119, 564, 587, 610, 615, 760, 778, 782.
Wright v. McCormack, 741.
Wright v. Milwaukee Electric Ry. & Light Co., 168.
Wright v. Minnesota Mut. L. Ins. Co., 571.
Wright v. Pipe Line Co., 225, 226.
Wright v. Southwestern R. Co., 281.
Wright v. Stewart, 246.
Wright v. Wright, 442.
Wright Bros. v. Merchants' & Planters' Packet Co., 334, 339.
Wright Lumber Co. v. Hixon, 522.
W. Scheidel Coil Co. v. Rose, 192.
Wuller v. Chuse Grocery Co., 326.
Wyman v. Bowman, 374, 642, 732, 744.
Wynehamer v. People, 268.

Y

Yakima Nat. Bank v. Knipe, 95.
Yale Gas Stove Co. v. Wilcox, 136, 140.
Yanish v. Pioneer Fuel Co., 200.
Yarborough v. Bank, 242, 243.
Yardley v. Wilgus, 724.
Yates v. Jones Nat. Bank, 647, 756.
Yazoo & M. V. R. Co. v. Adams, 192.
Yeaton v. Bank of Old Dominion, 53, 271.
Yeiser v. United States Board & Paper Co., 140.
Yetter v. Delaware Valley R. Co., 591.
Yonkers Gazette Co. v. Taylor, 334, 337, 353, 388, 389.
York Park Bldg. Ass'n v. Barnes, 73, 349, 378.
York & M. Line R. Co. v. Winans, 161, 169, 237.
Youmans v. Minnesota Title Ins. & Trust Co., 798.
Young, Ex parte, 504.
Young v. Erie Iron Co., 470, 480.
Young v. McKay, 719.
Young v. Naval Society, Ltd., 668.
Young v. Plattner Imp. Co., 116.
Young v. South T. Iron Co., 329.
Young v. United Zinc Co., 159.
Younglove v. Lime Co., 710, 741, 742, 745.
Youree v. Home Town Mut. Ins. Co. of Warrensburg, Mo., 294.
Yule v. Bishop, 717.

Z

Zabriskie v. Cleveland, C. & C. R. Co., 487.
Zakriskie v. Hackensack & N. Y. R. Co., 260, 275, 496, 565, 567, 570.
Zalesky v. Iowa State Ins. Co., 618.
Zang v. Adams, 360.
Zeis v. Potter, 629.
Zelaya Min. Co. v. Meyer, 468.
Zeltner v. Henry Zeltner Brewing Co., 671.
Zimmer v. State, 193, 258, 259.
Zinc Carbonate Co. v. First Nat. Bank, 242, 246, 663.
Zinn v. Germantown Farmers' Mut. Ins. Co., 428.
Zinn v. Mendel, 664, 665, 752.
Zion Co-op. Merc. Ass'n v. Mayo, 765.

INDEX

[THE FIGURES REFER TO PAGES]

A

ABANDONMENT,
Of charter, 295.
Of business and franchises, 298.
Of articles of association, 354.

ABATEMENT AND REVIVAL,
See Actions.

ABUSE OF POWER,
See Forfeiture of Charter; Officers and Agents; Powers and Liabilities of Corporation.

ACCEPTANCE,
Of charter, 52–56.
Of amendment of charter, 55, 270.
Presumption from conduct, 52, 54.
Power of majority to accept amendment of charter, 560, 565.
Of subscription to stock, 331, 335.
By state of surrender of charter, 295.

ACCOMMODATION PAPER,
Power of corporation to execute, 157, 174.
Negotiable paper, bona fide purchasers, 218–220.

ACCOUNTING,
By officers, see Officers and Agents.

ACTIONS,
Power of corporation to sue, 145.
Between the corporation and its members, 9.
By stockholder against corporation for dividend, 420, 426, 432.
Against corporation for refusal to recognize transfer of shares, 557.
By corporation on subscriptions, 392–397.
By and against corporation after dissolution, 313.
By corporation against officers and agents, 646, 652.
By stockholders against directors or officers and agents, 672.
By stockholders for injuries to corporation, and interference in management, 6, 13, 482 et seq.
At law, 6, 482, 483.
In equity, 13, 482 et seq.
Acts within power of majority, and discretionary powers, 495.
The rule as stated by the United States supreme court, 499.
Laches and estoppel, 501.
Motive of stockholder suing, 503.
Parties to suits, 503.
Abatement and revival, dissolution of corporation, 314.
Action to enforce liability of stockholder to creditors, 725.
By and against foreign corporations, 787 et seq.
By creditors of corporation, see Creditors of Corporations.

[The figures refer to pages]

AGENCY,
Subscriptions by agent, 365, 366.
Effect of want of authority, 365, 366.
Agents of corporation, see Officers and Agents.

AGGREGATE CORPORATIONS,
In general, 1, 27, 28.
See Corporations.

AGREEMENTS,
Between corporators, 66.
Between corporators and the corporation, 66.
Between corporation and the state, acceptance of charter, 52–56.
See Contracts; Stockholders and Members.

ALIENS,
As corporators, 68.
As subscribers to stock, 346.

ALLOTMENT,
Of shares, 386.

ALTERATION,
Of subscription, 352, 353.
Of subscription paper, when material, 353, 354.
Subscriber for shares, when released by, 352, 353.
Of charter, see Amendment; Majority; State Control.

AMENDMENT,
Of charter, power of state, see State Control.
Acceptance, 52, 53, 270.
General and special laws, 46, 47, 48.
As a release of subscribers, 406.
To authorize preferred stock, 448.
Power of majority, 560, 565.
Of by-laws, 581.

AMOTION,
What corporations possess implied power of, 146.
Of directors or officers, 609.
By-laws, 574.
Expulsion of members, 505–511.

APPOINTMENT,
Of agents, see Officers and Agents.

ARTICLES OF ASSOCIATION,
Necessity for, and sufficiency, 57 et seq.
Filing or recording, 58, 59.
Publishing, 58, 59.
See Charters; Creation of Corporations; De Facto Corporations; Estoppel.

ASSAULT AND BATTERY,
See Torts.

ASSESSMENTS AND CALLS,
In general, 397–402.
Necessity, 398.
Validity, 399.
Notice and demand, 401.
Interest, 402.
Action by corporation, 397–398.
Liability after transfer of shares, 518.

ASSETS,
As a trust fund, see Creditors of Corporations.

[The figures refer to pages]

ASSIGNMENT,
Of unpaid subscription to stock, 402.
By corporation for benefit of creditors, 691.
Of shares, see Transfer of Shares.

ASSUMPSIT,
See Actions.

ATTACHMENT,
Of shares of stock, 324, 327.
Of corporate property, 676.
Of property of foreign corporation, 796.

ATTORNEY, POWER OF,
See Transfer of Stock.

ATTRIBUTES,
Of corporation, 14 et seq.
Vital corporate, 22.

B

BANKING CORPORATIONS,
Powers, lending money, 150.
Buying notes, etc., 150
Purchase of real or personal property, 165.
See heading relating to particular point.

BANKRUPTCY ACT,
Corporate cloak to evade, 687, 688.
Criminal liability of corporation for violation of, 253.

BEQUEST,
See Powers and Liabilities of Corporation.
Income and profits of shares, 436.

BILLS AND NOTES,
See Contracts.

BOARD OF DIRECTORS,
See Officers and Agents.

BONDS,
See Contracts.
Distinguished from shares, 329.
Characteristics of, 324, 329.

BONUS STOCK,
See Watered and Bonus Stock.

BOOKS,
Inspection by stockholders or members, 411–418.
As evidence, see Evidence.

BORROWING,
See Contracts.

BY-LAWS,
In full, 572–582.
By whom enacted, 572.
Must be proved, not judicially noticed, 573.
Validity, 574 et seq.
Providing for election, appointment, and removal of officers, 574.
Limiting powers and prescribing duties of officers and agents, 574, 624, 626.
Provision for corporate meetings, 574.
Regulating right to vote, 574.
Regulating transfer of shares, 513, 514, 574, 576, 577.
Providing for expulsion of members, 574.

BY-LAWS—Continued,
Denying right of inspection of books, 413.
Must be consistent with law, 574, 575.
Restraint of trade, 575.
Giving lien on shares, 521, 576.
Providing for forfeiture of shares, 575, 577.
Must be reasonable, 574.
Must be general, 575.
Must be consistent with charter, 577.
Cannot deprive stockholder of contract rights, 578.
Partial invalidity, 578, 579.
Effect as to stockholders, 579.
Effect as to third persons, 579.
Repeal and amendment, 581.
Waiver of by-laws, 581.
Violation by officers, liability to corporation, 647.

C

CALLS AND ASSESSMENTS,
In general, 397–402.
Necessity, 398.
Validity, 399.
Notice and demand, 401.
Interest, 402.
Action by corporation, 397, 398.
Liability after transfer of shares, 518.

CAPACITY,
Of corporators, 67.

CAPITAL STOCK,
Defined, 322, 323.
Distinguished from shares of stock, 322, 324.
Distinguished from surplus, 323, 324.
Distinguished from capital, 322.
Corporation cannot subscribe for shares of its own, 347.
Increase of, 442.
Subscriptions and payment thereof, 443.
Unauthorized increase, 444.
Shareholder's right to preference, 444.
Preferred stock, 446–454.
Defined, 446.
Power to create, 446.
Amendment of charter authorizing, 448.
Laches and estoppel of stockholders, 449.
Rights and liabilities of holders of, 450.
Dividends, 450, 451.
Liability to creditors, 453.
Status as creditors and not stockholders, 451, 453.
Watered and bonus stock, 445–482.
Defined, 455.
Effect as to corporation, 455, 456.
Effect as to stockholders, 455, 458.
Effect as to stockholders, 458.
Effect as to creditors, 455, 458.
Payment of original subscriptions, 455, 459.
Increase of capital stock, 455, 462.
Issue of stock at market value by active corporation to pay debts, etc., 455, 462.
Gratuitous issue of stock, 455, 466.

[The figures refer to pages]

CAPITAL STOCK—Continued,
Payment for stock in property or services, 455, 467.
Value of property or services, 455, 468.
"Good faith" rule distinguished from "true value" rule, 469, 470.
Creditors who cannot complain, 455, 473.
Effect of constitutional and statutory provisions, 456, 475.
Liability of transferees, 480.
Power of corporation to acquire and hold stock, 157, 183, 187.
Certificates of stock, see Certificates.
Subscriptions, see Subscriptions to Stock.
Transfer, see Transfer of Shares.
As a trust fund, see Creditors of Corporations.

CASHIER,
See Officers and Agents.

CERTIFICATES,
Of incorporation, necessity for and sufficiency, 57 et seq.
Filing or recording, 58, 59.
Publishing, 58, 59.
See De Facto Corporations; Estoppel.
Of stock, nature of, 329, 390.
Not necessary to membership in corporation, 329, 390.
New certificate on transfer of shares, 538.
Compelling issuance, 558.
Forged and unauthorized certificates, 539, 544, 548, 550.
Liability of indorser, 550.
Liability of corporation, 551, 553, et seq.
Negotiable under uniform stock transfer act, 548.
Not negotiable at common law, 539, 540.

CHARITABLE CORPORATIONS,
Nature, 28, 30.

CHARTER,
Authority from the state essential to corporate existence, 35.
Power to grant charter, 35.
Power of state legislatures, 36.
Grant of exclusive privileges, 36.
Enactment of acts, two-thirds vote, 38.
Restriction as to subject and title of acts, 37, 38.
Restrictions in federal constitution, 38, 39.
Power of congress, 35, 40.
Corporations in District of Columbia, 41.
Power of territorial legislatures, 35, 41.
Presumption of charter, prescription, 35, 36.
Delegation of power to create corporations, 35, 41.
Performance of ministerial acts, 35, 42.
General and special laws, 43–49.
Limitation on power of territorial legislature, 41.
Distinction between general and special law, 43.
Conferring additional privileges or powers, 46, 47.
Amendment of charter, 46, 47.
Special law defined, 48.
Intention to create a body corporate, 49, 50.
Ratification of claim to corporate existence, 51.
Acceptance of charter, 52–55.
Withdrawal or repeal of offered charter or enabling act, 53, 54.
Presumption of acceptance, 53, 54.
Who may accept, 53, 54.
Acceptance of amendment, 55.
Who may accept, 55.
See Amendment.

[The figures refer to pages]

CHARTER—Continued,
Place of organization, outside the state, 56.
Compliance with conditions precedent, 57–65.
Substantial compliance sufficient, 57, 61.
Directory provisions, 57, 62.
Conditions subsequent, distinguished, 57, 63.
Who may object, de facto corporations, 57, 65.
Estoppel, 57, 65.
Particular conditions, 57–64.
As a license, 258.
Surrender, 295.
Extension of, 90.
Distinguished from creation of new corporation, 90.
Effect, 90.
Expiration, 100, 292.
Construction of, in general, 146.
In favor of the public in cases of doubt, 146–148.
General terms following special terms, 146, 149.
Express mention and implied exclusion, 146, 150.
Intention to create a body corporate, 49.
Purpose of incorporation, 70 et seq.
See Powers and Liabilities.
Forfeiture, see Dissolution; Forfeiture of Charter.
As a contract not to be impaired, see State Control.
Amendment, see Amendment.

CITIZEN,
Corporation as a, 26, 82, 85.

CITIZENSHIP,
Of corporation, 82 et seq.
Domicile—residence—habitat, 83.
Fiction of citizenship of corporators, 85.
For purpose of jurisdiction of federal courts, 84, 85.
For purpose of privileges and immunities of citizens, 85, 762.
For purpose of Fourteenth Amendment to federal constitution, 284, 763.
Where there are charters from several states, 82, 86.
Charter distinguished from license, 82, 89.
See Foreign Corporations.
Of joint-stock company, 25.

CIVIL CORPORATION,
Defined, 28, 30.

COLLATERAL ATTACK,
Existence of de facto corporation, 97, 98.
Ultra vires contract, 234, 235.

COMITY,
See Foreign Corporations.

COMPANIES,
See Corporations; Joint-Stock Company.

COMPENSATION,
Of directors and officers, 666.

COMPETITION,
Contracts to prevent, 179.

CONDITIONS PRECEDENT,
To formation of corporation, 57–64.
Substantial compliance sufficient, 57, 61.
Directory provisions, 57, 62.
Conditions subsequent, distinguished, 57, 63.

[The figures refer to pages]

CONDITIONS PRECEDENT—Continued,
Who may object, de facto corporations, 57, 65.
Estoppel, 57, 65, 66.
Particular conditions, 57, 64, 65.
In contract of subscription, 368 et seq.
After incorporation, 369.
Prior to incorporation, 372.
Must be expressed in the writing, 372, 374.
Waiver, 374.
Distinguished from special terms, 368, 375.
Foreign corporations, 777, 788.

CONDITIONS SUBSEQUENT,
Distinguished from conditions precedent to incorporation, 63, 64.
In subscriptions to stock, 375.
Distinguished from conditions precedent, 368, 375.
Validity, 377.
Who may receive, 379.

CONFLICT OF LAWS,
Power to take and hold property, 154.
Transfer of shares, 527.
Statutory liability of stockholders to creditors, 732, 735, 746.

CONGRESS,
Power to create corporations, 35, 40.
In District of Columbia, 35, 41.

CONSIDERATION,
For subscription to stock, 337 et seq.

CONSOLIDATION,
Power of corporations to consolidate, 157, 191.
Effect as to creditors, 694.

CONSPIRACY,
Liability of corporations, 242, 245.
Criminal liability of corporation for, 253.
See Torts.

CONSTITUTIONAL LIMITATIONS,
On power of state legislatures to create corporations, 35, 37.
Requirement of two-thirds vote, 38.
Restrictions as to subject and title of acts, 37, 38, 39.
Grant of exclusive privileges, 37.
General and special laws, 43–49.
Distinction, 43 et seq.
Conferring additional privileges or powers, 46, 47.
Special law defined, 48.
Restrictions of federal constitution, 37, 38, 39.
Power of congress to create, 34, 40.
In District of Columbia, 35, 41.
Federal corporation not controllable by states, 41.
Territorial corporations, 34, 41.
Delegation of power to create corporations, 35, 41.
Performance of ministerial acts, 35, 42.
The charter as a contract not to be impaired, see State Control.
Impairing rights of creditors, 713.

CONSTRUCTION,
Of charters, see Charters.

CONTEMPT OF COURT,
Liability of corporation for, 255.
Punishment by fine of corporation for a, 255.

[The figures refer to pages]

CONTINUOUS SUCCESSION,
The attribute of, 16, 17.

CONTRACTS,
Power to contract, in general, 142 et seq., 156.
Purchase of real and personal property, 151, 156, 163, 165.
Sale, conveyance, lease, mortgage, or pledge, 156, 165.
Railroad and other quasi public corporations, 156, 161, 168, 170.
Sale or mortgage of franchise, 156, 157, 168, 170.
Borrowing money, 156, 171.
Executing bonds, 156, 171.
Negotiable instruments, 156, 172.
Suretyship and guaranty, 156, 174.
Accommodation paper, 157, 174.
Contracts of partnership, 157, 177.
Joint contracts, 157, 178.
To prevent competition, 179.
Subscription for or purchase of stock in another corporation, 157, 183.
Taking and holding stock to secure, or in payment of debt, 157, 185, 186.
Purchase of its own stock, 157, 187–190.
Taking and holding stock to secure, or in payment of debt, 157, 185, 187.
Presumption of power to contract, 158, 193.
Lending money, 150.
Subscription to expenses of festival, etc., 162.
Offer of reward for apprehension of criminals, 160.
Form and mode of corporate contracts, 194 et seq.
Seal, 21, 194, 198.
Effect of seal, 201.
Appointment of agent, 194.
Implied contracts, 196.
Quasi contract, 196.
Requirement of writing, 195.
Effect of ultra vires contract, see Ultra Vires.
Illegal contracts, see Ultra Vires.
Of members, not binding on corporation, 7.
Between corporators, 66.
Between corporators and the corporation, 66.
Between the corporation and the state, acceptance of charter, 52–55.
The charter as a contract not to be impaired, see State Control.
By promoters, 128, 130, 136.
Subscriptions, see Subscriptions to Stock.
For sale of shares, statute of frauds, 324, 326.
Between stockholder or member and corporation, 9, 631.
Between officers and corporation, 636 et seq.
Liability of officers and agents to third persons, 656.
Of foreign corporations, 759, 760.

CONTRIBUTION,
Between stockholders, 749.

CONVEYANCES,
Of corporate property by members, 5, 6.
Between members and the corporation, 9.
Power to take, 151, 156, 163, 165.
Power to make, 156, 165.
Railroad and other quasi public corporations, 156, 161, 168, 170.
Conveyance of franchise, 156, 157, 168, 170.

COPARTNERSHIP,
See Partnership.

[The figures refer to pages]

CORPORATE ENTITY,
Explained, 5 et seq.
See Entity; Fiction.

CORPORATE NAME,
In general, 18, 76, 145.
See Name of Corporation.

CORPORATION,
Defined, 1, 3, 4, 5.
As a legal entity, 5, 18.
As a collection of individuals, 10.
As a mere legislative conception, 5.
As a responsible and respectable person, 27.
Attributes and incidents, 14.
Distinguished from partnership, 13 et seq.
From unincorporated joint-stock company, 22–25.
As a person, citizen, inhabitant, etc., 26.
Kinds of corporations, 27.
Sole and aggregate, 27.
Religious or ecclesiastical, 28, 30.
Eleemosynary, 28, 30.
Civil, 28, 30.
Public and private, 28, 30.
Stock and nonstock, 28, 33.
Quasi corporations, 28, 33.
By prescription, 35, 36.
De facto, see De Facto Corporations.
Foreign corporations de facto, 786.
Distinction between corporation and its members, 1–10.

CORPORATORS,
Agreement between, 66.
Agreement between corporators and corporation, 66.
Who may become, 67, 68.
Number of, 57, 67, 68.
See Stockholders or Members.

COVERTURE,
See Married Women.

CREATION OF CORPORATIONS,
In general, 34 et seq.
Power to create, 34.
State legislatures, 34, 37.
Congress of the United States, 34, 40.
In District of Columbia, 34, 41.
Territorial legislatures, 35, 41.
Corporations by prescription, 35, 36.
Delegation of power, 35, 41.
General and special laws, 43 et seq.
Constitutional restriction, 46.
Ratification of claim to corporate existence, 51.
Intention to create, 49, 50.
Agreement between corporation and the state, acceptance of charter, 52, 53.
Place of organization, 56.
Compliance with conditions precedent, 57.
Articles of association or certificate, necessity and sufficiency, 57 et seq.
Filing or recording, 58, 59.
Publishing, 58, 59.
See De Facto Corporations; Estoppel.
Agreement between corporation and corporators, 66.

[The figures refer to pages]

CREATION OF CORPORATIONS—Continued,
Who may become corporators, 67, 68.
Number of corporators, 57, 67, 68.
Purpose of incorporation, 70 et seq.
Attempt to evade statute by, 74.
Fraudulent acts in, 74, 75.
Corporations in restraint of trade, 73, 74.
Corporate name, 76.
Advantages of, under general laws, 48, note.
Residence and citizenship of corporations, 82.
Corresponding charters in several states, 82, 86.
Recognition of foreign corporation distinguished, 82, 87, et seq.
Extension of charter or creation of new corporation, 90.
Proof of corporate existence, 93.
For particular questions, see specific heads.

CREDITORS OF CORPORATIONS,
Relation between creditors and the corporation, 675–696.
Remedies in general, 675.
Property subject to execution, 676.
Assets of a corporation as a trust fund for creditors, 677–684.
Interference in management of corporation, 684.
Fraudulent conveyances and transfers, 687.
Subsequent creditors, 688.
Necessity for judgment before attacking, 689.
Suits for injunction and receiver, 690.
Assignment for benefit of creditors, 691.
Right to prefer creditors, 691.
Dissolution of corporation, effect, 693.
Effect of consolidation of corporations, 694.
Extension of charter, new corporation, 695.
Set-off by debtor of corporation, 696.
Relation between creditors and stockholders, 697–749.
Liability of stockholders to creditors at common law, 20, 697, 703.
Liability on subscriptions, 698, 699.
Conditional subscriptions, 698.
Subscriptions on special terms, 699.
Release of subscribers by corporation, 699.
Liability of holders of watered or bonus stock, 455, 458, 700.
Original subscriptions, 455, 459.
Increase of capital stock, 355, 360.
Increase of capital stock, 462.
Issue of stock at market value by going corporation to pay debts, etc., 455, 462.
Gratuitous issue of stock, 455, 466.
Payment for stock in property or services, 455, 467.
Value of property or services, 455, 468.
Creditors who cannot complain, 455, 473.
Effect of constitutional and statutory provisions, 455, 475.
Liability of transferees, 480.
Rights as to profits and dividends, 701.
Diversion of capital, unauthorized dividends, 701.
Preferred stockholders, 453, 702.
Statutory liability of stockholders to creditors, 703–727.
May be excluded by express agreement, 704.
Unpaid installment of subscriptions, 704.
Unlimited statutory liability, 704.
Limited liability, 705.
Liability until capital is paid in, 706.

[The figures refer to pages]

CREDITORS OF CORPORATIONS—Continued,
Constitutional provisions, 707.
Effect of dissolution of corporation, 707.
Nature of liability, whether penal or contractual, 708.
Nature of contractual liability, 709.
What constitutes dissolution for purpose of statute, 710.
Debts, demands, etc., within the statutes, 710.
Debts due clerks, laborers, etc., 711.
Excepted classes of corporations, 712.
Release or discharge of corporations, 712.
Constitutional law, laws affecting existing corporations, 713.
Repeal or change of law, 713.
Who liable as stockholders under the statutes, 714.
General rule, 714.
Shares registered in name of person without his knowledge, 716.
Effect of transfer of shares, 716.
Registration of transfer, 718.
Transfer to person incapable of assuming liability, 719.
To infant, 719.
To corporation, 719.
To insolvent, 720.
Sham or colorable transfers, 721.
Transfers after suspension of business, 722.
Pledgees, 722.
Trustees, executors, agents, etc., 723.
Election between apparent and real owner, 724.
Assignees in bankruptcy or insolvency, 724.
Married women, 724.
Death of stockholder, survival of liability, 725.
Forfeiture of stock, 725.
Holders of unauthorized stock, 725.
Status of preferred stockholders, whether creditors, 451, 453.
Who may enforce statutory liability, 726.
Stockholders or officers who are creditors, 727.
Remedies of creditors against stockholders, 728.
Common-law liability on subscriptions, etc., 728, 729.
Action by assignee for creditors or in bankruptcy, 729.
Action at law by creditors, 729.
General creditors' bill in equity, 730.
Suit for appointment of receiver, 730.
Parties to suit, 731.
Necessity for calls, 732.
Statutory remedies, 732.
Statutory liability, 733.
Where the statute gives a remedy, 733.
Where no remedy is prescribed, 734.
Enforcement in foreign jurisdiction, 732, 735, 746.
Necessity for judgment against corporation, 740.
Effect of judgment against corporation, 742.
Statute of limitations, 743.
Liability on subscription, 743.
Statutory liability, 744.
Enforcement in foreign jurisdiction, 746.
Set-off by stockholders, 747.
Contribution among stockholders, 749.
Relation between creditors and officers, 750–757.
Liability of officers to creditors at common law, 750.
Preferences to officers who are creditors, 752.
Statutory liability of officers, 754.
Enforcement in foreign jurisdiction, 756.

[The figures refer to pages]

CRIMES,
Responsibility of corporation, 249.
Liability of corporation for offenses involving mental element, 252.
Misfeasance, 250.
Nonfeasance, 249.
Tendency to hold corporations liable for, 255.

CUMULATIVE VOTING,
At stockholders' meetings, 598.
Authorized under reserved power, 276.

CURATIVE ACTS,
Ratifying claim to corporate existence, 51.

D

DAMAGES,
Liability of corporation for exemplary or punitive, 247.

DEBTS,
See Powers and Liabilities.

DECEIT,
See Torts.

DEEDS,
See Contracts; Conveyances.

DE FACTO CORPORATIONS,
Defined, 93, 97, 98.
Status and powers, 93, 95, 97, et seq.
Power of eminent domain, 100.
Collateral attack upon is not permitted, 98.
Foreign de facto corporations, 100, 786.
De facto existence after expiration of charter, 100 et seq.
What necessary to constitute, 97–112.
Valid law authorizing incorporation, 103.
Bona fide attempt to organize, 65, 104.
Sufficiency of compliance with law, 106.
Payment of fees, 107.
User of corporate powers, 108.
Fraudulent attempt to organize, 109.
Modern tendency to apply doctrine of, 125.
Doctrine is distinct from doctrine of estoppel, 109, 110.
See Estoppel.

DE FACTO DIRECTORS,
See Officers and Agents.

DEFINITIONS,
Corporation, 1, 3, 4, 5.
Unincorporated joint-stock company, 22.
Sole corporation, 27.
Aggregate corporation, 1, 28.
Religious corporation, 27, 30.
Ecclesiastical corporation, 27, 30.
Eleemosynary corporation, 27, 30.
Lay corporation, 30.
Civil corporation, 28, 30.
Public corporation, 28, 30.
Private corporation, 28, 30.
Stock corporation, 28, 33.
Nonstock corporation, 28, 33.
Quasi corporations, 28, 33.
Foreign corporations, 82 et seq., 758 et seq.

[illegible]

DEFINITIONS—Continued.
Corporations by prescription, [illegible]
De jure corporation, [illegible]
Capital, [illegible]
Capital stock, [illegible]
Shares, [illegible]
Certificates of stock, [illegible]
Common stock, [illegible]
Preferred stock, [illegible]
Guaranteed stock, [illegible]
Dividend, [illegible]
Stock dividend, [illegible]
Promoters, [illegible]
Prospectus, [illegible]
Underwriting, [illegible]

DE JURE CORPORATION.
Definition of, [illegible]

DELEGATION.
Of power to create corporation, [illegible]
Performance of ministerial acts, [illegible]

DENTISTRY.
Practice of, by corporation, [illegible]

DEPOSIT.
Payment of, by subscriber, [illegible]

DERIVATIVE SUITS.
See Stockholders or Members; Actions; Equity.

DEVISE.
To corporation, [illegible]
To foreign corporation, [illegible]

DIRECTORS.
See Officers and Agents; Mandatories; Trustees.

DIRECTORY PROVISIONS.
Character of, [illegible]
Effect of noncompliance, [illegible]

DISCHARGE.
Of subscriber, see Subscriptions to Stock.

DISCOUNT.
Issue of shares at a, [illegible] et seq.

DISORDERLY HOUSE.
Liability of corporation for maintaining a, [illegible]

DISREGARD OF CORPORATE ENTITY.
See Definitions; Entity; Fiction.

DISSOLUTION OF CORPORATION.
How effected, [illegible]
Expiration of charter, [illegible]
By act of the legislature, [illegible]
Loss of integral part, death or loss of members, [illegible]
Surrender of charter, [illegible]
Loss or surrender of property, [illegible]
Sale of entire corporate property as a practical, [illegible]
Abandonment of franchises or business, [illegible]
Forfeiture of charter, [illegible]
Who may declare, [illegible]
Necessity for judicial proceeding, [illegible]
When forfeiture will be decreed, [illegible]

[The figures refer to pages]

DISSOLUTION OF CORPORATION—Continued,
Waiver of forfeiture, 306.
Modes of proceeding to enforce, 309.
Equity jurisdiction, 310.
Effect of dissolution, 313 et seq.
Exercise of corporate powers, 314, 315.
Actions and proceedings after dissolution, 313, 314.
Judgment rendered after dissolution, 314.
Extinguishment of debts, 313, 315, 317.
Reversion and escheat of property, 316 et seq.
Equity jurisdiction over assets, 316, 317, 802.
Effect as to creditors, 693.
Effect in foreign jurisdiction, 803.
Statutory rules modifying effect of, 315.
Acts of members as acts of corporation, for purpose of forfeiture, 11.
Extension of charter, 90.

DISTRIBUTION,
Of shares in case of excessive subscriptions, 382, 386.

DIVIDENDS,
Rights as to profits and dividends, 418–442.
Dividend defined, and distinguished from profits, 422, 423.
No right to profits until dividend declared, 420.
Right to dividend vests when it is declared, 420, 421.
When dividends may be declared, 422.
Discretion of directors as to declaring, 426.
Who entitled to dividends, 427.
Effect of transfer of shares, 428, 429, 520.
How payable, 430.
Specific fund to pay, 434.
When cumulative, 452.
Stock dividends, 430.
Set off against debt due to corporation, 431.
Remedies of stockholders, 432.
Interest, 432.
Statute of limitations, 432.
Remedies where dividends are improperly paid, 434.
On preferred stock, 450, 451.
Grants and bequests of income and profits of stock, 436–442.
Rights as between life tenant and remainderman, 436–442.
Extraordinary, apportionment between life tenant and remainderman, 439–441.
Rights of stockholders as against creditors of corporation, 434.

DOING BUSINESS,
See Foreign Corporations.

DOMICILE,
See Citizenship; Foreign Corporations.

DRUNKEN PERSONS,
As subscribers to stock, 346.

E

ECCLESIASTICAL CORPORATION,
Defined, 30.

ELECTIONS,
See Meeting of Stockholders; Officers and Agents.

ELEEMOSYNARY CORPORATION,
Defined, 27, 30.

[illegible]

EMINENT DOMAIN,
Power of state, [illegible].
Possession of power of, by de facto corporations, [illegible].

ENTITY,
See Corporation; Definitions; Fiction.
Corporate entity explained, [illegible] et seq.
Doctrine of corporate, when disregarded, [illegible].

EQUITY,
Suits by stockholders, interference in management, [illegible] et seq.
Acts within power of majority and discretionary powers, [illegible].
Rule stated by the United States supreme court, [illegible].
Laches and estoppel, [illegible].
Motive of stockholder suing, [illegible].
Parties to suit, [illegible].
To compel declaration of dividend, [illegible].
Jurisdiction to dissolve corporation, [illegible].
Jurisdiction over assets of dissolved corporation, [illegible].
Jurisdiction over stockholders' meetings, [illegible].
No jurisdiction to remove director, [illegible].
Power to admit to membership in nonstock corporation, [illegible].
Suits by creditors, see Creditors of Corporations.

ESCHEAT,
Of property on dissolution of corporation, [illegible] et seq.

ESCROW,
Conditional delivery of subscription, [illegible].

ESTOPPEL,
By contract or otherwise, to deny organization and existence of corporation, [illegible].
Necessity for recognition of corporate existence, 116.
The doctrine based upon equitable grounds, [illegible].
Unlawful assumption of corporate powers, [illegible].
The doctrine not limited to de facto corporations, 119.
Of subscriber to stock, to deny corporate existence, [illegible], 114, note.
To dispute validity of subscription, 409.
To show secret agreement, [illegible].
Of foreign corporation, to set up failure to comply with condition, [illegible].

EVIDENCE,
Proof of corporate existence, 93–96.
Of acceptance of charter, presumption, 52, 54.
Of amendment, 55.
Presumption of charter, corporations by prescription, [illegible].
Presumptions of corporate power, 151, 157, [illegible].
Parol evidence of condition in subscription, 374.
Oral subscriptions to stock, 348, 349.
Corporate books as prima facie, 715, 716.

EXCLUSIVE PRIVILEGES,
Power to grant, 36.
Power of state, 261.

EXECUTION,
Property of corporation subject to, 676.
Levy upon shares of stock, 324, 327.

EXECUTIVE COMMITTEE,
Delegation of power to, 611, 612.

EXECUTOR OR ADMINISTRATOR,
Power of corporation to act as, 155.

[The figures refer to pages]

EXEMPLARY DAMAGES,
See Torts.
Liability of corporation for, 247.

EXEMPTION,
From taxation, see Taxation.

EXPIRATION OF CHARTER,
Extension, 90.
Effect, 100.

EXPULSION,
Of members, 505–511.
By-laws, 574.

EXTENSION OF CHARTER,
In general, 90.
Distinguished from creation of new corporation, 90.
Effect, 90.

EXTRAORDINARY DIVIDENDS,
See Dividends.

F

FEDERAL CORPORATIONS,
Power of congress to create, 35, 40.
In District of Columbia, 35, 41.
Not controllable by the states, 41.

FEES,
Payment of, 107.

FICTION,
Corporate entity is not a, 5.
Corporate personality is a, 5.
Disregard of the corporate, 10, 673, 687.

FICTITIOUS STOCK,
See Watered and Bonus Stock.

FORECLOSURE SALE,
Purchase by director at a, 636.

FOREIGN CORPORATIONS,
Defined, 82 et seq., 758 et seq.
Status, in general, 758.
Power to act in another jurisdiction, 758, 759.
Comity, 758, 760.
Right to exclude or impose conditions, 761.
Taxation, 763.
Requiring deposit, 764.
Requiring appointment of agent, and submission to jurisdiction of courts, 764, 790.
Interstate commerce, 764–767.
Foreign commerce, 767.
Treaties, 768.
Absolute exclusion, sufficiency of grounds, 768.
Foreign corporation in fraud of laws of a state, or contrary to its policy, 770.
Retaliatory statutes, 772.
What constitutes doing business in the state, 773, 796.
Single act does not constitute doing business in the state, 776.
Effect of noncompliance with statute, contracts, etc., 777.
Estoppel, 781.
Powers of foreign corporation, limitation of its charter, 782.
Limitation of the local law, 784.
Power to acquire real estate, 785.
Power to take by devise, 785.

[The figures refer to pages]

FOREIGN CORPORATIONS—Continued,
Foreign corporations de facto, 100, 786.
Rights and immunities of members, 786.
Quo warranto and mandamus, 786.
Actions by, 787–790.
Statutes imposing conditions, 788.
Actions against, 787, 790–800.
Service of process, 790, 792, et seq.
Attachment of property, 796.
Ceasing to do business in the state, 796.
Who may sue, 798.
Effect of judgment against, 799.
Visitorial power of state over foreign corporation, 800.
Cannot enforce forfeiture of charter, 801.
Other illustrations, 801–803.
Dissolution, 802, 803.
Enforcement of liability of stockholders of, 732, 735, 746.
Enforcement of liability of officers of, 756.

FORFEITURE OF CHARTER,
In general, 299 et seq.
Vacation by legislature, 277, 298.
Who may enforce, 299, 307.
Necessity for judicial proceedings, 299, 300, 301.
When forfeiture will be decreed, 299, 301.
Waiver of forfeiture, 306.
Modes of proceedings to enforce, 309.
Equity jurisdiction, 310.
See Dissolution.

FORFEITURE OF SHARES,
For nonpayment of assessments, 392–394.
Action and forfeiture as cumulative remedies, 392, 395.
Effect, 392, 394, 409.
By-laws, 575, 577.

FORGED TRANSFER,
See Transfer of Shares.

FORMATION,
See Creation of Corporations.

FOURTEENTH AMENDMENT.
See Citizenship of Corporations.

FRANCHISE,
See Creation of Corporations; Powers and Liabilities.

FRAUD,
Liability of corporation, 242, 244.
See Officers and Agents; Torts.
In procuring subscriptions to stock, 354.
Authority of agents, 354, 357.
What constitutes fraud, 358.
Effect, ratification, and laches, 362.
Of promoters, 136.
In organization of corporation, 109.
See Watered and Bonus Stock.

FRAUDS, STATUTE OF,
Whether applicable to contracts for sale of shares, 324, 326.
Not applicable to subscriptions to stock, 349.

FRAUDULENT CONVEYANCES,
By corporations, 687.

G

GENERAL AND SPECIAL LAWS,
See Creation of Corporations.
GRAND LARCENY,
Criminal liability of corporation for, 254.
GRATUITOUS STOCK,
See Watered and Bonus Stock.
GUARANTIED STOCK,
Defined, 446, 447.
See Preferred Stock.
GUARANTY,
See Contracts; Powers and Liabilities of Corporations.
GUARDIAN,
Power of corporation to act as, 155.

H

HABITAT,
See Citizenship.
HUSBAND AND WIFE,
See Married Women.

I

ILLEGAL CONTRACTS,
See Contracts; Ultra Vires.
IMPLIED POWERS,
See Powers and Liabilities of Corporations.
INCOME AND PROFITS OF SHARES,
See Dividends.
INCORPORATION,
See Creation of Corporations.
INCREASE,
Of stock, see Capital Stock.
INDEMNITY,
Of directors and officers, 668.
INDICTMENT,
See Crimes.
INFANTS,
As subscribers to stock, 346.
INHABITANT,
Corporation as an, 26.
INJUNCTION,
See Equity.
Suit by stockholders, see Stockholders and Members.
Suit by creditors, 690.
See Creditors of Corporations.
INSANE PERSONS,
As subscribers to stock, 346.
INSOLVENCY,
Does not dissolve, 297, 298.
Rescission of subscription as affected by, 355, 356.

[The figures refer to pages]

INSPECTION OF BOOKS AND PAPERS,
Right of stockholders or members, 411–418.
By agent, clerk, stenographer or attorney of stockholder, 416.
By stockholder in competing corporation, 415.
Effect of motive at common law, 413, 414.
Statutory right, 416 et seq.
Effect of motive under statute, 416, 417.
Penalty for refusal of right, 418, 418.

INSURANCE COMPANIES,
Powers, generally, see Powers and Liabilities.
Lending money on discount of notes, 163, note.
Borrowing money, 171.

INTEGRAL PART,
See Dissolution of Corporation.

INTEREST,
On subscription to stock, 402.
On dividends, 432.

INTERLOCKING DIRECTORS,
Contracts of corporation which have, 640–642.
Transactions of, are not void but voidable, 642.

INTERPRETATION,
Of charters, see Charters.

INTERSTATE COMMERCE,
See Foreign Corporations.

IRREGULAR INCORPORATION,
See De Facto Corporations; Estoppel; Partnership.

J

JOINT-STOCK COMPANY,
In general, 22.
Distinguished from corporation, 24, 25.
Nothing but large partnership, 22.
Liability of associates in, 24.
Not a citizen for federal jurisdiction, 25.

JOINT TENANCY,
Power to hold in joint tenancy, 153.

JUDGMENT,
Against foreign corporation, 799.
Against corporation after dissolution, 314.

JURISDICTION,
See Actions; Equity.

K

KNOWLEDGE,
Notice to officer or agent as notice to corporation, 629.

L

LACHES,
See Actions.

LAW,
See Powers and Liabilities of Corporations; Purpose of Incorporation.

LAY CORPORATIONS,
Defined, 30.

[The figures refer to pages]

LEASES,
By corporation, power, 156, 165.
Railroad or other quasi public corporation, 156, 165, 168.

LEGAL ENTITY,
See Definitions; Entity; Fiction.

LEGISLATIVE CONTROL,
See State Control.

LEGISLATURE,
See Congress; State Legislature; Territorial Corporations.

LIABILITY OF STOCKHOLDERS,
See Creditors of Corporations.

LIBEL,
Liability of corporation for, 242, 244.
Criminal liability of corporation for, 254.
See Torts.

LICENSE,
See Foreign Corporations; Charter.

LIEN,
Of corporation on shares, 521, 576.

LIFE TENANT,
See Dividends.

LIMITATION OF ACTIONS,
To recover dividend, 432.
Action by corporation against officers and agents, 656.
Action by creditors to enforce liability of stockholders, 743.
Liability on subscriptions, 743.
Statutory liability, 744.
Enforcement in foreign jurisdiction, 746.

LOANS,
See Contracts.

M

MAJORITY,
Powers of the majority, in full, 560, 572.
In general, 560.
Where the power of management is vested in the directors, 560, 564.
Power to accept amendment of charter, 560, 565.
Must act at a meeting duly held, 582 et seq.
Power to make by-laws, 572.
See By-Laws.
Increase of capital stock, 442.

MALICE,
See Torts; Crimes.
Corporation may be imputed with, 244, 252.

MALICIOUS PROSECUTION,
Liability of corporation, 242, 244.
See Torts.

MANAGEMENT OF CORPORATIONS,
Powers of the majority of stockholders, 560–572.
In general, 560 et seq.
Where the power of management is vested in the directors, 560, 564.
Power to accept amendment or alteration of charter, 560, 565.
Must act at a meeting duly held, 582 et seq.

[The figures refer to pages]

MANAGEMENT OF CORPORATIONS—Continued.
By-laws, 572–582.
By whom enacted, 572.
Must be proved, not judicially noticed, 573.
Validity, 574.
Providing for election, appointment, and removal of officers and agents, 574.
Limiting powers and prescribing duties of officers and agents, 574, 624.
Provision for corporate meetings, 574.
Regulating right to vote, 574.
Regulating transfers of shares, 574, 576.
Expulsion of members, 574.
Restraint of trade, 575.
Giving lien on shares, 521, 576.
Providing for forfeiture of shares, 575, 577.
Must be reasonable, 574.
Must be general, 575.
Must be consistent with charter, 577.
Cannot deprive stockholder of vested rights, 578.
Partial invalidity, 578, 579.
Effect as to stockholders, 579.
Effect as to third persons, 579.
Repeal and amendment, 581.
Waiver of by-law, 581.
Stockholders' meetings, 582.
Necessity, 583.
Calling meetings, 583.
Notice of meeting, 584.
Time and place of meeting, 585.
Conduct of meeting, 588.
Quorum and majority, 588.
Disability of individual stockholders, 590.
Record and proof of action, 590.
Cure of irregularity by ratification, 590.
Presumption of regularity, 590.
Adjourned meetings, 591.
Equity jurisdiction, 591.
Voting, 592–606.
Who entitled to vote, in general, 592, 593.
Pledgor and pledgee, 594.
Trustees, 594.
Shares held by the corporation, 595.
Shares owned jointly, 596.
Restrictions in charter or statute, 596.
Evasion of charter or statutory provision, 596.
Personal interest of stockholder, 597.
Number of votes, 598.
Cumulative voting, 598.
Votes by proxy, 599.
Voting trusts and pooling agreements, 600.
Effect of illegal reception or rejection of votes, 605.
Election and appointment of officers and agents, 606.
Qualifications of directors and other officers, 607.
Powers of directors, 609.
Directors de facto, 611.
Appointment of agents, and ratification, 611.
Must act as a board, 613.
Directors' meetings and resolutions, 613.
Special meetings, 614.
Place of meeting, 615.

MANAGEMENT OF CORPORATIONS—Continued,
Notice of meeting, 615.
Quorum and majority, 617.
Record of proceedings, 618.
Authority of other officers and agents, in general, 619.
General manager, 619.
President, 621.
Treasurer, 621.
Secretary, 622.
Cashier of bank, 623.
Effect of charter and by-laws, 624, 626.
Holding out, agency by estoppel, 624.
Agency by ratification, 626.
Negotiable instruments, 627.
Ultra vires contracts by agents, 628.
Notice to officer or agent as notice to corporation, 629.
Contracts between stockholder and corporation, 631.
Relation between officers and corporation, 632.
A fiduciary relation, 632.
Fraud and breach of trust, 632.
Contracts and other transactions between officers and corporation, 636, 637.
Contract or transaction by officer with himself, 636, 637.
Personal interest of officer in contract or transaction, 638.
Extent of personal interest, 640.
Where corporation is represented by other agents, 642.
Consent, acquiescence, and laches of corporation or stockholders, 644.
Liability of corporation to extent of benefit, 645.
Liability of officers to corporation, 647 et seq.
Mistakes or errors of judgment, 646, 647.
Breach of trust, 646, 647, et seq.
Violation of charter or by-laws, 646, 647.
Negligence, 648 et seq.
Remedies against officers, 652.
Statute of limitations, 656.
Liability of officers and agents to third persons, on contracts, 656.
Liability of corporation for torts of officers and agents, 656.
Ratification, 661.
Ultra vires, 661.
Liability of officers and agents to third persons for torts, 664.
Compensation of directors and officers, 666.
Removal of officers and agents, 669.
Relation between directors or officers and individual stockholders, 672.
Interference and suits by individual stockholders, 483 et seq.
Laches and estoppel, 501.
Interference by creditors, 684.

MANAGERS,
See Officers and Agents.

MANDAMUS,
To compel court or officer to issue certificate of incorporation, etc., 42.
To recover or compel declaration of dividend, 433.
By stockholder, to enforce right to inspect books, 411.
As remedy to compel transfer of stock, 558.
As remedy of member to secure reinstatement, 510.
Not proper remedy to test right to office, 670.
By foreign corporation, 786, 802.

MANDATORIES,
Directors as, 632.

[The figures refer to pages]

MANSLAUGHTER,
Liability of corporation for, 251, 254.

MANUFACTURING COMPANIES,
Powers of, see Powers and Liabilities.

MARRIED WOMEN,
As subscribers to stock, 346, 347.

MEDICINE,
See Powers and Liabilities of Corporations; Purpose of Incorporation.

MEETING OF DIRECTORS,
In general, 613.
Special meeting, 614.
Place of meeting, 615.
Notice of meeting, 615.
Quorum and majority, 617.
Record of proceedings, 618.

MEETINGS OF STOCKHOLDERS,
In general, 582.
Necessity, 583.
Calling meetings, 583.
Notice of meeting, 584.
Time and place of meeting, 585.
Conduct of meeting, 588.
Quorum and majority, 588.
One stockholder holding meeting, 588, 589.
Disability of individual stockholders, 590.
Record and proof of action, 590.
Cure of irregularity by ratification, 590.
Presumption of regularity, 590.
Adjourned meetings, 591.
Equity jurisdiction, 591.
By-laws regulating, 574.
Voting, 592–606.
Who entitled to vote, in general, 592, 593.
By-laws regulating, 574.
Pledgor and pledgee, 594.
Trustees, 594.
Shares held by corporation, 595.
Shares owned jointly, 596.
Restrictions in charter or statute, 596.
Evasion of charter or statute, 596.
Personal interest of stockholder, 597.
Number of votes, 598.
Cumulative voting, 598.
Voting by proxy, 599.
Voting trusts and pooling agreements, 600.
Effect of illegal reception or rejection of votes, 605.

MEMBERS,
See Stockholders or Members.

MERGER,
Of members in corporation, 5 et seq.

MINORITY,
See Stockholders or Members; Majority.

MINORS,
See Infants.

MISNOMER,
Of corporation, effect, 82.

MISTAKE,
Subscriptions to stock, 364.

MONOPOLY,
See Trusts.
Power to grant exclusive privileges, 87.

MORTGAGES,
Power of corporation to mortgage property, 156, 165, 167.
Railroad or other quasi public corporation, 156, 165, 168.
Power of corporation to take, 154.

MORTMAIN,
Statutes of, 152.

MUNICIPAL CORPORATIONS,
As subscribers to stock, 348.
Distinguished from private corporations, 30.

N

NAME OF CORPORATION,
See Corporate Name.
In general, necessity, 18, 76, 145.
Choice of name, 76, 77.
Taking name of another corporation, 77–80.
Acquisition by user or reputation, 80, 81.
Statutory regulations affecting, 76, 77.
Limited as part of, 77.
Unfair competition by use of similar, 78.
Foreign corporation, protected in, 79.
Protection of benevolent, charitable, and social corporations, 79, 80.
Change of name, 81.
Special act authorizing change, 46.
Effect, 76 et seq., 81.
Effect of misnomer, 82.

NATIONAL BANKS,
Conveyances to, 206, 207, note.
Lien on stock of, 521, 523.
Taxation of, 279, 285, 286, 290.

NATURE OF CORPORATION,
See Corporation; Definitions; Entity; Fiction.

NEGLIGENCE,
Liability of corporation, 242, 243.
See Torts.
Of officers and agents, see Officers and Agents; Torts.

NEGOTIABLE INSTRUMENTS,
See Contracts.
Want of authority in officer or agent executing, 627, 628.

NONRESIDENCE,
Of corporators, 68.
Nonresidents, as subscribers to stock, 346.

NONSTOCK CORPORATIONS,
Defined, 28, 33.

NOTES,
See Contracts.

NOTICE,
To officer as notice to corporation, 629.

NOVATION,
Transfer of membership as, 518.

NUISANCE,
Liability of corporation for, 250.

NUMBER,
Of corporators, 57, 58, 67, 68.

O

OBJECT OF INCORPORATION,
See Purpose of Incorporation.

OBLIGATION OF CONTRACTS,
See State Control.

OFFICERS AND AGENTS,
Election and appointment, 194, 606.
By-laws, 574.
Qualification of directors and other officers, 607.
Resignation of, 671.
Inspection of books of corporation by, 415.
Powers of directors, 609.
Directors de facto, 611.
Appointment of agents and ratification, 611.
Must act as a board, 613.
Directors' meetings, 613.
Special meetings, 614.
Place of meeting, 615.
Notice of meeting, 615.
Quorum and majority, 617.
Record of proceedings, 618.
Authority of other officers and agents, in general, 619.
General manager, 619.
President, 621.
Treasurer, 621.
Secretary, 622.
Cashier of bank, 623.
Effect of charter and by-laws, 574, 624.
Holding out, agency by estoppel, 624.
Agency by ratification, 626.
Negotiable instruments, 627.
Ultra vires contracts by agents, 628.
Notice to officer as notice to corporation, 629.
Contracts between stockholder and corporation, 631.
Relation between officers and corporation, 632.
A fiduciary one, 632.
Fraud and breach of trust, secret profits and personal benefit, 632.
Contracts and other transactions between officers and corporation, 636, 637.
Contract or transaction by officer with himself, 636, 637.
Personal interest in contract or transaction, 638.
Extent of personal interest, 640.
Where corporation is represented by other agents, 642.
Consent, acquiescence, and laches of corporation or stockholders, 644.
Liability of corporation to extent of benefit, 645.
Liability of officers to corporation, 647 et seq.
Mistake or error of judgment, 434, 646, 647.
Breach of trust, 646, 647 et seq.
Violation of charter or by-laws, 646, 647.
Negligence, 648 et seq.

[The figures refer to pages]

OFFICERS AND AGENTS—Continued,
Remedies against officers, 652.
Statute of limitations, 656.
Discretion as to declaring dividends, 426.
Who authorized to increase capital stock, 442.
Liability of officers and agents to third persons on contracts, 656.
Liability to creditors, see Creditors of Corporations.
Liability of corporation for torts of officers and agents, 357, 656.
Ratification, 661.
Ultra vires, 661.
Agents to receive subscriptions, 366.
As subscribers to stock, 348.
Liability of officers and agents to third persons for torts, 664.
Compensation, 666.
Removal, 669.
By-laws, 574.
Relation between directors or officers and stockholders, 672.
Liability to creditors, 750–757.
Preferences to officers who are creditors, 752.
Statutory liability, 754.
Promoters, see Promoters.

"ONE-MAN" COMPANY,
See Corporation; Entity; Fiction; Stockholders or Members.

OPINION,
Mere expression of, will not render subscription voidable, 360.
Expression of, as distinguished from statement of fact, 360, 361.

ORGANIZATION,
See Creation of Corporations.

OVERISSUE OF STOCK,
See Capital Stock.

P

PAROL EVIDENCE,
See Evidence.

PARTNERSHIP,
Distinguished from corporation, 13 et seq.
Liability of associates of pretended corporation as partners, 122 et seq.
Liability of associates in de facto corporation as partners, 106, note.

PAYMENT,
In whole or in part for stock, as condition precedent to incorporation, 59.
Of deposit by subscriber, 387.
Of subscriptions, in part only, 455 et seq.
Of subscriptions, in property, 455 et seq.
Of dividends, see Dividends.
See Watered and Bonus Stock.

PENAL STATUTES,
See Creditors of Corporations; Crimes.

PERJURY,
Liability of corporation for, 251.

PERPETUAL SUCCESSION,
The faculty of, 16, 17.

PERSON,
Corporation as a, 26.
Corporation as a responsible and respectable, 26.

[The figures refer to pages]

PERSONAL PROPERTY,
Shares of stock are, 326.
Power to take and hold, 151.
By gift or bequest, 151.
Power to sell, convey, mortgage, or pledge, 156, 165.
Power to purchase, 157 et seq.

PLACE,
Of organization, outside the state, 56.

PLEDGE,
Power of corporation to pledge property, 156, 165.

PLEDGEE,
Right of, to vote stock, 594.

POLICE POWER,
Of state over corporations, 263–268.
Property of corporation taken under, 266, 267.

POOLING AGREEMENTS,
Voting trusts and pooling agreements, 600.

POOLS,
Contracts to prevent competition, 179.

POWERS AND LIABILITIES OF CORPORATION,
In general, 142.
Express powers, 145.
Powers incidental to corporate existence, 145.
Perpetual succession, 145.
Corporate name, 145.
Power to sue, in general, 145.
To contract, see Contracts.
To use common seal, 145, 156, 194.
To make by-laws, see By-Laws.
Amotion or removal of members, see Expulsion of Members.
Powers implied from those expressly granted, 146, 158.
Purposes of incorporation as affecting, 158.
Question of fact as well as law, 143.
Construction of charters, in general, 146, 147.
In favor of the public in case of doubt, 146.
General terms following special terms, 146, 149.
Express mention and implied exclusion, 146, 150.
Power to take and hold real and personal property, 151, 156, 163.
By gift or bequest, 151.
By devise, 151, 153.
Enumeration of purposes as an exclusion of others, 150.
Limitation as to amount or value of property, 151.
Presumption of power, 151, 193.
Statutes of mortmain, 152.
Power to take fee, 152.
Reversion, 152, 153.
Joint tenancy, 153.
Tenancy in common, 153.
Conflict of laws, 154.
Devise for use of corporation, 154.
Power to take mortgage, 154.
Power to act as trustee, executor, guardian, etc., 155.
Power as to contracts and conveyances, see Contracts; Conveyances.
Power as to leases, see Leases.
Power as to mortgages, see Mortgages.
Power as to pledges, see Pledge.
Acquire and hold stock in another corporation, 183–186.

[The figures refer to pages]

POWERS AND LIABILITIES OF CORPORATION—Continued,
Acquire and hold its own stock, 187–190.
Lend money on credit, 173, 177.
Power to make negotiable instruments, 172.
Liability for torts, see Torts.
Liability for acts of officers or agents, see Officers and Agents.
Criminal responsibility, see Crimes.
Power to increase capital stock, 442.
Issuing preferred stock, 446–454.
See Preferred Stock.
Issue of watered or bonus stock, 455–482.
See Watered and Bonus Stock.
Insurance of life of president and manager, 160.
Law, practice of, 162.
Maintain accident and relief department for employés, 160.
Medicine, practice of, 163.
Real estate, engage in business of, 163, note.
Subscription to fund for military camp, 162.
Transfer of entire corporate property, 167–168.

POWERS OF MAJORITY,
See Majority.

PREFERENCE,
See Stockholders or Members; Capital Stock; Preferred Stock.

PREFERRED STOCK,
In full, 446–454.
Defined, 446.
Power to create, 446, 447.
Amendment of charter authorizing, 448.
Laches and estoppel of stockholders to object, 449.
Rights and liabilities of holders, 450.
Dividends, 450, 451.
Dividends, when cumulative, 452.
Liability to creditors, 453.
Status as creditors, and not as stockholders, 451, 453.

PREFERRING CREDITORS,
Validity of preferences, 691.

PRESCRIPTION,
Corporations by, 35, 36.

PRESIDENT,
See Officers and Agents.

PRESUMPTION,
Of charter, corporations by prescription, 35, 36.
Of acceptance of charter, 52, 53, 54.
Of corporate power, 151, 157, 193.

PRINCIPAL AND AGENT,
See Agency; Officers and Agents.

PRINCIPAL AND SURETY,
See Contracts; Powers and Liabilities of Corporations.

PRIVATE CORPORATIONS,
Distinguished from public, 28, 30.

PROCESS,
See Foreign Corporations.

PROFITS,
See Dividends.

PROMISSORY NOTES,
See Contracts; Negotiable Instruments.

PROMOTERS,
Definition of, 126.
Relation between corporation and its promoters, 126–136.
Liability of corporation for expenses and services of promoters, 128.
Liability on contracts by promoters, 130.
Liability of, for fraudulent statements, 127.
Liability of promoters, secret profits, etc., 136.
Prospectus of, 127.
Ratification or adoption by corporation of contracts of, 132, 133.

PROOF,
See Evidence.

PROPERTY OF CORPORATION,
Is not owned by the members individually, 5 et seq.
Members cannot convey individually, 6, 7.
Nor sue at law for injury to, 7.
Otherwise under some circumstances in equity, 13.
Not attachable for debts of members, 7.
Insurable interest of members, 6, note.

PROSPECTUS.
See Definitions; Promoters.
When deemed to be fraudulent, 359.

PROXY,
Voting by proxy at stockholders' meeting, 599.

PUBLIC CORPORATIONS,
Defined, and distinguished from private, 28, 30.

PUNITIVE DAMAGES,
See Damages.

PURPOSE OF INCORPORATION,
For what purposes corporation may be formed, 70 et seq.
Construction of general clause of enabling act, 72.
Restrictions of federal constitution on power of states, 35, 38.
Power of congress, 35, 40.
Grant of exclusive privileges, 37.
Practice of law, 75.
Practice of medicine, 75.
Consummation of fraud, 75.
Real estate, to acquire and hold, 75.

Q

QUASI CONTRACT,
Liability of corporation in, for contracts of promoters, 132.
Liability of corporation in, under ultra vires contracts, 220.
Statutory liability of stockholders to creditors, 736.

QUASI CORPORATIONS,
Defined, 28, 33.

QUASI PUBLIC CORPORATION,
Defined, 31, 32.

QUORUM,
See Meetings of Directors; Meetings of Stockholders.

QUO WARRANTO,
Forfeit charter of corporation, 309.
Foreign corporation, right of to carry on business, 786.

[The figures refer to pages]

QUO WARRANTO—Continued,
Against foreign corporation, 786.
See State Control.
Test right to office as director, 670.
Remedy of state against corporation de facto, 305.

R

RAILROAD COMPANIES,
Powers, to take and hold land, 151.
To aid in maintenance of steamboat line by another, 161.
To purchase and operate a steamboat, 161.
Lease and operation of another road, 161.
Lease or transfer of its own road, 161.
Consolidation agreement, 161.
See Consolidation.
Lease of telegraph line to another, 161, 162.
Contract to carry over connecting line, 159, 181.
Restriction as to motive power, 160.
Purchase of real or personal property, 165.
Dealing in bills and notes, 165.
Sale, lease, mortgage, or pledge of property, 168 et seq.
Contracts of guaranty or suretyship, 173, 174.

RATIFICATION,
Of claim to corporate existence, 51.
By corporation of contracts of officer or agent, 626.
Of torts, 661.

REAL PROPERTY,
Power to take and hold, 151, 785.
By devise, 151, 153.
Enumeration of purposes as an exclusion of others, 150.
Limitation as to amount or value, 152.
Presumption of power, 151.
Statutes of mortmain, 152.
Power to take in fee, 152.
Reversion, 152, 153.
Joint tenancy, 153.
Tenancy in common, 153.
Conflict of laws, 154.
Devise for use of corporation, 154.
Power to take mortgage, 154.
Power to sell and convey or mortgage, 156, 165.
Power to purchase, 156, 163.

REBATES,
Liability of corporation for giving, 251.

RECEIVERS,
Suits by creditors, 690.
Suits by stockholders, 482 et seq.
Suits by creditors for appointment, 730.

REGISTRATION,
Of transfer, see Transfer of Shares.

RELEASE,
Of subscriber, see Subscriptions to Stock.

RELIGIOUS CORPORATIONS,
Defined, 28, 30.
Powers, generally, see Powers and Liabilities.
Contracts in raising money for church purposes, 163, note.

REMEDIES,
See Actions; Equity; Injunction; Mandamus; Quo Warranto.
REMOVAL,
Of members, 505–511.
Of officers, 669.
By-laws, 574.
REPRESENTATIVE SUITS,
See Stockholders or Members; Actions; Equity.
REPUTATION,
Acquisition of corporate name by, 80.
RESCISSION,
Of subscription contract, burden of proof upon one seeking, 364.
RESIDENCE,
Of corporation, 82 et seq.
For purpose of jurisdiction of federal courts, 82 et seq.
Domicile—residence—habitant, 83.
Citizenship, 84, 85.
Where there are charters from several states, 82, 86.
Charter distinguished from license, 82, 89.
Of corporators, 68.
RESIGNATION,
Acceptance of, 671.
Officers and directors, 671.
REVERSION,
Of property on dissolution of corporation, 153, 315–318.
REVOCATION,
Of subscription to stock, 339, 341.

S

SALARY,
See Compensation.
SALES,
Power of corporation to purchase property, 151, 156, et seq.
Power to sell, 156, 165.
Railroad and other quasi public corporations, 156, 165, 168, 170.
Sale of franchise, 156, 165, 168.
Of shares, see Transfer of Shares.
Distinguished from subscription, 331.
Statute of frauds, 324, 326.
See Contracts.
SCIRE FACIAS,
To forfeit charter of corporation, 309.
SEAL,
Corporate seal, 21.
See Contracts.
SECRETARY,
See Officers and Agents.
SET-OFF AND COUNTERCLAIM,
Against dividend, 431.
By debtor of corporation, 696.
By stockholder as against creditors, 747.
SHARES,
Defined, 324, 325.
Not a chattel interest, but in the nature of chose in action, 324.

[The figures refer to pages]

SHARES—Continued,
Not real estate, 324, 325.
Power of corporation to acquire its own, 187–190.
Power of corporation to acquire, in another corporation, 183–186.
Execution and attachment of shares, 324, 327.
Transferability, 19.
Transfer of, see Transfer of Shares.
Forfeiture, see Forfeiture of Shares.

SHERMAN ANTI-TRUST ACT,
Provisions of, 181.
Construction of, 181, 182.
Standard Oil and Tobacco Trust cases under, 182.

SITUS,
Of shares of stock, 328.

SLANDER,
Liability of corporation, 242, 245, note.
See Torts.

SOLE CORPORATION,
In general, 27.

SOLE STOCKHOLDER,
Cannot sue for injury to corporation, 8.

SPECIAL LAWS,
See Creation of Corporations.

STATE CONTROL,
Power of the state over corporations, 256 et seq.
The charter as a contract not to be impaired, 256.
Contract between corporation and members, 259.
Creating similar corporation, 260.
Where exclusive privilege has been granted, 261.
Contracts between corporation and third persons, 262.
Change of remedies, 262.
Police power of state, 263–268.
Power of eminent domain, 268.
Reservation of power to alter or repeal charter, 269–278.
In constitution or general law, 269, 270.
Acceptance of amendment, 270.
Changes authorized by reservation, 271 et seq.
Vacation of charter for misuser, 277.
Offer of amendment, power of majority, 278.
Taxation of corporations, 278–290.
The power in general, 278, 279.
Object of taxation, 279.
Jurisdiction, 280.
Property taxable, 280, 281.
Elements of taxable value, 281.
Double taxation, 281.
Place of taxation, 283.
Restrictions in federal constitution, 284.
Equality and uniformity, 284.
United States bonds, 285.
Regulation of commerce, 285.
Federal corporations, 286.
National banks, 286.
Exemption from taxation, 287 et seq.
Exemption of shares, 282, 283.
Doctrine of ultra vires, 290.
Foreign corporations, 290.
Forfeiture and dissolution, 290, 291.

[The figures refer to pages]

STATE LEGISLATURE,
Power to incorporate, 35.
Grant of exclusive privileges, 37.
Enactments of laws, two-thirds vote, 38.
Restriction as to subject and title of laws, 37, 38.
Restrictions in federal constitution, 37, 38, 39.
Delegation of power to create corporation, 35, 41.
Performance of ministerial acts, 35, 42.
Ratification of claim to corporate existence, 51.
Power over corporations, see State Control.

STATUTES,
Of mortmain, 152.
Of wills, 154.
Of frauds, whether applicable to contracts for sale of shares, 324, 328.
Not applicable to subscriptions to stock, 348, 349.
General and special laws, see Creation of Corporations.

STOCK,
See Capital Stock.

STOCK CORPORATIONS,
Defined and distinguished from nonstock, 28, 33.

STOCK DIVIDENDS,
Defined, right to declare, 430.
Rights as between life tenant and remainderman, 437 et seq.

STOCKHOLDERS' MEETINGS,
See Meeting of Stockholders.

STOCKHOLDERS OR MEMBERS,
Distinct from the corporation, 5.
Merger in corporate entity, 5.
Do not own the corporate property, 5, 6.
Cannot convey corporate property, 5, 6.
Cannot sue at law for injury to corporate property, 7.
Otherwise, under some circumstances in equity, 13.
Cannot bind corporation by contracts, 7.
Their declarations or admissions not binding on corporation, 8.
Insurable interest in corporate property, 6, note.
May contract with corporation, or convey to or take from it, 9.
May sue corporation, and be sued by it, 9.
Action by or against corporation, not by or against members, 9.
Demands of, as set-off to demand against corporation, 10.
When acts of, considered acts of corporation, 10.
Change or death of, does not affect corporate existence or identity, 17.
How membership is acquired, in general, 320.
Nonstock corporations, 320, 321.
Stock corporations, 320, 322.
Subscriptions to stock, 330, 332.
After incorporation, 332.
Distinguished from a sale of shares, 331.
Prior to incorporation, 332 et seq.
Common-law subscriptions, 333.
Nature as a contract, 334, 335.
Formation of the contract, 334, 335.
Consideration, 337.
Revocation or lapse, 339.
Subscription under statutes, 342.
Consideration and revocation, 342.
Agreements to pay subscription to trustees for corporation when formed, 343.

STOCKHOLDERS OR MEMBERS—Continued,
Distinction between present subscription and agreement to subscribe, 344.
Who may become subscribers, 345 et seq.
Aliens and nonresidents, 346.
Infants, 346.
Insane and drunken persons, 346.
Married women, 347, 348.
Corporations, 347.
Municipal corporations, 348.
Directors or officers, 348.
Form of subscription, 348–351.
At common law, 348.
Necessity for writing, 349.
Formalities required by statute, 349.
Subscriptions after incorporation, 350.
Directory provisions, 351.
Substantial compliance with statute, 351.
Mutual consent, 352.
Subscriptions induced by fraud, 354.
Authority of agents, 354, 357.
What constitutes fraud, 358.
Effect of fraud, ratification and laches, 362.
Subscriptions under mistake, 364.
Subscription by agent, 365.
Effect of want of authority, 365.
Agents to receive subscriptions, 366.
Conditional subscriptions, 368 et seq.
After organization of corporation, 369.
Prior to incorporation, 372.
Conditions must be expressed in the writing, 374.
Waiver of conditions, 374.
Subscriptions upon special terms, 375.
Distinguished from conditional subscriptions, 368, 375.
Validity, 377.
Who may receive, 379.
Conditional delivery of subscription, escrow, 380.
Subscription of entire capital, 381.
Excessive subscription and distribution, 299, 304.
Excessive subscription and distribution, 386.
Payment of deposit, 387.
Delivery of certificate not essential to liability or rights, 390.
Remedy of corporation on subscriptions, 392–397.
Action to recover assessments, 392.
Forfeiture of shares, 392, 394.
Action and forfeiture as cumulative remedies, 392, 395.
Calls and assessments, 397–402.
Necessity, 398.
Validity, 399.
Notice and demand, 401.
Interest, 402.
Assignment of unpaid subscription, 402.
Release and discharge of subscriber, 403–409.
Withdrawal and release, 403.
Reduction of shares, 403.
Violation of charter by corporation, mismanagement, 405.
Alteration or amendment of charter, 406.
Loss or abandonment of business, property, or franchises, 407.
Forfeiture of shares, 409.
Transfer of shares, 409.
Estoppel of subscriber, 113, 114, 409.

[The figures refer to pages]

STOCKHOLDERS OR MEMBERS—Continued,
Increase of stock, 442.
Shareholder's right to preference, 444.
Right to inspect books and papers of corporation, 411–418.
Rights as to profits and dividends, 418–442.
Dividend defined, 420.
Distinguished from profits, 420, 422.
No right to profits until dividend declared, 420.
Right to dividend vests when it is declared, 420, 421.
When dividend may be declared, 422.
Discretion of directors as to declaring, 426.
Who entitled to dividends, 427.
Effect of transfer of shares, 428, 429, 520.
How payable, 430.
Stock dividends, 430.
Set-off against debt due to corporation, 431.
Remedies of stockholders, 432.
Interest, 432.
Statute of limitations, 432.
Remedies where dividends are improperly paid, 434.
Grants and bequests of income and profits of stock, 436–442.
Rights as between life tenant and remainderman, 436–442.
Preferred stock, 446–454.
Defined, 446, 447.
Power to create, 447.
Amendment of charter authorizing, 448.
Laches and estoppel of stockholders to object, 449.
Rights and liabilities of holders of, 450.
Dividends, 450, 451.
Liability to creditors, 453.
Status as creditors, and not stockholders, 451, 453.
Watered and bonus stock, 455–482.
Defined, 455.
Effect as to corporation, 455, 456.
Effect as to stockholders, 455, 458.
Effect as to creditors, 455, 458.
Payment of original subscriptions, 455, 459.
Increase of capital stock, 455, 462.
Issue of stock at market value by active corporation to pay debts, etc., 455, 462.
Gratuitous issue of stock, 455, 466.
Payment for stock in property or services, 455, 467.
Value of property or services, 455, 468.
Creditors who cannot complain, 455, 473.
Effect of constitutional and statutory provisions, 456, 475.
Liability of transferees, 480.
Actions by, for injuries to corporations, and interference in management, 482 et seq.
At law, 482, 484.
In equity, 482, 486.
Who may sue, 500.
Acts within power of majority, and discretionary powers, 495.
The rule as stated by the United States supreme court, 499.
Federal equity rule, 501.
Laches and estoppel, 501.
Motive of stockholder suing, 506.
Parties to suits, 503.
Costs and expenses, 505.
Transfers of shares, 19, 512, et seq.
Right to transfer, 512.

[The figures refer to pages]

STOCKHOLDERS OR MEMBERS—Continued,
By-laws, 513, 514, 576, 577.
Agreement not to transfer, 514, 516.
Effect of transfer, 517–521.
Liability for calls, 518.
Right to dividends, 520.
Statutory liability to creditors, 520.
Pledgees, trustees, etc., 521.
Lien of corporation on shares, 521.
By-laws, 521, 576.
Waiver, 523.
Uniform stock transfer act, 523, 524.
Validity of transfers, 524.
Transfer after dissolution, 525.
Mode of transfer, 526.
What law governs, 527.
Registration of transfer, 528, 529.
The rules stated, 528, 529.
Necessity, as against corporation, 531.
As against estoppel of owner in case of unauthorized transfer, 532.
As against prior equities of third persons, 533.
As against creditors of the corporation, 533.
As against bona fide purchasers or pledgees, 533.
As against creditors of registered owner, 534.
Failure to register as evidence of secret trust, 537.
Issue of new certificate, 538.
Forged and unauthorized transfers, 539.
Liability of transferee, 542.
Transfers by trustees, 542.
Estoppel of owner in case of unauthorized transfer, 544.
Effect of judicial proceedings, 549.
Liability of indorser of forged certificate, 550.
Liability of corporation arising from unauthorized or invalid transfer, 551.
Liability of corporation on certificates issued fraudulently, without authority, etc., 553.
Remedy against corporation for refusal to recognize transfer, 557.
Compelling corporation to issue new certificates, 558.
Acceptance of amendment of charter, 55.
Powers of the majority, see Majority.
Relation between directors or officers and individual stockholders or members, 672.
Expulsion of members, 505–511.
Liability to creditors, see Creditors of Corporations.
See Corporators.

SUBJECT OF ACTS,
Constitutional limitation, 37, 38, 39.

SUBSCRIPTIONS TO STOCK,
After incorporation, 330.
Distinguished from a sale of shares, 331.
Prior to incorporation, 332 et seq.
Common-law subscriptions, 333.
Nature as a contract, 334, 335.
Formation of the contract, 334, 335.
Consideration, 337.
Revocation or lapse, 339.
Subscriptions under statutes, 342.
Consideration and revocation, 342.
Agreements to pay subscriptions to trustees for corporation when formed, 343.
Distinction between present subscription and agreement to subscribe, 344.

[The figures refer to pages]

SUBSCRIPTIONS TO STOCK—Continued,
Who may become subscribers, 345 et seq.
Aliens and nonresidents, 346.
Infants, 346.
Insane and drunken persons, 346.
Married women, 346, 347.
Corporations, 156, 183, 345, 347.
Municipal corporations, 348.
Directors or officers, 348.
Form of subscription, 348–352.
At common law, 348.
Necessity for writing, 349.
Formalities required by statute, 349.
Directory provisions, 351.
Substantial compliance with statute, 351.
Mutual consent, 352.
Subscriptions induced by fraud, 354.
Authority of agents, 354, 357.
What constitutes fraud, 358.
Effect of fraud, ratification and laches, 362.
Subscriptions under mistake, 364.
Subscription by agent, 365.
Effect of want of authority, 365.
Agents to receive subscriptions, 366.
Conditional subscriptions, 368 et seq.
After incorporation, 369.
Prior to incorporation, 372.
Conditions must be expressed in the writing, 374.
Waiver of conditions, 374.
Subscriptions upon special terms, 375.
Distinguished from conditional subscriptions, 368, 375.
Validity, 377.
Who may receive, 379.
Conditional delivery of subscription, escrow, 380.
Subscription of entire capital, 381.
Excessive subscription and distribution, 382, 386.
Payment of deposit, 387.
Delivery of certificate, 390.
Remedy of corporation on subscriptions, 392–397.
Action to recover assessments, 392.
Forfeiture of shares, 392, 394.
Action and forfeiture as cumulative remedies, 392, 395.
Calls and assessments, 397–402.
Necessity, 398.
Validity, 399.
Notice and demand, 401.
Interest, 402.
Assignment of unpaid subscription, 402.
Release and discharge of subscriber, 403–409.
Withdrawal and release, 403.
Reduction of shares, 403.
Violation of charter by corporation, mismanagement, 405.
Alteration or amendment of charter, 406.
Loss or abandonment of business, property, or franchises, 407.
Forfeiture of shares, 409.
Transfer of shares, 409.
Estoppel of subscriber, 113, 114, 409.
Subscriptions as a condition precedent to incorporation, 59, 60.
Payment in whole or in part as a condition precedent, 59, 60.
Increase of stock, 442.
Shareholder's right to preference, 444.

[The figures refer to pages]

SUCCESSION,
The faculty of, 16, 17, 145.

SUITS,
See Actions; Equity.

SURETYSHIP,
See Contracts; Powers and Liabilities of Corporations.

SURRENDER,
See Charter.

T

TAXATION,
Of domestic corporation, see State Control.
Of foreign corporation, see Foreign Corporations.

TENANCY IN COMMON,
Power to hold as tenant in common, 153.

TERRITORIAL CORPORATIONS,
Power of territorial legislatures to create, 35, 41.
Effect of admission to statehood, 41.

TITLE OF ACTS,
Constitutional limitation, 37, 38, 39.

TITLE TO PROPERTY.
Corporation has, and not stockholders, 5 et seq.

TORTS,
Responsibility of corporation for torts, 242.
Malice involved, 244.
Authority of agent or servant of corporation, 248.
Liability of corporation for torts of officers and agents, 656.
Ratification, 661.
Ultra vires, 661.
Fraud in procuring subscriptions, 354.
Liability arising from unauthorized or invalid transfer of shares, 551.
Liability on certificates of stock issued fraudulently, without authority, etc., 558.
Liability of officers and agents to third persons, 664.

TRANSFER OF SHARES,
In full, 19, 512, et seq.
Right to transfer, 512.
Uniform stock transfer act, regulations as to, 527, 528.
By-laws, 513, 514, 576, 577.
Agreement not to transfer, 514, 516.
Effect of transfer, 517–521.
Liability for calls, 518.
Right to dividends, 428, 436, 520.
Statutory liability to creditors, 520.
Pledgees, trustees, etc., 521.
Lien of corporation on shares, 521.
By-laws, 521, 576.
Waiver, 523.
Uniform stock transfer act, 523, 524.
Validity of transfers, 524.
Transfer after dissolution, 525.
Mode of transfer, 526.
What law governs, 527.
Registration of transfer, 528, 529.
The rules stated, 528, 529.
As against corporation, 531.
As against estoppel of owner in case of unauthorized transfer, 532.
As against prior equities of third persons, 533.

TRANSFER OF SHARES—Continued,
As against creditors of the corporation, 533.
As against bona fide purchasers and pledgees, 533.
As against creditors of registered owner, 534.
Failure to register as evidence of secret trust, 537.
Issue of new certificate, 538.
Forged and unauthorized transfers, 539 et seq.
Liability of transferee, 542.
Transfers by trustees, 542.
Estoppel of true owner, 544.
Effect of judicial proceedings, 549.
Liability of indorser of forged certificate, 550.
Liability of corporation arising from unauthorized or invalid transfer, 551.
Affected by uniform stock transfer act, 548, 549.
Liability of corporation on certificates issued fraudulently, without authority, etc., 553.
Remedy against corporation for refusal to recognize transfer, 557.
Compelling corporation to issue new certificate, 558.
Liability of transferees of watered or bonus stock, 480.

TREASON,
Liability of corporation for, 251.

TREASURER,
See Officers and Agents.

TRESPASS,
Liability of corporation, 243, 244.

TRUST COMPANIES,
Power to act as trustee, 155, 156.

TRUSTEES,
Directors as, 632.

TRUST-FUND DOCTRINE,
In general, 677–684.

TRUSTS,
Power of corporation to act as trustee, 155.
Devise in trust for use of corporation, 154.
Relation between corporation and its promoters, 128, 136.
Contracts to prevent competition, 179.
See Officers and Agents.

TURNPIKE COMPANIES,
Power to engage as carriers, 162.

U

ULTRA VIRES,
What acts are ultra vires, 202.
A corporation may exceed its powers, 202, 203.
Effect of ultra vires act, in general, 204 et seq.
Objection by state, forfeiture of charter, 205.
Injunction at suit of stockholder, 204, 205.
Conveyances of land, or transfers of personalty, 206.
Contracts, 210.
The doctrine that an ultra vires contract is illegal and void, 211.
Executed and executory contracts, 214.
Ignorance of ultra vires character of transaction, 217.
Negotiable bills and notes, 218–220.
Bonds, 219.

[The figures refer to pages]

ULTRA VIRES—Continued,
Severable transaction, 220.
Actions quasi ex contractu, 220.
Suit in equity for accounting, 220.
Relief in equity against ultra vires contract, 222.
Borrowing money, subrogation of lender, 222.
The doctrine allowing recovery on ultra vires contract, 223.
Action maintainable by corporation, 227.
Necessity for performance by the plaintiff, 228.
The ground of this doctrine, 228.
Specific performance, 233.
Assent of shareholders, 235.
Progressive doctrine forbidding any collateral attack, 234.
Illegal contracts in the strict sense, 236.
Contracts disabling quasi-public corporation from performing duties, 237.
Express prohibition in charter, 238.
Effect of illegality, 240.
Devises and bequests, 207.
Torts, liability of corporation for, 242, 243, 661–664.
Liability for torts, see Torts.
Responsibility for crime, see Crimes.
As a defense against taxation, 290.
Ultra vires acts as releasing subscription to stock, 405.
Contracts by agents, 628.

UNDERWRITERS AND UNDERWRITING,
Definition of, 141.

UNITED STATES,
See Congress.

USER,
Acquisition of corporate name by user or reputation, 78, 80.

V

VISITATION.
See State Control.
Right of, 256, 257.

VISITORIAL POWER.
See State Control; Visitation.

VOTING,
Voting trusts and pooling agreements, 600.
See Meetings of Stockholders.

W

WATERED AND BONUS STOCK,
In full, 455–482.
Defined, 455.
Effect as to corporation, 455, 456, 458.
Effect as to creditors, 455, 458.
Payment of original subscriptions, 455, 459.
Increase of capital stock, 455, 462.
Issue of stock at market value by active corporation to pay debts, etc., 455, 462.
Gratuitous issue of stock, 455, 466.
Payment for stock in property or services, 455, 467.

WATERED AND BONUS STOCK—Continued,
Value of property or services, 455, 468.
Creditors who cannot complain, 455, 473.
Effect of constitutional and statutory provisions, 456, 475.
Liability of transferees, 480.
Issuance of shares without par value as suggested remedy, 482.
Maximum capitalization as suggested remedy, 482.
German Commercial Code provides against, 481.
Administrative control necessary in order to regulate issue of, 481, 482.
WILLS,
Power of corporation to take by devise or bequest, 151, 158.
Conflict of laws, 154.
Bequest of income and profits, dividends, 436.

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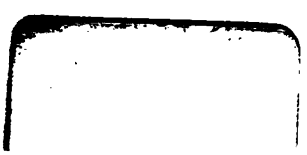
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